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THE GENERAL STATUTES OF NORTH CAROLINA

Containing General Laws of North Carolina through
the Legislative Session of 1951

PREPARED UNDER THE SUPERVISION OF THE DEPARTMENT OF JUSTICE
OF THE STATE OF NORTH CAROLINA

Annotated, under the Supervision of the Department of Justice,
by the Editorial Staff of the Publishers

Under the Direction of

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Volume 1A

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Scope of Volume

Statutes:

Full text of Chapter 1 of the General Statutes of North Carolina, including all enactments through the Legislative Session of 1951 heretofore contained in Volume 1 of the General Statutes of North Carolina and the 1951 Cumulative Supplement thereto.

Annotations:

Sources of the annotations to the General Statutes appearing in this volume are:

North Carolina Reports volumes 1-233 (p. 312).
Federal Reporter volumes 1-300.
Federal Reporter 2nd Series volumes 1-186 (p. 744).
Federal Supplement volumes 1-95 (p. 248).
United States Reports volumes 1-340 (p. 366).
Supreme Court Reporter volumes 1-71 (p. 473).
North Carolina Law Review volumes 1-29 (p. 226).

Abbreviations

(The abbreviations below are those found in the General Statutes which refer to prior codes.)

P. R. Potter's Revisal (1821, 1827)
R. S. Revised Statutes (1837)
R. C. Revised Code (1854)
C. C. P. Code of Civil Procedure (1868)
Code Code (1883)
Rev. Revisal of 1905
C. S. Consolidated Statutes (1919, 1924)

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Preface

Volume 1 of the General Statutes of North Carolina of 1943 has been replaced by recompiled volumes 1A, 1B and 1C. These new volumes contain Chapters 1 through 27 of the General Statutes, as amended and supplemented by the enactments of the General Assembly down through the 1951 Session. Chapter 1 appears in volume 1A, Chapters 2 through 14 are in volume 1B, and Chapters 15 through 27 are in volume 1C. The Constitution of North Carolina and the Constitution of the United States, appearing under Division I in original volume 1, have been transferred to Division XIX-A in recompiled volume 4A. As will be noted, this transfer is not shown in the Table of Contents appearing in Volumes 2A through 3C.

Both the statutes and the annotations in the recompiled volumes are in larger type and in more convenient form than in the original volume. The annotations in the new volumes comprise those which appeared in original volume 1 and the 1951 Cumulative Supplement thereto; however, they have been considerably revised, and it is believed that the present annotations are an improvement over the old.

The historical references appearing at the end of each section have been rearranged in chronological order. For instance, the historical references appended to § 31-5 read as follows: (1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2; 1840, c. 62; R. C., c. 119, s. 22; Code, s. 2176; Rev., s. 3115; C. S., s. 4133; 1945, c. 140.) In this connection attention should be called to a peculiarity in the manner of citing the early acts in the historical references. The acts through the year 1825 are cited, not by the chapter numbers of the session laws of the particular years, but by the chapter numbers assigned to them in Potter's Revisal (published in 1821 and containing the acts from 1715 through 1820) or in Potter's Revisal continued (published in 1827 and containing the acts from 1821 through 1825). Thus, in the illustration set out above the citations "1784, c. 204, s. 14; 1819, c. 1004, ss. 1, 2" refer to the chapter numbers in Potter's Revisal and not to the chapter numbers of the Laws of 1784 and 1819, respectively. The chapter numbers in Potter's Revisal and Potter's Revisal continued run consecutively, and hence do not correspond, at least after 1715, to the chapter numbers in the session laws of the particular years. After 1825 the chapter numbers in the session laws are used. In Volumes 2A through 2C, there is no particular designation to show that an act is from Potter's Revisal. However, in the other volumes such an act is followed by "P. R.", meaning Potter's Revisal.

The recompiled volumes have been prepared and published under the supervision of the Department of Justice of the State of North Carolina. The members of the North Carolina Bar are requested to communicate any defects they may find in the General Statutes, and any suggestions they may have for improving them, to the Department, or to The Michie Company, Law Publishers, Charlottesville, Virginia.

HARRY McMULLAN,
Attorney General.

June 12, 1953.

Original Preface

It has been customary for the publication of each official revision of the North Carolina statutes to contain, in its preface, a reference to the authority for the revision and the general procedure for the execution of this authority. Read together, these prefaces form a continuous history of the North Carolina codes through the last official code, the Consolidated Statutes. As a projection of that history, the steps which have led to the preparation and adoption of the General Statutes of 1943 are hereinafter set forth.

The Act of the General Assembly creating the North Carolina Department of Justice, Chapter 315, Public Laws 1939, authorized the Attorney General to set up therein a division to be designated as the Division of Legislative Drafting and Codification of Statutes.

This Division was assigned two principal duties by the statute: (1) to prepare bills to be presented to the General Assembly at the request of the Governor, State officials and departments, and members of the General Assembly, and to advise and assist counties, cities and towns in drafting legislation to be submitted to the General Assembly; (2) to supervise the recodification of the general public statutes and to keep such recodification current.

With respect to the latter duty, the General Assembly authorized the Division to arrange with any publisher or publishers for doing the necessary editorial work and publication of the recodification, with annotations, appendixes, and index, under the supervision and direction of the Division and subject to the final approval and acceptance by the General Assembly. Acting upon this legislative authority, the Attorney General contracted with The Michie Company, Law Publishers of Charlottesville, Virginia, for publication of this recodification. It should be pointed out that The Michie Company, for over fifteen years, had published the unofficial codes and supplements in the State, and its Code of 1939 was used as a basis upon which to prepare the new codification.

This Division was set up on July 1, 1939, with W. J. Adams, Jr., as the director of the staff employed to carry on the work.

At the request of the Attorney General, Honorable Kingsland Van Winkle, President of the North Carolina Bar Association, and Honorable Fred S. Hutchins, President of the North Carolina State Bar, appointed a committee of able lawyers to assist in planning the new code. For the North Carolina Bar Association the following were named: Bennett H. Perry, Henderson; H. G. Hedrick, Durham; H. Gardner Hudson, Winston-Salem; Clifford Frazier, Greensboro; and Bryan Grimes, Washington. For the North Carolina State Bar the following were named: C. W. Tillett, Charlotte; Jack Joyner, Statesville; H. J. Hatcher, Morganton; Frank E. Winslow, Rocky Mount; and William T. Joyner, Raleigh.

At the request of the Attorney General, the following named persons also served as a part of this committee: Honorable A. A. F. Seawell, Associate Justice of the Supreme Court; Dean M. T. Van Hecke, of the University Law School; Dean H. C. Horack, of the Duke University Law School; Dean Dale F. Stansbury, of the Wake Forest Law School; and Dillard S. Gardner, Raleigh, Supreme Court Marshal and Librarian.

Full acknowledgment is made of the valuable assistance given by this committee in formulating the plans for the new code. The members of the committee very generously responded to the call for this service, giving a great deal of their valuable time to it without compensation or even reimbursement for their travel expenses.

In keeping with the procedure in prior revisions, the General Assembly of 1941 (Public Laws, Chapter 35) authorized the preparation and printing of a Legislative Edition of the proposed code for submission to the General Assembly of 1943.

The General Assembly of 1941 also adopted Joint Resolution No. 33, providing for a Commission on Recodification to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes, naming on this Commission the following persons:

Representatives F. E. Wallace, J. A. Pritchett, Hubert C. Jarvis, Irving Carlyle, Rupert T. Pickens, Julian R. Allsbrook, J. Q. LeGrand, O. L. Richardson, Arch T. Allen, John Kerr, Jr., George R. Uzzell, W. Frank Taylor, S. O. Worthington, J. T. Pritchett, Forrest A. Pollard, and T. E. Story; Senators Jeff D. Johnson, Jr., E. T. Sanders, J. C. Pittman, Wade B. Matheny, John W. Wallace, John D. Larkins, Jr., Thomas J. Gold, Archie C. Gay, Herbert Leary, and Hugh G. Horton.

The Commission organized shortly after the adjournment of the Legislature and elected Mr. F. E. Wallace as Chairman.

The members of this Commission have cooperated to the fullest possible extent in the manner provided by the Statute. Every chapter and every section of the new code has been checked and approved by the Commission. This has involved an enormous amount of work as must be evident. The cooperation and approval of this Commission affords assurance that the work has been properly done and errors reduced to a minimum. A detailed statement of the methods used in preparing the new code may be found in the Preface to the Legislative Edition.

The Act revising and consolidating the General Statutes of the State of North Carolina was ratified on February 4, 1943. Chapter 15 of the Session Laws of 1943 provided that this Act should not be printed in the Session Laws of 1943.

Chapter 15 of the Session Laws of 1943 provided that the Division, under the direction of the Attorney General, should complete and perfect the recodification, which should be designated "General Statutes", by inserting 1943 Acts in their proper places, deleting repealed statutes and making other necessary corrections and rearrangements. This Act specifically provided that "after the completion of such codification of the general and public laws of one thousand nine hundred and forty-three, such laws, as they appear in the printed volumes of the General Statutes, shall be deemed an accurate codification of the statutes of one thousand nine hundred and forty-three contained therein."

Chapter 543 of the Session Laws of 1943 enacted many of the recommendations of the Attorney General and the Legislative Commission, and Legislative Committees, designed to clarify various statutes, and correct other defects, and these changes are reflected in the General Statutes.

VOLUME AND CHAPTER ARRANGEMENT

It is clearly apparent that a one-volume code is no longer practicable because of the increase in the volume of legislation, the great increase in the size of the index, the use of much heavier paper, and the inclusion of frontal tables and additional supplemental material. After much consideration, a four-volume code was decided upon as the most practicable.

Once the idea of a one-volume code was abandoned, it became necessary to devise a new classification and arrangement of statutes since the arrangement used in the Consolidated Statutes would require in many instances that all volumes be consulted in the study of certain related statutes in different chapters. In order to avoid this inconvenience as much as possible, an effort was made to group related chapters in larger "divisions" and to place related divisions together. At the same time, it was necessary to maintain a balance so that all four volumes would be as nearly uniform in size as would be conveniently possible.

It is believed that the adopted chapter arrangement will be convenient and also allow for an expansion of the code within a basic framework.

NUMBERING SYSTEM

The enactment of thousands of new laws since adoption of the Consolidated Statutes of 1919 made it necessary to change the section numbers in the new code.

The numbering system of the Consolidated Statutes had grown unwieldy through much sub-numbering. Furthermore, adherence to the old system forestalled any improvement in the arrangement of the statutes.

The choice of a satisfactory numbering system for the new code was carefully studied. After a consideration of various systems, it was finally decided that a modified form of consecutive numbering would be the most satisfactory system to adopt, and such a system was approved by the Legislative Commission on Recodification. This system consists of: (1) numbering the chapters of the code consecutively, (2) using the chapter number as the first part of each code section number, and (3) numbering the sections in each chapter consecutively from "one" on through the end of the chapter. The code section number consists of the chapter number, a dash, and the number of the section in the chapter. This system will have two advantages. New sections may be added indefinitely at the end of each chapter without necessitating sub-numbering and disturbing the numbering system. This numbering system will readily permit the insertions of new chapters with a minimum of inconvenience and confusion in the numbering of the new sections. The old Consolidated Statutes section number has been carried forward in the citations at the end of the statutes as has been the practice heretofore in noting prior official code references. Comparative tables translating the Consolidated Statutes and Michie Code section numbers to the new code numbers are included in an appendix.

LOCAL LAWS

The recodification has been made of the "general public statutes." North Carolina has enacted a great volume of private, special and local legislation. The problem of local legislation seems to be more serious in North Carolina than in most states. The problem of the proper disposition of these laws has harassed the preparation of the General Statutes to an even greater degree than prior revisions, which have included many local laws for convenience or to fill some gap in the general laws. However, with the great increase in the volume and complexity of legislation, it was clearly apparent that to continue to include in the code statutes which are essentially local in nature (except for necessary exceptions) would result in an over-bulky code and greatly complicate the search for the general laws.

The last official revision of the statutes was that embodied in the two volumes of the Consolidated Statutes of 1919, as brought forward by the third volume in 1924. Thus, the main basis for the present work is that revision and subsequent public session laws. However, many of the statutes in the "public laws" volumes are of local application, and it was necessary to make a decision as to which statutes should be codified. It was finally decided that any statute or portion of a statute which did not affect at least 10 or more counties would not be placed in the code. All portions of the statutes or direct amendments to statutes affecting 9 counties or less have merely been cited in the first annotation paragraph following the statute and entitled "Local Modification." Under this heading the affected counties, together with the appropriate session law or Consolidated Statutes citation, have been listed alphabetically without any attempt to summarize the provisions of the local laws modifying the general law. It was found that any attempt to analyze the exact effect of particular local provisions would often be not only misleading but inaccurate in the absence of a comprehensive study of all the vast body of local legislation appearing in the Public-Local and Private Law volumes since the vast majority of local laws do alter the general law without making direct references.

A great deal of attention has been devoted to the index in a section-by-section analysis, designed (1) to delete inapplicable index references, (2) to correct inaccurate index references, and (3) to add new index references where sections or portions of sections are found to be indexed inadequately or not at all. At the same time, index lines have been repeated as often as the limitations of space and utility permit, to the end that "Cross References" or "See" references (some of

which are absolutely necessary in a code index) may be reduced to a minimum, and where they cannot be entirely eliminated, the inclusive section numbers have been listed along with the Cross Reference.

As will be noted, the index type has been increased from six point to eight point, and set in a two-column page.

ANNOTATIONS

The work of preparing the annotations rested largely with the editorial staff of the publishers. The editors, in co-operation with the Division's Codification Staff, have made an effort to provide annotations which are as complete and accurate as are necessary for an understanding of the statutes. It is believed that the proper function of the code annotations is to aid in the construction of the statutes and that the annotations should not take the scope of a general digest of case law. In an effort to provide effective annotations, various sources have been checked, including the citators, the annotations of the Consolidated Statutes of 1919, and the annotations in Pell's Revisal of 1908. Annotations in the General Statutes begin with Volume 1 and extend through Volume 222 of the North Carolina Reports.

ADDITIONAL FEATURES

A complete table of contents is inserted at the beginning of each volume of the code and will be of considerable assistance in locating any chapter or article immediately. Frontal tables, listing the titles of each section in a chapter, are being placed at the beginning of each chapter and should be of great assistance in locating any section desired. The code will be kept current for as long as possible by pocket supplements. The comparative tables have been expanded, and citations have been added to the State Constitution indicating the authority by which the various constitutional provisions were adopted. The appendix material has also been supplemented.

THE PUBLISHER'S EDITORIAL STAFF

The publisher's editorial staff, headed by A. Hewson Michie, the Company's President, and Chas. W. Sublett, Editor-in-Chief, specially assisted by Beirne Stedman and Robert H. Davis, Jr., has cooperated fully in the preparation of this code, and, notwithstanding difficulties brought on by war conditions, has ably carried its responsibilities associated with this publication.

THE CODIFICATION STAFF

The staff of the Division has varied from two to five lawyers, including the director, and one secretary. The calls of the military and naval services and the opportunities for advancement elsewhere have resulted in many changes in personnel since the work was first begun. During this time the following persons have served on the legal staff: Moses B. Gillam, Jr., Cornelia McKimmon Trott, James E. Tucker, Carmon Stuart, John Lawrence, Harry W. McGalliard, James B. McMillan, Kemp Yarborough, J. B. Bilisoly, Sarah Starr Gillam, Junius D. Grimes, Jr., Joseph B. Cheshire, IV, Catherine Paschal and Joel Denton; and the following persons have served as secretaries: Minerva Coppage, Marjorie Mann and Effie McLean English. All of them have given loyal and diligent service. Grateful acknowledgment is made to them for their labors which were both extensive and difficult.

When W. J. Adams, Jr., was named Assistant Attorney General in October, 1941, Harry W. McGalliard was appointed Director of the Division. Mr Adams continued to assist in the supervision of the recodification work. Mr. McGalliard has continued to serve as Director until the present. He has personally done the important job of revising the index.

CONTINUOUS REVISION

The General Assembly of 1943 enacted Chapter 382 of the Session Laws, which provides in part as follows:

"In order that the laws of North Carolina, as set out in the General Statutes of North Carolina, may be made and kept as simple, as clear, as concise and as complete as possible, and in order that the amount of construction and interpretation of the statutes required of the courts may be reduced to a minimum, it shall also be the duty of the Division of Legislative Drafting and Codification of Statutes to establish and maintain a system of continuous statute research and correction. To that end the Division shall:

"1. Make a systematic study of the general statutes of the State, as set out in the General Statutes and as hereafter enacted by the General Assembly, for the purpose of ascertaining what ambiguities, conflicts, duplications and other imperfections of form and expression exist therein and how these defects may be corrected.

"2. Consider such suggestions as may be submitted to the Division with respect to the existence of such defects and the proper correction thereof.

"3. Prepare for submission to the General Assembly from time to time bills to correct such defects in the statutes as its research discloses."

By Joint Resolution No. 23, the General Assembly of 1943 created a Commission on Statutory Revision, consisting of Senators Irving E. Carlyle, Brandon P. Hodges, D. E. Hudgins, Wade B. Matheny and K. A. Pittman; and Representatives Oscar G. Barker, Frank W. Hancock, Jr., A. I. Ferree, Bryan Grimes, W. I. Halstead, Robert Moseley and Kerr Craige Ramsey, "to cooperate with the Attorney General and the Division of Legislative Drafting and Codification of Statutes in the study of the recommendations of the Division with respect to desirable clarifying statutes and the preparation of such proposed statutes for submission to the General Assembly of 1945."

The General Assembly, by this Act and Resolution, laid the foundation for a system of continuous statutory revision in North Carolina similar to systems that have been inaugurated in some of the other states with much success.

The purpose of this system is to provide an agency which will continuously study the statutory law of the State, and prepare recommendations to successive General Assemblies in the form of revision bills for the elimination of statutory defects as soon as possible after their appearance, and thus to avoid, or at least postpone, the necessity of the periodical bulk revisions that have heretofore been necessary.

SUPPLEMENTS

Under the contract with the publishers, the General Statutes will be kept current by use of cumulative pocket supplements for as long as possible and a minimum period of eight years, before any other edition can be published. The publishers will issue these supplements within six months of each regular or extra session of the General Assembly, and they will contain complete annotations and indexes. Each six months after the publication of the General Statutes, the publishers have agreed to issue interim annotation supplements, containing all pertinent annotations since the publication of the General Statutes or the last supplement, all of which will be done under the supervision of the Department of Justice.

HARRY McMULLAN,
Attorney General.

August 15, 1943

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The Constitution of North Carolina and the Constitution of the United States, appearing under this Division in original volume 1, have been transferred to Division XIX-A in volume 4A.

STATE OF NORTH CAROLINA

IN THE YEAR OF OUR LORD ONE THOUSAND
NINE HUNDRED AND FORTY-THREE

A BILL TO BE ENTITLED

AN ACT

REVISING AND CONSOLIDATING THE PUBLIC AND GENERAL
STATUTES OF THE STATE OF NORTH CAROLINA

The General Assembly of North Carolina do enact the following named chapters, subchapters and sections, to be known as the GENERAL STATUTES OF NORTH CAROLINA, that is to say:

Division II. Courts and Civil Procedure.

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SUBCHAPTER I. DEFINITIONS AND GENERAL PROVISIONS.**ARTICLE 1.***Definitions.*

§ 1-1. **Remedies.**—Remedies in the courts of justice are divided into—

1. Actions.

2. Special proceedings.

(C. C. P., s. 1; Code, s. 125; Rev., s. 346; C. S., s. 391.)

Application of § 1-64 to All Civil Remedies.—By virtue of this section and § 1-3 the terms of § 1-64, as to actions by guardians, embrace all civil remedies. *Hollomon v. Hollomon*, 125 N. C. 29, 34 S. E. 99 (1899).

Admission of Patient to Hospital for In-

sane.—A proceeding in accordance with the provisions of §§ 122-36 et seq., in strictness, seems to be neither a civil action nor a special proceeding, notwithstanding this section. *In re Cook*, 218 N. C. 384, 11 S. E. (2d) 142 (1940).

§ 1-2. **Actions.**—An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment or prevention of a public offense. (C. C. P., s. 2; 1868-9, c. 277, s. 2; Code, s. 126; Rev., s. 347; C. S., s. 392.)

§ 1-3. **Special proceedings.**—Every other remedy is a special proceeding. (C. C. P., s. 3; Code, s. 127; Rev., s. 348; C. S., s. 393.)

Cross References.—As to special proceedings generally, see § 1-393. As to special proceeding by creditor against personal representative, see § 28-122. As to special proceeding for collection of legacies and distributive shares, see § 28-159. As to special proceeding for partition of real estate, see § 46-1. As to special proceedings for allotment of dower, see §§ 30-11 et seq. As to special proceeding in allotment of year's allowance, see §§ 30-27 et seq.

Tests to Determine Special Proceedings.—Any proceedings which prior to the Code of Civil Procedure might have been commenced by petition, or motion on notice, such for instance as proceedings for dower, partition and year's allowance, are special proceedings under this section. *Tate v. Powe*, 64 N. C. 644 (1870); *Felton v. Elliott*, 66 N. C. 195 (1872).

Under this test, proceedings in bastardy (*State v. McIntosh*, 64 N. C. 607 (1870)), or a petition by an administrator to sell lands for the payments of debts (*Hyman v. Jarnigan*, 65 N. C. 96 (1871); *Badger v.*

Jones, 66 N. C. 305 (1872)), classify as special proceedings.

In *Woodley v. Gilliam*, 64 N. C. 649 (1870), Mr. Justice Rodman expressed the opinion that a better test of a special proceeding is whether or not existing statutes direct a procedure different from the ordinary. He stated, however, that in practice the results of applying the two tests would almost always coincide, although he thought the one suggested by him the most convenient. And the court held in *Sumner v. Miller*, 64 N. C. 688 (1870), that proceedings to obtain damages for injuries to land caused by the erection of a mill are special proceedings because made so by the statute creating a statutory remedy.

Under either rule an action to recover the possession of land, as, for example, ejectment, is not a special proceeding. *Woodley v. Gilliam*, 64 N. C. 649 (1870). Nor is mandamus to try title to an office. *State v. Tate*, 66 N. C. 231 (1872).

Quoted in *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756 (1924).

§ 1-4. **Kinds of actions.**—Actions are of two kinds—

1. Civil.

2. Criminal.

(C. C. P., s. 4; Code, s. 128; Rev., s. 349; C. S., s. 394.)

§ 1-5. **Criminal action.**—A criminal action is—

1. An action prosecuted by the State as a party, against a person charged with a public offense, for the punishment thereof.

2. An action prosecuted by the State, at the instance of an individual, to prevent an apprehended crime against his person or property. (Const., art. 4, s. 1; C. C. P., s. 5; Code, s. 129; Rev., s. 350; C. S., s. 395.)

Editor's Note.—This section worked a significant change in the law of the State with its enactment in the Code of Civil Procedure. Prior to that time "all suits prosecuted in the name of the State were not necessarily criminal suits as distinguished from civil suits—the true test being that when the proceeding was by indictment the suit was criminal, and when by action or other mode, though in the name of the State, it was a civil suit." *State v. Pate*, 44 N. C. 244 (1853). Hence a warrant to keep the peace was a civil action though brought in the name of the State. See *State v. Locust*, 63 N. C. 574 (1869). But this section changed the rule in all such cases, the test now being whether the person is charged with a public offense or whether the action is prosecuted by the State at the instance of an individual to prevent an apprehended crime

against the person or property of the individual; in either case the action being a criminal proceeding. See *State v. Oates*, 88 N. C. 668 (1883); *State v. Lyon*, 93 N. C. 575 (1885).

Private Individuals as Prosecutors.—No person is regarded as a prosecutor for a public offense unless he is so marked on the bill of indictment. *State v. Lupton*, 63 N. C. 483 (1869).

Title of Case.—The terms "people of the State" as found in Art. IV, § 1 of the Constitution, and "the State" as used in this section mean substantially the same. Thus a criminal case entitled "People v. A. B., criminal action" or "State v. A. B., indictment" as was used prior to the present Constitution, are either correct forms. *Larkins v. Murphy*, 68 N. C. 381 (1873).

Remedy against Alleged Unconstitutional Discriminations.—By prosecuting

under this section persons doing acts allowed by a statute a remedy against alleged unconstitutional discrimination of a statute is afforded. *Newman v. Watkins*, 208 N. C. 675, 182 S. E. 453 (1935).

Adequate Remedy.—Where the alleged acts of the defendant are criminal the plain-

tiff is not entitled to equitable relief in the nature of an injunction but is furnished an adequate remedy by this section. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936).

§ 1-6. **Civil action.**—Every other is a civil action. (C. C. P., s. 6; Code, s. 130; Rev., s. 351; C. S., s. 396.)

§ 1-7. **When court means clerk.**—In the following sections which confer jurisdiction or power, or impose duties, where the words “superior court,” or “court,” in reference to a superior court are used, they mean the clerk of the superior court, unless otherwise specially stated, or unless reference is made to a regular term of the court, in which cases the judge of the court alone is meant. (C. C. P., s. 9; Code, s. 132; Rev., s. 352; C. S., s. 397.)

Clerks Act for Court.—See § 1-12. Although the terms “court” and “superior court” as used in this section mean the clerk of the court as indicated, the clerk is given no separate jurisdiction apart from the court itself. In so far as the civil procedure is concerned, at least, the clerk acts as and for the court in the specified instances. His acts are performed by the court through him and stand as that of the court if not excepted to and reversed or modified on appeal, and thus there is no divided jurisdiction between the clerks and the judge. The whole procedure is in the court and has its sanction. *Jones v. Desern*, 94 N. C. 32 (1886). See also, 1 N. C. Law Rev. 15.

Same—Civil Actions.—It was pointed out in *Brittain v. Mull*, 91 N. C. 498 (1884), that the clerk does not exercise power in respect to pleadings and practice to any considerable extent in civil actions (as distinguished from special proceedings) because questions arising in such matters arise mainly in term time when the judge must act directly. This was due to the suspension act, but since the Crisp Act in 1919 the rule is otherwise. See note to § 1-12, and see 1 N. C. Law Rev. 199. So the clerk represents and is the court and has authority to exercise the discretionary powers conferred for the purpose of decreeing a sale of a decedent's estate for the payment of debts. Indeed the clerk implies the court in cases like this. *Tillett v. Aydlett*, 90 N. C. 551 (1884).

Same—Special Proceedings.—But in special proceedings he acts for the court in superintending the pleadings, practice and procedure, and in making all proper orders and judgments therein unless his action is revised or modified by the judge upon appeal. *Jones v. Desern*, 94 N. C. 32 (1886); *Adams v. Howards*, 110 N. C. 15, 14 S. E. 648 (1892).

It has never been doubted that it was competent for the legislature to confer such jurisdiction upon the clerk. *Bank v. Wilkesboro Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

The words “superior court” as used in Art. IV, § 22 of the Constitution do not mean the court of the clerk. *McAdoo v. Benbow*, 63 N. C. 461 (1869).

Since the statute providing that a summary remedy against a railroad for damages caused by construction of the road over the land in favor of persons owning land may be begun either in or out of term by service of petition upon the defendant, it is proper for the judge to appoint commissioners as provided, if begun in term, but where the proceeding is begun in vacation the clerk may act for the court in the manner explained in these annotations. *Click v. Western, etc., R. Co.*, 98 N. C. 390, 4 S. E. 183 (1887).

The reference in § 8-89 to “the court” or “a judge thereof” refers to the clerk as well as the judge. *Mills v. Biscoe Lumber Co.*, 139 N. C. 524, 52 S. E. 200 (1905).

The jurisdiction under § 26-3 is conferred upon the clerk by virtue of this section. *Bank v. Wilkesboro Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

This section gives the clerk power to enter a judgment for the recovery of money. *Bank v. Wilkesboro Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

Application of Section.—This section was cited in *Pelletier v. Saunders*, 67 N. C. 261 (1872), as authority for the proposition that the term “superior court” as used in § 28-81 means clerk of the superior court.

Term Clerk Impliedly Read into Former § 1-461.—In view of this section it was held that when the judgment in garnishment proceedings under former section 1-461 was entered up, the execution was

awarded as a matter of course and could be issued by the clerk without application to the judge. *Newberry v. Meadows Fert. Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

ARTICLE 2.

General Provisions.

§ 1-8. Remedies not merged.—Where the violation of a right admits both of a civil and a criminal remedy, the right to prosecute the one is not merged in the other. (C. C. P., s. 7; Code, s. 131; Rev., s. 353; C. S., s. 398.)

Summons Served upon Person in Jail.—In view of this section it was proper to serve a summons and order of arrest upon the defendant while confined in jail upon failure to give appearance bond to answer for a secret criminal assault. *White v.*

Underwood, 125 N. C. 25, 34 S. E. 104 (1899).

Cited in *Scales v. Wachovia Bank & Trust Co.*, 195 N. C. 772, 143 S. E. 868 (1928).

§ 1-9. One form of action.—The distinction between actions at law and suits in equity and the forms of such actions and suits are abolished, and there is but one form of action for the enforcement or protection of private rights and the redress of private wrongs, which is denominated a civil action. (Const., art. 4, s. 1; C. C. P., s. 12; Code, s. 133; Rev., s. 354; C. S., s. 399.)

Effect upon Substantive Law—Torts.—Although there is but one form of action there are torts and contracts just as there were prior to the Code of Civil Procedure, but there are not several forms of action as there used to be, and pleadings are not suited for different forms of action as they used to be, but are all suited to one form, whether the subject of the action be a tort or a contract. *Bitting v. Thaxton*, 72 N. C. 541 (1875).

Same—Legal and Equitable Principles.—Although one tribunal deals out both law and equity, the principles of law and equity remain separate and distinct, and it is just as important now as ever before to keep them separate. *Jordan v. Lanier*, 73 N. C. 90 (1875).

But it is true that having but one tribunal causes the principles of law and equity to run into each other to some extent at least. For an illustration, see *Jordan v. Lanier*, 73 N. C. 90 (1875).

The defendant's right of action by his counterclaim upon his unendorsed bond is still an equitable claim notwithstanding this section. *Kiff v. Weaver*, 94 N. C. 274 (1886).

§ 1-10. Plaintiff and defendant.—In civil actions the party complaining is the plaintiff, and the adverse party the defendant. (C. C. P., s. 13; Code, s. 134; Rev., s. 355; C. S., s. 400.)

§ 1-11. How party may appear.—A party may appear either in person or by attorney in actions or proceedings in which he is interested. (C. C. P., s. 423; Code, s. 109; Rev., s. 356; C. S., s. 401.)

Cannot Appear in Person and by Counsel at Same Time.—This right is alternative. A party has no right to appear both by himself and by counsel. Nor should he

Nature of Defense Immaterial.—Any defense either legal or equitable may be set up by the defendant in an action by the endorsee upon a non-negotiable note. *Thompson v. Osborne*, 152 N. C. 408, 67 S. E. 1029 (1910).

Common-Law Forms Immaterial.—Since the old technical distinctions in the forms of actions were abolished by this section, it is immaterial whether the plaintiff's remedy under the old practice was trespass or case. *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920 (1891).

An exception to a complaint that it is for money had and received and as such cannot be maintained unless the money has been actually received by the defendant is not maintainable under this section regardless of the common-law practice. *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904).

Where parties are brought into court by summons, the plaintiff can file his complaint, alleging a legal cause of action, or an equitable cause of action, or can combine them as he may elect. *Wilson v. Waldo*, 221 F. 505 (1915).

Cited in *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941).

be permitted ex gratia to do so. *Abernethy v. Burns*, 206 N. C. 370, 173 S. E. 899 (1934). See *McClamroch v. Colonial Ice Co.*, 217 N. C. 106, 6 S. E. (2d) 850 (1940).

This section simply means that a litigant may not appear both in *propria persona* and by counsel at one and the same time. It cannot be construed to mean that he may not first appear in person and then later through counsel. Thus, a litigant who elects to employ counsel at any stage of proceedings may not be deprived of his services for the reason he has theretofore appeared in person and it is error for the court to undertake so to do. *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242 (1945).

In Criminal Case.—A party is entitled to appear in *propria persona*, and when a defendant insists upon this right notwith-

standing his ability to employ counsel and the efforts of the trial judge to assign him counsel, it cannot be pressed successfully on appeal that he was prejudiced by the action of the trial court in failing to provide counsel and in permitting him wide latitude in the introduction of evidence. *State v. Pritchard*, 227 N. C. 168, 41 S. E. (2d) 287 (1947).

Stated in *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

Cited in *Buncombe County v. Penland*, 206 N. C. 299, 173 S. E. 609 (1934); *In re Taylor*, 229 N. C. 297, 49 S. E. (2d) 749 (1948).

§ 1-12. Feigned issues abolished and substituted.—Feigned issues are abolished, and instead thereof, in the cases where the power formerly existed to order a feigned issue, or when a question of fact not put in issue by the pleadings is to be tried by a jury, an order for the trial may be made by the judge, stating distinctly and plainly the question of fact to be tried; and this order is the only authority necessary for a trial. (C. C. P., s. 15; Code, s. 135; Rev., s. 357; C. S., s. 402.)

Benefit of Feigned Issue Preserved.—See *Harkey v. Houston*, 65 N. C. 137 (1871).

Effect upon Proper Parties.—Since feigned issues in seduction cases have been abolished, the woman and not her father is the real party in interest if she be of age. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E.

397 (1892).

Effect of Carrying Feigned Issue to Supreme Court.—When an action upon a feigned issue is carried to the Supreme Court it will be dismissed. *Blake v. Askew*, 76 N. C. 325 (1877).

§ 1-13. Jurisdiction of clerk.—The clerk of the superior court has jurisdiction to hear and decide all questions of practice and procedure and all other matters over which jurisdiction is given to the superior court, unless the judge of the court or the court at a regular term is expressly referred to. (C. C. P., s. 108; Code, s. 251; Rev., s. 358; C. S., s. 403.)

Cross Reference.—As to summons in civil actions and duties of clerk therewith, see § 1-89. See also § 1-7.

Editor's Note.—This section was passed in 1868 as a part of the Code of Civil Procedure. It was a part of the scheme to simplify procedure and speed up litigation so that justice could be had much sooner and at less expense than was formerly possible. But due to the depressed financial conditions brought about by the civil war, the people were not desirous of a more speedy system of procedure for the reason that in actions for debts the unfortunate litigants might have more time in which to improve their financial conditions so that they might be able to discharge the judgments. Under pressure of such demand the legislature passed in the same year what is known as the "Bachelor Act" which suspended the operation of certain portions of the Code of Civil Procedure temporarily. The legislature of 1870 made the suspension more permanent by providing that the act should remain in force until otherwise pro-

vided. The suspension act became chapter 18 of Battle's revision, was incorporated in the Code of 1883 as chapter 10 of the Code of Civil Procedure, was carried forward in subsequent revisions (See *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170 (1887)), and remained in force until 1919 when the legislature passed what is known as the "Crisp Act" restoring the suspended provisions of the Code of Civil Procedure. (See § 1-89.) See *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920); 1 N. C. Law Rev. 199.

The suspension act was chiefly directed at the portions of the Code of Civil Procedure which gave the clerk of the superior court power to decide questions of practice, procedure and other such matter out of term time. Hence this section was modified by the act. To prevent this section from operating in the class of cases named above, the act provided that the summons in all civil actions should be made returnable to the court in term time and that questions of pleading, practice and

procedure⁶ should be determined during term time only. Therefore in such cases the operation of this section was totally suspended. But the suspension act did not affect special proceedings and in such cases the clerk continued to exercise the power hereby conferred upon him, except as such authority may have been modified or affected by subsequent statutes. *Brittain v. Mull*, 91 N. C. 498 (1884); *Jones v. Desern*, 94 N. C. 32 (1886); *Warden v. McKinnon*, 94 N. C. 378 (1886).

With the passage of the Crisp Act this section is in full force and effect and should be construed in connection with § 1-89. See *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920).

Constitutionality of Suspension Act.—

The constitutionality of the suspension act was attacked in *McAdoo v. Benbow*, 63 N. C. 461 (1869), upon the ground that the Constitution required the clerk to hear and decide all questions of practice and procedure, but it was held that the Constitution made no such provision and that the legislature had power thereunder to make such regulations. Although there was one dissent to the holding, it became to be universally recognized as the law until the Crisp Act of 1919. *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170 (1887).

Nature of Clerk's Power.—In exercising the jurisdiction herein conferred, the clerk is no more than a servant of the court, subject to its supervision in the manner provided elsewhere by statute. *Brittain v. Mull*, 91 N. C. 498 (1884); *Maxwell v. Blair*, 95 N. C. 317 (1886); *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731 (1891).

As was indicated in *McAdoo v. Benbow*, 63 N. C. 461 (1869), the jurisdiction is conferred upon the court, and not upon the clerk. He is merely an instrument in performing his functions. Thus there is no divided jurisdiction between the clerk and judge, but they both function as officials of the same court exercising but one jurisdiction. *Jones v. Desern*, 94 N. C. 32 (1886).

Upon appeal from the rulings of the clerk, in vacation, upon procedural motions in pending civil actions, the jurisdiction of the superior court is not derivative but the judge hears the matter *de novo*. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30 (1941).

Regularly, in special proceedings (since the act of 1919 in all proceedings) the pleadings should be made up and perfected by the clerk, acting as and for the court. Indeed, he so makes all the orders and judgments in the course of the proceeding, except in some exceptional respects, otherwise expressly provided for. *Brittain v.*

Mull, 91 N. C. 498 (1884); *Wharton v. Wilkerson*, 92 N. C. 407 (1885); *Loftin v. Rouse*, 94 N. C. 508 (1886).

The court in term, should not do more than to direct the clerk to perfect the pleadings and to allow or disallow amendment according to law. If the clerk should proceed and make decisions of questions of law, with which a party should be dissatisfied, such party might appeal, and in that way the decision of the judge would become that of the court. It was the duty of the clerk to make all proper orders of reference, as well as other orders and judgments in the course of the proceeding. If he should err in such respect, an appeal might be taken as indicated above. *Loftin v. Rouse*, 94 N. C. 508 (1886).

It was not the duty of the judge in term, after the issues were tried—there being no question of law to be decided,—to direct the clerk what to do, or to make an order remanding the case to the clerk. The latter ought to have proceeded without an order, and heard and determined the case upon its merits, subject to the right of appeal to the judge. *Brittain v. Mull*, 94 N. C. 595 (1886).

Same—To Grant Equitable Relief.—The Code of Civil Procedure does not give the clerk power to make an order granting affirmative equitable relief. Equitable relief must be set up in the answer as a defense and then the clerk has power to hear all questions herein permitted. See *Bragg v. Lyon*, 93 N. C. 151 (1885); *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768 (1896).

Same—Effect of Failure of Clerk to Decide Questions.—We are not authorized to decide the questions of law presented by the pleadings and the issues of fact found by the jury, because they have not been decided by the clerk, acting for the court, and, upon appeal, by the judge. It is the duty of the clerk, acting for the court, to decide whatever question may be presented, and to make all proper orders. *Brittain v. Mull*, 94 N. C. 595 (1886).

Amendments after Joinder of Issues.—

Where, in special proceedings, the pleadings are made up before the clerk, and upon joinder of issues are transferred to the court in term, the judge has power to allow amendments, or he may stay the trial and remand the papers to the clerk, in order that he may consider a motion to amend. *Loftin v. Rouse*, 94 N. C. 508 (1886).

Same—Remanding Order Interlocutory.

—An order remanding the papers to the clerk, in order that he may hear a motion to amend the pleadings, to the end that an account should be taken, is interlocutory

and does not impair a substantial right, and cannot be appealed from. *Loftin v. Rouse*, 94 N. C. 508 (1886).

Application to Special Proceedings.—See the Editor's Note to this section. Proceedings to obtain partition, dower and the like are special proceedings, *Jones v. Desern*, 94 N. C. 32 (1886). So is a proceeding by creditors to compel an administrator to an account and payment of the debts of

the estate. *Brittain v. Mull*, 91 N. C. 498 (1884); *Warden v. McKinnon*, 94 N. C. 378 (1886).

And the granting of a warrant of attachment was a special proceeding. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889).

Stated in Ex parte Wilson, 222 N. C. 99, 22 S. E. (2d) 262 (1942) (con. op.).

SUBCHAPTER II. LIMITATIONS.

ARTICLE 3.

Limitations, General Provisions.

§ 1-14. When action commenced.—An action is commenced as to each defendant when the summons is issued against him. (C. C. P., s. 40; Code, s. 161; Rev., s. 359; C. S., s. 404.)

When Statute Adopted.—The statutes of limitation appearing in the following sections did not become effective until the adoption of the Code of Civil Procedure; prior to that time the statute of presumptions was in force. *Crawford v. McLellan*, 87 N. C. 169 (1882).

The statutes prescribing limitations in the Code displace those contained in the Revised Code. *Lynn v. Lowe*, 88 N. C. 478 (1883).

Subchapter Exclusive.—All civil actions must be commenced within the periods prescribed in this subchapter, "except where in special cases a different limitation is prescribed by statute." *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Modes of Commencing Action.—There are only two ways by which a civil action may be commenced: 1. By issuing a summons; 2. By submitting a controversy without action. When the former method is resorted to the action is commenced when the summons is issued, and not until that is done. But if the defendant sees proper to do so he may appear without a summons and thereby waive its issuance. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902).

Any form of action or special proceeding in this State must always be commenced by summons or attachment. *Morris v. House*, 125 N. C. 550, 34 S. E. 712 (1899).

What Constitutes Issuing of Summons.—The word "issue," means going out of the hands of the clerk, expressed or implied, to be delivered to the sheriff for service. If the clerk delivers it to the sheriff to be served, it is then issued; or if the clerk delivers it to the plaintiff, or someone else, to be delivered by him to the sheriff, this is an issue of the summons; or, as is

often the case, if the summons is filled out by the attorney of plaintiff, and put in the hands of the sheriff. This is done by the implied consent of the clerk, and constitutes an issuance from the time it is placed in the hands of the sheriff for service. But a summons simply filled up and lying in the office of an attorney, would not constitute an issuing of the summons. Nor would the fact that a summons was filled up and held by the clerk for a prosecution bond constitute the issuing of a summons, until the bond is given, or at least until it goes out by the consent of the clerk for the purpose of being served on the defendant. *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912 (1895); *Pettigrew v. McCain*, 165 N. C. 472, 81 S. E. 701 (1914).

Notwithstanding the omission of the signature of the clerk, or the omission of the seal, it has been held sufficient where the clerk actually issued it, but where the clerk gave a blank summons to counsel who filled it out without either the seal or the signature of the clerk and had it served without giving the clerk an opportunity to pass upon the sufficiency of the undertaking, the summons was too defective to constitute a commencement. *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

Effect of Defective Summons.—If a paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process. It may be amended to conform to the requirements of a perfect summons, and be considered as issued in the first instance. But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all, and cannot be con-

sidered the commencement of an action. *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

Issuance Does Not Confer Jurisdiction.—While an action is commenced as to each defendant when the summons is issued against him, jurisdiction of the cause and of parties litigant can be acquired only by a legal service of process, unless there is an acceptance of service or a general ap-

pearance, actual or constructive. *Hatch v. Alamance Co.*, 183 N. C. 617, 112 S. E. 529 (1922), citing *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527 (1896); *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908); *Warlick v. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657 (1910).

Cited in *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942) (dis. op.).

§ 1-15. **Statute runs from accrual of action; pleading.**—Civil actions can only be commenced within the periods prescribed in this chapter, after the cause of action has accrued, except where in special cases a different limitation is prescribed by statute. The objection that the action was not commenced within the time limited can only be taken by answer. (C. C. P., s. 17; Code, s. 138; Rev., s. 360; C. S., s. 405.)

Section Not Statute of Presumptions.—Now we have no statute of presumptions. This section prescribes a statute of limitations only. *Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023 (1893).

This section applies to actions wherein formal pleadings are required to be filed and not to proceedings in the nature of a controversy without action upon an agreed statement of facts for the distribution of funds arising from a foreclosure sale. In *re Gibbs*, 205 N. C. 312, 171 S. E. 55 (1933).

Necessity of Cause of Action or Claim.—If there is no claim or cause of action the statute will not run. This principle is recognized by this section and there is nothing in § 1-49 which conflicts with it. *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892).

Necessity of Pleading Statute.—It is familiar learning that the statute of limitations is not available unless pleaded, *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204 (1890); *Randolph v. Randolph*, 107 N. C. 506, 12 S. E. 374 (1890); and this is required by the statute. *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713 (1891); *King v. Powell*, 127 N. C. 10, 37 S. E. 62 (1900). But facts will suffice. *Pipes v. Lum. Co.*, 132 N. C. 612, 44 S. E. 114 (1903).

It is error for the judge to instruct the jury where the statute of limitations is not pleaded that the plaintiff can not recover. *Pegram v. Stoltz*, 67 N. C. 144 (1872).

Manner of Pleading.—It was unquestionably true under the former system, where an equitable claim appeared upon the face of the bill to be barred by lapse of time, or the statute of limitations, that it might have been taken advantage of by demurrer, and that it need not be specially pleaded, but the statute now requires it to be pleaded, and no distinction is made in this respect between equitable and legal causes of action. *Guthrie v. Bacon*, 107 N. C. 337, 12 S. E. 204 (1890).

The statute of limitations cannot be pleaded in a demurrer, but must be taken advantage of only by answer, by express provision of the statute. In *Bacon v. Berry*, 85 N. C. 124 (1881), the defendant demurred because more than seven years elapsed since the rendition of the judgment when the suit was commenced. The court held that it was, in fact, a plea of the statute of limitations, which must be set up in the answer, it being an objection that can never be taken by demurrer, citing *Green v. North Carolina R. Co.*, 73 N. C. 524 (1875). See also, *Kahnweiler v. Anderson*, 78 N. C. 133 (1878); *King v. Powell*, 127 N. C. 10, 37 S. E. 62 (1900). If the facts are admitted, the court may pass on the question of the bar, as in *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348 (1915). It was held in *Long v. Bank*, 81 N. C. 41 (1879), that even if the statutory bar is apparent on the face of the complaint, it could not be pleaded except by answer, and not by demurrer or motion to dismiss. The same was held in *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091 (1907), and the reason why such a thing cannot be done is fully stated, in addition to the positive requirement of the statute as the best of reasons, and a demurrer alleging that time had elapsed was in that case characterized as a "speaking demurrer." Nor could the bar of the statute be raised by a motion to dismiss. *Oldham v. Rieger*, supra; *Moody v. Wike*, 170 N. C. 541, 87 S. E. 350 (1915).

Under this section limitation on foreclosure of tax sale certificate cannot be taken advantage of by demurrer. *Logan v. Griffith*, 205 N. C. 580, 172 S. E. 348 (1934).

Application to Possessory Titles.—The rule does not apply to possessory titles, which are more in the nature of presumptions than strict limitations. *Commonwealth Mut. Fire Ins. Co. v. Edwards*, 124 N. C. 116, 32 S. E. 404 (1899).

Accrual of Cause Illustrated.—The stat-

ute of limitations where a party dies pending action begins to run from the date of the appointment of the administrator, and the plea of the statute must be set up in the answer. *Lynn v. Lowe*, 88 N. C. 478 (1883).

Where one pays another upon a debt which is uncertain in amount and takes an acknowledgment to a refund if overpaid, the statute does not begin to run against the agreement to refund until after the amount of overpayment is ascertained. *Falls v. McKnight*, 14 N. C. 421 (1832).

The defendant administrator, according to his own admission assuming to act as plaintiff's agent in the collection and application of the rents, cannot plead the statute of limitations unless there was a demand and a refusal, and then only from the time thereof. *Shuffler v. Turner*, 111 N. C. 297, 16 S. E. 417 (1892).

A cause of action against the guarantor on a note accrues upon the maturity of the note and the failure of the maker to pay same according to its tenor. *Hall v. Hood*,

208 N. C. 59, 179 S. E. 27 (1935).

Where a municipal corporation constructs a sewer system which empties quantities of raw sewage and other obnoxious matter in a stream, which matter is periodically washed upon contiguous lands by freshets, in an action against the city by the owner of the land, all damages to the land based on trespass occurring prior to three years before the institution of the action are barred by the three-year statute of limitations under this section and § 1-52. *Lightner v. Raleigh*, 206 N. C. 496, 174 S. E. 272 (1934).

When personal services are rendered with the understanding that compensation is to be made in the will of the recipient, payment therefor does not become due until death, and the statutes of limitation do not begin to run until that time. *Stewart v. Wyrick*, 228 N. C. 429, 45 S. E. (2d) 764 (1947).

Cited in *McNeill v. Suggs*, 199 N. C. 477, 154 S. E. 729 (1930).

§ 1-16. Defenses deemed pleaded by insane party.—On the trial of any action or special proceeding to which an insane person is a party, such insane person is deemed to have pleaded specially any defense, and shall on trial have the benefit of any defense, whether pleaded or not, that might have been made for him by his guardian or attorney under the provisions of this chapter. The court, at any time before the action or proceeding is finally disposed of, may order the bringing in, by proper notice, of one or more of the near relatives or friends of the insane person, and may make such other order as it deems necessary for his proper defense. (1889, c. 89, s. 2; Rev., s. 361; C. S., s. 406.)

Applicable against State Institutions.—The superintendent of a State hospital cannot recover compensation against guardian of insane person for the maintenance of his ward for more than three years preceding the bringing of the action. *State Hospital v. Fountain*, 129 N. C. 90, 39 S. E. 734 (1901).

Hearing of Family.—If there was ever a

time when the family of an insane person ought to be heard, it would seem that a petition for the appointment of a receiver for an insane person confined in the State asylum is one. *In re Hybart*, 119 N. C. 359, 25 S. E. 963 (1896). See *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1 (1924).

§ 1-17. Disabilities.—A person entitled to commence an action, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, who is at the time the cause of action accrued either—

1. Within the age of twenty-one years; or
2. Insane; or
3. Imprisoned on a criminal charge, or in execution under sentence for a criminal offense;

may bring his action within the times herein limited, after the disability is removed, except in an action for the recovery of real property, or to make an entry or defense founded on the title to real property, or to rents and services out of the same, when he must commence his action, or make his entry, within

three years next after the removal of the disability, and at no time thereafter. (C. C. P., ss. 27, 142; Code, ss. 148, 163; 1899, c. 78; Rev., s. 362; C. S., s. 407.)

Editor's Note.—In 1899 the legislature struck the provisions which made coverture a disability on par with the others enumerated in this section. *Weathers v. Borders*, 124 N. C. 610, 32 S. E. 881 (1899); *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278 (1906). And see *Lafferty v. Young*, 125 N. C. 296, 34 S. E. 444 (1899), *Swift v. Dixon*, 131 N. C. 42, 42 S. E. 458 (1902).

Applicable to Idiot.—The statute of limitations does not run against an idiot by reason of the excepting clause in this section. *Outland v. Outland*, 118 N. C. 138, 23 S. E. 972 (1896).

Detention in Asylum by Defendant's Wrongful Act.—Where plaintiff's cause of action was based upon the alleged wrongful act of defendant in causing plaintiff's detention in an insane asylum, defendant will not be allowed to take advantage of his own wrong, and as to defendant, plaintiff was non sui juris for the period during which plaintiff was detained, and the statute of limitations did not run against plaintiff's cause of action during that period. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873 (1939).

A proceeding to set aside a void judgment of foreclosure is not within the application of this section. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

Former Law Unchanged. — There is nothing in this section which changes the law as it formerly existed. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298 (1889).

Section Relates to True Title.—Adverse possession relates only to the true title, and the exemptions in the statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278 (1906).

Three-Year Period Enforced.—In case of infancy, even after the expiration of the time of the limitation, an action may be brought within three years after full age. *Campbell v. Crater*, 95 N. C. 156 (1886), and if not brought within that time the action is barred. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458 (1921) (dis. op.).

Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. *Clayton v. Rose*, 87 N. C. 106 (1882).

If land is held adversely to an insane person for such length of time as would bar his recovery if sane, such insane person, or those claiming under him, must commence an action within three years after the disability of insanity is removed, else their rights to recover will be barred. *Warlick v. Plonk*, 103 N. C. 81, 9 S. E. 190 (1889).

Effect of Disability Continuing Through Life.—If the disability continued during life, and for a period thereafter sufficient to complete the prescribed time of seven years, the title would be perfected in the occupant, subordinate only to a right in the heir to sue for the recovery of the land for the space of three years next after his death. The running of the statute against the action and to consummate the title would be concurrent after the decease of the grantor. *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208 (1889).

Effect of Guardian Having Right to Sue.—*Culp v. Lee*, 109 N. C. 675, 14 S. E. 74 (1891), has no application to actions for the recovery of realty when the legal title is in the person under disability. The court held that the distributees having had a general guardian, the executor, having been exposed to an action by him for the full period prescribed by the statute, was protected by the lapse of time. *Cross v. Craven*, 120 N. C. 331, 26 S. E. 940 (1897).

The failure of the guardian to institute actions which he has the authority and duty to bring on behalf of his ward is the failure of the ward, entailing the same legal consequences with respect to the bar of the statutes of limitation. *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375 (1940).

Running of Statute Where No Final Account Filed.—When no final account has been filed, the statute begins to run from the arrival of the ward at age. *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

§ 1-18. Disability of marriage.—In any action in which the defense of adverse possession is relied upon, the time computed as constituting such adverse possession shall not include any possession had against a feme covert during

coverture prior to February thirteenth, one thousand eight hundred and ninety-nine. (1899, c. 78, ss. 2, 3; Rev., s. 363; C. S., s. 408.)

Cross References.—As to constitutional provision concerning property of married women, see the North Carolina Constitution, Art. X, § 6. As to status of married women in civil actions and with reference to property in general, see § 52-1.

Purpose of Section.—This section is a part of the major stroke of the law to free the married woman from the merged identity fiction which deprived her of a legal existence. Other sections are §§ 52-1 et seq. See 2 N. C. Law Rev. 181.

Coverture Not Defense Since 1899.—Under the provisions of this section, and §§ 52-1 et seq., passed in pursuance of Art. X, § 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried. *Roberts v. Roberts*, 185 N. C. 566, 118 S. E. 9 (1923).

Since the passage of this section if the feme covert's right of entry and title were defeated by defendants' adverse possession for seven years under color before the action was commenced, the plea of coverture will not avail her. *Bond v. Beverly*, 152 N. C. 56, 67 S. E. 55 (1910).

Since the passage of this section coverture is not a defense in bar of the running

of the statute of limitations. *Carter v. Reaves*, 167 N. C. 131, 83 S. E. 248 (1914).

In a suit to cancel deeds because of the mental incapacity of the grantor to make them, and under which the defendant in possession claims title by adverse possession under color, the coverture of the plaintiff will not avail her to repel the bar of the statute of limitations, which has run in favor of the defendant's title. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217 (1921).

Section Contemplates True Owner.—A possession cannot well be adverse, within the meaning of this section, to any one who has no title or right of entry or action. It cannot be adverse to one who is a mere stranger to the true title and who has no claim whatever to the land, for he has no right to be barred by such a possession. It has sole reference to the owner of the title. *Berry v. Ritter Lumber Co.*, 141 N. C. 386, 54 S. E. 278 (1906).

Effect of Statute upon Proof.—Until twenty years had elapsed since the passage of this section, one claiming title by adverse possession had the burden of proving that the statute began to run prior to the disability of coverture. *Holmes v. Carr*, 172 N. C. 213, 90 S. E. 152 (1916).

§ 1-19. Cumulative disabilities.—When two or more disabilities coexist at the time the right of action accrues, or when one disability supervenes an existing one, the limitation does not attach until they all are removed. (C. C. P., ss. 28, 49; Code, ss. 149, 170; Rev., s. 364; C. S., s. 409.)

Editor's Note.—By the phraseology of this section, it is evident that cumulative disabilities will only prevent the running of a statute before it has started. Any number, after the statute has once begun to run, will not suspend or arrest the operation. See *Holmes v. Carr*, 172 N. C. 213, 90 S. E. 152 (1916). See also, § 1-20.

Operation of Section Illustrated.—The disability of coverture supervened upon that of infancy, and the statute of limitations is suspended in language too explicit to be capable of any other construction. *Clayton v. Rose*, 87 N. C. 106 (1882); *Epps v. Flowers*, 101 N. C. 158, 7 S. E. 680

(1888); *Cross v. Craven*, 120 N. C. 331, 26 S. E. 940 (1897); *Lafferty v. Young*, 125 N. C. 296, 34 S. E. 444 (1899).

This section can have no application when there is a clear running of the statute for the period fixed after the disability is removed, as when an infant attains his majority. *Campbell v. Crater*, 95 N. C. 156 (1886).

Significance of Length of Time of Disabilities.—The length of time elapsing during cumulative disabilities so long as the disabilities are continuous is immaterial. *Epps v. Flowers*, 101 N. C. 158, 7 S. E. 680 (1888).

§ 1-20. Disability must exist when right of action accrues.—No person may avail himself of a disability except as authorized in § 1-19, unless it existed when his right of action accrued. (C. C. P., s. 48; Code, s. 169; Rev., s. 365; C. S., s. 410.)

Running of Statute Cannot Be Stopped.—If the statute of limitations commences to run nothing stops it. When it begins to run against the ancestor, it continues to

run against the heir, although the heir is under disability when the descent is cast. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298 (1889). See *Asbury v. Fair*, 111 N.

C. 251, 16 S. E. 467 (1892); *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458 (1921).

Principle Applied.—The principle of this section applies where the defendant is out of the State but left after the cause of ac-

tion accrued. *Blue v. Gilchrist*, 84 N. C. 239 (1881). It applies also in the case of insanity, see note under § 1-16; and applied formerly in the case of coverture, see note under § 1-18.

§ 1-21. Defendant out of State; when action begun or judgment enforced.—If, when the cause of action accrues or judgment is rendered or docketed against a person, he is out of the State, action may be commenced, or judgment enforced, within the times herein limited, after the return of the person into this State, and if, after such cause of action accrues or judgment is rendered or docketed, such person departs from and resides out of this State, or remains continuously absent therefrom for one year or more, the time of his absence shall not be a part of the time limited for the commencement of the action, or the enforcement of the judgment. (C. C. P., s. 41; 1881, c. 258, ss. 1, 2; Code, s. 162; Rev., s. 366; C. S., s. 411.)

Retroactive Effect.—As a general rule statutes of this character apply to actions pending at the time they take effect provided the actions have not been barred by a previous limitation. See *Cox v. Brown*, 51 N. C. 100 (1858).

The general purpose of this section, taken in connection with the statute of limitation, is to give the person having an accrued cause of action, or judgment, as prescribed, opportunity substantially during the whole of the lapse of the time against him to bring his action or enforce his judgment. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887).

Nonsuit in Absence of Supporting Evidence.—Where plaintiff resists under this section defendant's plea of the statute of limitations solely on the ground that defendant left the State prior to three years from the accrual of the cause of action, and defendant denies the allegation of non-residence, in the absence of evidence by plaintiff in support of the allegation of non-residence, defendant's motion as of nonsuit is properly allowed. *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569 (1934). See § 1-25 and note thereto.

The words "any person," are employed to designate the person to be affected and embraced by the section, are very comprehensive, and there is nothing in its scope or purpose that excludes nonresidents. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887).

"The times herein limited" means, and must mean, the time prescribed elsewhere in the Code, or in statutes amending or passed as substitutes therefor. The plain intent of the statute is to put nonresidents on the same footing as residents, and not to protect them from an action unless they have been for two years exposed to service of summons. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887); *Williams v. Iron*

Belt Bldg., etc., Ass'n, 131 N. C. 267, 42 S. E. 607 (1902); *Hill v. Lindsay*, 210 N. C. 694, 188 S. E. 406 (1936).

Sufficiency of Return to Start Statute.—Where the debtor was a nonresident of this State, but was here on visit of a day or two each year, such visits would not have effect of putting the statute in motion. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887).

The "return to the State," specified by this section, as necessary to put the statute in motion, is a return with a view to residence—not a casual appearance in the State, passing through it, or even making a visit here. *Lee v. McKoy*, 118 N. C. 513, 24 S. E. 210 (1896).

Same — Applicable Where Absence Started Before Accrual.—Where a debtor is out of the State at the time the cause of action accrues, the statute of limitation does not begin to run until he returns to this State for the purpose of making it his residence. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887).

When Running Suspended by Action. — It will be observed that this statutory provision prescribes and embraces three distinct cases in which the statute of limitation will not operate as a bar because of the continuous lapse of the time prescribed next after the cause of action accrued, or judgment was rendered or docketed: (1) Where the debtor was out of the State at the time the cause of action accrued or the judgment was rendered or docketed. This case may apply alike to a resident or non-resident debtor. In it time does not begin to lapse in his favor until he shall return to the State—not simply on a hasty visit of a day or two, at long intervals, but for the purpose of residence. And if, after such returns, he shall depart from the State for the purpose of residence out of it,

or to sojourn out of it for a year or more, the time of his absence will not be allowed in his favor; it will be subtracted from the time that would have been so allowed if he had remained in the State. (2) When, after the cause of action accrued or the judgment was rendered or docketed, the debtor-resident or nonresident of the State—departed from and resided out of it, “the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action or the enforcement of such judgment.” (3) When, after the cause of action has accrued or judgment has been rendered or docketed, the debtor shall depart from the State, “and remain continually absent for the space of one year or more,” the time of his absence shall not be allowed in his favor. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887); *Arthur v. Henry*, 157 N. C. 393, 73 S. E. 206 (1911).

The statute of limitations is suspended in the following cases: (1) When the person against whom a cause of action exists becomes a nonresident, whether he remain continuously absent for a year or occasionally visits the State; (2) When such person retains his residence, but is absent from the State continuously for one year or more. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

When a person becomes a nonresident of the State it is not necessary that he should remain continuously out of the State one year to stop the running of the statute, nor would occasional visits to the State put the statute in motion. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

And this without exception of instances where a proceeding in rem will lie against property situated here. No presumption of payment of the debt will be raised within the period allowed for the commencement of the action. *Love v. West*, 169 N. C. 13, 84 S. E. 1048 (1915).

When Limitation Begins to Operate against Foreign Corporation.—An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. *Williams v. Iron Belt Bldg., etc., Ass’n*, 131 N. C. 267, 42 S. E. 607 (1902).

When Judgment in Personam Not Rendered.—Where a nonresident defendant of this State has had no personal service of summons made upon him and has not accepted service, and has no property herein subject to attachment or levy, a judgment upon publication of service under the provisions of this section, may not be rendered

against him in personam, in an action for debt; and where so rendered it will be set aside. *Bridger v. Mitchell*, 187 N. C. 374, 121 S. E. 661 (1924).

Section Not Applicable after Statute Has Run.—This section is not applicable after the statute of limitation has run. *Southern R. Co. v. Mayes*, 113 F. 84 (1902).

Applicability to Actions in Rem.—This section is applicable to actions in rem as well as actions in personam, no exception being made. *Love v. West*, 169 N. C. 13, 84 S. E. 1048 (1915).

Applicability to Suits against Bail.—Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. *Albemarle Steam Nav. Co. v. Williams*, 111 N. C. 35, 15 S. E. 877 (1892).

Applicable to Enforce Resulting Trust.—Where a cause of action to enforce a resulting trust has existed for more than ten years, but subtracting the length of time the trustee thereof had been out of the State, the elapsed time is less than ten years, then, under this section, the cause of action is not barred by the ten-year statute. *Miller v. Miller*, 200 N. C. 458, 157 S. E. 604 (1931).

Where the defendant is a nonresident of the State the statute of limitations has not run. *Lassiter v. Powell*, 164 F. (2d) 186 (1947).

Effect of Nonresident’s Ownership of Property in State.—The fact that a nonresident debtor has property within the State will not affect this section, which suspends the operation of the statute of limitations for the period during which the person, against whom the demand is made, is out of the State. *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889 (1892).

Nonresident Foreign Corporations.—The statute of limitations does not apply to foreign nonresident corporations. *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889 (1892); *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 21 S. E. 917 (1895).

But it does apply to nonresident corporations as well as individuals. *Grist v. Williams*, 111 N. C. 53, 15 S. E. 889 (1892); *Alpha Mills v. Watertown Steam Engine Co.*, 116 N. C. 797, 21 S. E. 917 (1895); *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 51 S. E. 887 (1905); *Volivar v. Richmond Cedar Works*, 152 N. C. 34, 67 S. E. 42 (1910); *Volivar v. Richmond*

Cedar Works, 152 N. C. 656, 68 S. E. 200 (1910).

Effect of Corporation Service Statutes.—Sections 58-153, 58-154, which authorize service of summons against nonresident insurance companies upon the Commissioner of Insurance, in no way abrogate or affect the suspension of the running of the statutes of limitation in such cases. That service can thus be had upon a nonresident corporation may be a reason why the General Assembly should amend this section, so as to set the statute running in

such cases, but it has not done so and the courts can not. *Green v. Hartford Life Ins. Co.*, 139 N. C. 309, 51 S. E. 887 (1905).

Applicable to Operation of § 1-53.—The existence of the conditions enumerated in this section will suspend the operation of § 1-53. *Williams v. Iron Belt Bldg., etc., Ass'n*, 131 N. C. 267, 42 S. E. 607 (1902).

Stated in *Holderness v. Hamilton Fire Ins. Co.*, 54 F. Supp. 145 (1944).

Cited in *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642 (1935).

§ 1-22. Death before limitation expires; action by or against executor.—If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his representatives after the expiration of that time, and within one year from his death. If a person against whom an action may be brought dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced against his personal representative after the expiration of that time, and within one year after the issuing of letters testamentary or of administration, provided the letters are issued within ten years of the death of such person. If the claim upon which the cause of action is based is filed with the personal representative within the time above specified, and admitted by him, it is not necessary to bring an action upon such claim to prevent the bar, but no action shall be brought against the personal representative upon such claim after his final settlement. (C. C. P., s. 43; 1881, c. 80; Code, s. 164; Rev., s. 367; C. S., s. 412.)

I. General Consideration.

II. Death of Creditor.

III. Death of the Debtor.

IV. Filing Claim.

I. GENERAL CONSIDERATION.

Cross References.—As to actions which survive to and against a personal representative, see §§ 28-172 et seq. As to actions which do not survive, see § 28-175. See also § 1-74. As to final settlement of personal representative, see § 28-121 and §§ 28-162 et seq.

Editor's Note.—This section was new with the Code of Civil Procedure. It has remained unchanged since its insertion except that the last sentence was added by the act of 1881, and the proviso at the end of the second sentence by the Consolidated Statutes.

The section has been held to be an enabling and not a disabling statute, and to apply only in those cases where, but for its interposition, a claim would be barred, *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432 (1893); *Redmond v. Pippen*, 113 N. C. 90, 18 S. E. 50 (1893); *Geitner v. Jones*, 176 N. C. 542, 97 S. E. 494 (1918); *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383 (1926), intending to enlarge and ex-

tend the time within which the action may be brought, and not to suspend the operation of the statute, which continues to run. *Irvin v. Harris*, 184 N. C. 547, 114 S. E. 818 (1922). It means that if at the time of the death of the debtor the claim is not barred, action may be brought within one year after the grant of letters to the personal representative in those cases where, in regular course, but for the interposition of this section, the claim would become barred in less time than one year from such grant. It was not intended to be a restriction on the statute of limitation so that a claim should become barred by the lapse of a year from the grant of letters, where, in regular course but for this section, it would not be barred till a later date. The object in view is that when the cause of action survives and is not barred at the time of the death, there shall be at least one year after the death of the creditor, or one year after the grant of letters of administration to the personal representative of the debtor, before action is barred. This is conclusively shown by the words of the section, that if the party die before the claim is barred action may be brought "after the expiration of the time limited, and within one year." *Benson v. Bennett*,

112 N. C. 505, 17 S. E. 432 (1893). See *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890).

Formerly there was no such extension of time to prevent the bar of the statutes from becoming complete as is provided in this section. *Hawkins v. Savage*, 75 N. C. 133 (1876); *Bruner v. Threadgill*, 88 N. C. 361 (1883); *Patterson v. Wadsworth*, 89 N. C. 407 (1883).

Exception to General Rule. — This section is an exception to the general rule that when the statutes of limitation once begin to run nothing can stop them. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909), citing *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840 (1902).

However, it should be observed that it has no application where the bar attached before death. *Daniel v. Laughlin*, 87 N. C. 433 (1882); *Vaughan v. Hines*, 87 N. C. 445 (1882); *Grady v. Wilson*, 115 N. C. 344, 20 S. E. 518 (1894); *Parker v. Hardin*, 121 N. C. 57, 28 S. E. 20 (1897); *Copeland v. Collins*, 122 N. C. 619, 30 S. E. 315 (1898); *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840 (1902); *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383 (1926).

And for that reason will not constitute an exception to the rule where such bar had attached at death. Nor will the section apply where the action is not barred within the year fixed by the section.

To What Limitations Applicable.—The section only applies to the limitations prescribed in the Code of Civil Procedure. *Hall v. Gibbs*, 87 N. C. 4 (1882).

Nothing will defeat the operation of this section except the disabilities mentioned in the statutes, fraud or certain other defenses of an equitable nature. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887).

When it is pertinent to the subject it must be taken in connection with § 1-47. *Redmond v. Pippen*, 113 N. C. 90, 18 S. E. 50 (1893).

Applicability in Action to Subject Lands.—The heirs at law can successfully plead the statute of limitations against the administrator seeking to subject their lands to the payment of deceased's debt as fully as he can against a creditor. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909).

A personal representative who seeks to subject descended or devised lands to make assets for the payment of debts represents the creditors of the estate and in that capacity is entitled to any benefit or exception which the creditors might have in prosecuting the action against him in-

cluding the benefits of this section. *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890 (1888).

When Section Begins to Run Against Insane. — This section commences to run against an insane claimant only from the time of the qualifications of his guardian. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867 (1921).

Whether Notes under Seal. — Where notes matured less than three years prior to the date of death of the maker, an action on the notes was not then barred by the three-year statute of limitation, and the filing of claim and the admission of it, in accordance with this section, would prevent the claim being barred, and any question as to whether the notes were or were not under seal becomes immaterial in this phase of the case. *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342 (1943).

Effect of Order to Add Parties in Supreme Court. — See *Gertner v. Jones*, 176 N. C. 542, 97 S. E. 494 (1918).

Cited in 13 N. C. Law Rev. 60.

II. DEATH OF CREDITOR.

Brought within Year of Creditor's Death.

—Actions upon claims in favor of an estate of a decedent must be brought within one year of his death, without regard to when administrator was appointed. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890).

Construction upon Section.—Although it was held that a statute does not run against a party not in existence or under a disability or against such a person, it may be noted that *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73 (1891), does not change the construction placed upon this section that an action must be brought by a representative of a creditor within one year after his death, and against the representative of a debtor in one year after taking out letters of administration, when it would otherwise have become barred. *Burgwyn v. Daniel*, 115 N. C. 115, 20 S. E. 462 (1894).

Time is counted from the death of the decedent, in respect to claims in favor of the estate, because the law does not encourage remission in those entitled to administrations, and this notwithstanding what is said in *Dunlap v. Hendley*, 92 N. C. 115 (1885). *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890).

Same—Dunlap v. Hendley.—It is said in *Dunlap v. Hendley*, 92 N. C. 115 (1885) that where the creditor died before the statute ran and the administrator brought action within the year after the death of the creditor but after the statute had run,

it is questionable whether this section could help the case because the administrator should bring the action within the period of the statute of limitation and while it is running. This position is clearly contradictory to the terms of the section and it was held in *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890), that notwithstanding the language used the action could be brought any time within the year.

When Time Extended.—This section does not extend the life of a judgment beyond the ten years where the judgment creditor dies more than a year before the expiration of the ten-year limitation. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63 (1894).

The death of the judgment creditor did not suspend the statute. The effect was only to give one year's time from the death of the creditor to the personal representative to bring action, if otherwise it would have been barred by the lapse of ten years before such year had expired. *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432 (1893). But there was more than one year after the death of the creditor before the ten years expired, and therefore this section has no place. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63 (1894).

Contract as to Limit Permissible.—A reasonable stipulation in a contract of carriage with a railroad company for an interstate shipment of goods, as to the time wherein suit may be brought for loss or damage, is a part of the contract between the parties, and being made without exception, is not suspended by this section. *Thigpen v. East Carolina Railway*, 184 N. C. 33, 113 S. E. 562 (1922).

Principle Illustrated.—Where the statute had not run at the intestate's death, and the action was brought within one year after the issuing of the letters of administration, the action was not barred under this section notwithstanding that the ordinary statutory period had elapsed between the accrual and the bringing of the action. *Robertson v. Dunn*, 87 N. C. 191 (1882); *Mauney v. Holmes*, 87 N. C. 428 (1882).

III. DEATH OF THE DEBTOR.

Section Mandatory.—Actions upon claims against the estate of a decedent must be brought in one year after administration. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890); *Winslow v. Benton*, 130 N. C. 58, 40 S. E. 840 (1902).

Running Arrested against Unrepresented Estate—Where Proceeding on Representative's Bond.—*Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73 (1891), held that the statute of limitation did not run to bar an

action by an administrator de bonis non against the representative and bondsmen of a deceased administrator while there was no administrator de bonis non—no one in esse who could bring such action. This would not apply to an action brought by the creditor, or a distributee, or legatee, directly against the representative of the deceased executor, administrator or guardian and their sureties for breach of the bond. *Coppersmith v. Wilson*, 107 N. C. 31, 12 S. E. 77 (1890); *Benson v. Bennett*, 112 N. C. 505, 17 S. E. 432 (1893); *Burgwyn v. Daniel*, 115 N. C. 115, 20 S. E. 462 (1894).

Flemming v. Flemming Qualified.—It is said in *Flemming v. Flemming*, 85 N. C. 127 (1881), to be well settled that the death of the debtor after the cause of action has accrued will not suspend the running of the statute to the completion of the prescribed time. This was intended to be the statement of a general principle, resting upon numerous adjudications, and without reference to the modifications made by the words of the act recited, and to which attention was not at the moment of penning the sentence directed, and certainly with no intent to disregard or ignore the express statutory mandate. *Mauney v. Holmes*, 87 N. C. 428 (1882).

Applicable to Partners.—Notwithstanding that a deceased partner's debt to his firm would have otherwise been barred by statute since his death, yet where no administrator has been appointed, the debt will not be barred until after one year from the appointment of an administrator unless more than ten years has elapsed since his death. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871 (1921).

Principle Illustrated.—It was held that a claim reduced to judgment is barred by the ten-year statute of limitation unless the claim was admitted by administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889).

Where judgment is obtained against an administrator who dies five years later and there was no further administration until thirteen years later when steps were taken to collect the judgment, it was held that the ten-year proviso applied to bar an enforcement. *Fisher v. Ballard*, 164 N. C. 326, 80 S. E. 239 (1913).

Where the period of limitation for a judgment was ten years, and some two months before it ran the judgment creditor died and no representative qualified until two and a half years later but in the mean-

time the debtor had died and his representative was not qualified until two years and eleven months after the death of the creditor, and the action was brought four months after the latter representative's qualification, by virtue of this section it was not barred. *Dunlap v. Hendley*, 92 N. C. 115 (1885).

Proviso—Issuing within Ten Years.—The proviso is a wise restriction to prevent the inconvenience and often the injustice of collecting stale claims. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909).

When the letters of administration have been issued before the operative effect of the proviso the provision that such should have been issued within ten years from the death of the intestate is inapplicable. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909).

There is no statutory provision which prevents the expiration of a judgment lien in case of death and administration similar to that of the proviso. *Matthews v. Peterson*, 150 N. C. 134, 63 S. E. 721 (1909).

IV. FILING CLAIM.

Not Retroactive.—The last sentence of this section applied only to those claims that were filed at the time of the passage of the act and were not then barred. It could not apply to those barred when the act became effective. *Whitehurst v. Dey*, 90 N. C. 542 (1884).

Purpose of Filing Claim.—If a judgment creditor of a deceased judgment debtor wishes to protect himself against the running of the statute of limitations as against the debt, he must file his claim with the personal representative of the deceased. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

The purpose of the creditor then is, by filing his claim with the administrator, to avoid the running of the statute against his debt, and to fix the debt by the admission of the personal representative—the very reverse of presenting the claim for instant payment. *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836 (1898) (dis. op.).

The word "filed" has reference, certainly, to the old custom of stringing on a line or wire papers of value for past or future usefulness, or maybe both. The same end is subserved by tying together or bundling papers and labeling them or cataloguing them on rolls or lists for future use. *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836 (1898) (dis. op.).

The filing of claim is intended to be of advantage to creditors who do not receive or who do not expect to receive payment of their debts on presentation, in enabling

them to leave with the personal representative a memorandum of their claims to save the trouble and expense of bringing suit, and to prevent the bar of the statute of limitations. And the act of the creditor in filing the claim is an admission on his part that he does not expect the immediate payment of the debt, but that he wishes the claim entered, "filed," somewhere, in some way, by the personal representatives. *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836 (1898) (dis. op.).

Notice to the executor for information is the prime purpose of the statute in requiring the claim to be filed and seems to be all that is necessary for his purpose, until he is ready to make a final settlement. *Hinton v. Pritchard*, 126 N. C. 8, 35 S. E. 127 (1900).

The term "filed" signifies that the claim is to be exhibited, for inspection, to the personal representative, for his admission or rejection. It is not required of the creditor to part with the possession of the evidence of his claim. *Hinton v. Pritchard*, 126 N. C. 8, 35 S. E. 127 (1900).

Sufficiency of Filing.—Where an administrator, knowing that his appointment is at the instance and solicitation of judgment creditors so that they might make collection immediately upon appointment, with memorandum of the judgment in hand, investigates and ascertains that the judgment has not been paid, and thereafter institutes proceedings to sell the lands of intestate to make assets to pay the judgment, claim on the judgment has been filed and admitted by the administrator within this section. *Rodman v. Stillman*, 220 N. C. 361, 17 S. E. (2d) 336 (1941).

Mere notice to an executor of a claim against the decedent's estate, received without comment or approval by the executor, is not a filing of the claim within the meaning of this section, but where, after such notice, the executor carries the item as a debt on the books of the estate and reports it to the clerk as a debt owed by the estate, the executor's approval will be inferred, and the statute will not operate as a bar. *Horne Corp. v. Creech*, 205 N. C. 55, 169 S. E. 794 (1933).

Section Illustrated.—The exhibition by the sheriff within one year of the date of administration to the administrator, of an execution issued in favor of the county against the intestate, which the administrator admits is correct and does not pay for want of assets—is a sufficient "filing" required by this section, so as to render unnecessary an action to prevent the bar of statute of limitations. *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836 (1898).

In *Stonestreet v. Frost*, 123 N. C. 640, 31 S. E. 836 (1898), it is said that it is a sufficient "filing," when the claim is presented within the proper time to the personal representative and he acknowledges the validity of the debt. The creditor can never compel the administrator to "string" the claim. He has done his part when he has presented it to the administrator with sufficient certainty as to the nature and amount of the debt. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850 (1902).

Sufficiency of Presentation. — Where the plaintiff never presents his claim, or any proof of it, but simply announces its amount, without response from the representative, the running of the statute is not arrested under this section. *Flemming v. Flemming*, 85 N. C. 127 (1881).

Sufficiency of Admission. — A partial payment by the personal representative, without objection, is an unequivocal act from which an admission of the justice of the claim may be inferred. *Hinton v. Pritchard*, 126 N. C. 8, 35 S. E. 127 (1900).

When the personal representative does not deny the correctness of the claim filed with him in proper time, but filed his petition to make assets to pay it, this is strong proof that he admitted it. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891).

Same — Silence. — If a claim is presented in the form of a bill of particulars, and the representative refuses an explicit admission of denial, the plaintiff has the right to deem its acceptance without remark as arresting the running of the statute. *Flemming v. Flemming*, 85 N. C. 127 (1881).

Effect of Admission.—The admission of the validity of a claim by an administrator, where presented within proper time, dispenses with any formal proof thereof. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850 (1902).

Claims not barred presented to the administrator in one year after letters granted and admitted by him need not be

put in suit to prevent the bar of the statute pending the administration, nor can the heirs plead the statute as to them. *Turner v. Shuffler*, 108 N. C. 642, 13 S. E. 243 (1891).

A distinct acknowledgment and promise made by an executor or administrator and based upon a sufficient consideration imposes a personal liability upon the representative, but does not take away the protection afforded by lapse of time to the estate represented. *Fall v. Sherrill*, 19 N. C. 371 (1837); *Oates v. Lilly*, 84 N. C. 643 (1881); *Flemming v. Flemming*, 85 N. C. 127 (1881).

Application to Heirs.—There is nothing in this section which would seem to indicate a suspension of the statute as to the personal representative only, leaving the heir at law to be protected by the lapse of time. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891).

The personal representative represents the deceased, and his admission of the correctness of a claim, unless impeachment for fraud, will estop the heirs. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891).

Since the amendment of 1881 the heir is as much barred by the filing of the claim within the prescribed time and its admission by the personal representative, as he would be by the latter submitting to a judgment. It will be noted that the claim in controversy in *Beyers v. Park*, 88 N. C. 456 (1883), was a cause of action accrued prior to the Code of Civil Procedure and this section did not apply to it at all. *Hall v. Gibbs*, 87 N. C. 4 (1882); *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891).

Suit by Administrator Sufficient Notice of His Claim.—*Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406 (1903).

Not Applicable to Judgments.—Where a judgment had been obtained on a claim, the amendatory act of 1881 can have no application. *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891).

§ 1-23. Time of stay by injunction or prohibition.—When the commencement of an action is stayed by injunction or statutory prohibition, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action. (C. C. P., s. 46; Code, s. 167; Rev., s. 368; C. S., s. 413.)

Nature of Operation upon Statute.—This section as its terms clearly impart, affects, and is intended to affect only a litigant's right to prosecute an action in court as fixed by the statute, and does not as a rule operate to extend or prolong a

time limit or a property right as determined by the contract of the parties. *Gatewood v. Fry*, 183 N. C. 415, 111 S. E. 712 (1922).

Effect of Irregularity in Granting.—Mere irregularity in the granting of an in-

junction will not render it a nullity, so as to prevent the suspension of the statute of limitations, under this section, during the pendency of the injunction. *Walton v. Pearson*, 85 N. C. 34 (1881).

Evidence Sufficient to Overrule Motion to Nonsuit.—Where plaintiff showed that shortly after the defendant's steamship collided with bridge, proceedings were instituted in the United States district court, in which it was ordered that all suits arising

out of the collision be stayed, and immediately after plaintiff's claim was dismissed in that court for want of jurisdiction, it instituted present action, plaintiff's evidence was sufficient to overrule motion to nonsuit on the ground of the bar of the statute of limitations. *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 226 N. C. 371, 38 S. E. (2d) 214 (1946).

§ 1-24. Time during controversy on probate of will or granting letters.—In reckoning time when pleaded as a bar to actions, that period shall not be counted which elapses during any controversy on the probate of a will or granting letters of administration, unless there is an administrator appointed during the pendency of the action, and it is provided that an action may be brought against him. (C. C. P., s. 47; Code, s. 168; Rev., s. 369; C. S., s. 414.)

Persons Protected. — This section applies only to protect creditors, there being no one for them to sue. *Stelges v. Simmons*, 170 N. C. 42, 86 S. E. 801 (1915).

It does not apply to the heirs at law or devisees to nullify the protection given every one in adverse possession of realty for seven years under color of title, nor to invalidate a judgment rendered against the heir or devisee that the title to the

property is in another. *Stelges v. Simmons*, 170 N. C. 42, 86 S. E. 801 (1915).

Effect Where No Representative during Contest. — This section applies only where there is no administrator or collector during the contest. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63 (1894).

Cited in *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298 (1889); *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16 (1904).

§ 1-25. New action within one year after nonsuit, etc.—If an action is commenced within the time prescribed therefor, and the plaintiff is nonsuited, or a judgment therein reversed on appeal, or is arrested, the plaintiff or, if he dies and the cause of action survives, his heir or representative may commence a new action within one year after such nonsuit, reversal, or arrest of judgment, if the costs in the original action have been paid by the plaintiff before the commencement of the new suit, unless the original suit was brought in forma pauperis. (C. C. P., ss. 21, 45; Code, ss. 142, 166; Rev., s. 370; 1915, c. 211, s. 1; C. S., s. 415.)

Cross References.—As to actions which do and which do not survive, see §§ 28-172 et seq. As to actions in forma pauperis, see §§ 1-109 et seq. and § 6-24.

Editor's Note. — This section was amended in 1915 by adding the condition relating to costs.

This section is mandatory as to the payment of costs prior to the commencement of the record action. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922).

The words "new action," "new suit," and "original suit" indicate a difference in the two actions though the causes may be identical. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310 (1931); *Bourne v. Southern Ry. Co.*, 224 N. C. 444, 31 S. E. (2d) 382 (1944).

When Section Applies.—This section applies only when the party would otherwise be barred from his right of action from the lapse of time prescribed by the statute of limitations relating to the cause

of action. *Grimes v. Andrews*, 170 N. C. 515, 87 S. E. 341 (1915).

It has been held in *Bradshaw v. Citizens' Nat. Bank*, 172 N. C. 632, 90 S. E. 789 (1916), that when both suits, as in this case, are brought within the time allowed by the general law, neither the section in question nor the amendment thereto requiring the prepayment of costs, applied for in such case it was not necessary to resort to it, nor could plaintiff be properly considered as proceeding under it, but, under the provisions of the general statute, establishing the time within which these actions should be brought. *Summers v. Southern R. Co.*, 173 N. C. 398, 92 S. E. 160 (1917).

Since the claim was not presented within the time limited before the first action was commenced, it is not protected from the operation of the statute after the nonsuit by this section. *Royster v. Commissioners*, 98 N. C. 148, 3 S. E. 739 (1887).

While this section relating to the time of institution of an action in regard to the statute of limitations, provides that an action may be instituted within one year from judgment as of nonsuit, provided the original action was not brought in forma pauperis, a voluntary nonsuit will not bar a subsequent action even though the original action nonsuited was brought in forma pauperis. *Briley v. Roberson*, 214 N. C. 295, 199 S. E. 73 (1938).

Pendency of Action Suspends Statute.—An action for the recovery of real property, instituted against a tenant in common in adverse possession, suspends the running of the statute of limitations as to the cotenant then out of possession. *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580 (1903).

The reason of the law is that the running of the statute should, in the very nature of things, be arrested as soon as the party has asserted his right by action. *Locklear v. Bullard*, 133 N. C. 260, 45 S. E. 580 (1903).

This section applies to limitations generally, including a contractual limitation in a policy of liability insurance, and not solely to limitations which are strictly statutes of limitation. *Carolina Transp., etc., Co. v. American Alliance Ins. Co.*, 214 N. C. 596, 200 S. E. 411 (1939).

Actions to Which Applicable.—This section has reference only to actions regularly instituted in the regular course of civil procedure, and does not embrace mere motions in an action or a motion for an execution upon a dormant judgment. This appears from the legal meaning of the terms employed and the obvious implications arising upon them, taken together, to express the legislative intent. The leading important words are "an action," "an action commenced within the time prescribed therefor," "a judgment therein," "reversed on appeal," or "arrested," "the cause of action survived," "a new action." These words and such phraseology do not apply for the most part to motions and merely incidental proceedings. *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 1001 (1891).

The cause of action in the first suit may be identical with the cause in the second, but it does not follow that the prosecution bond, the bond of indemnity, or the leave given by the Attorney General in the first action can avail the defendant in the action last instituted. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310 (1931).

Where a foreign receiver, under the mistake that special permission was necessary for him to sue in the courts of our State, has taken a voluntary nonsuit, and obtains

permission to sue in our courts, and brings the identical action again within one year from the nonsuit, if the former action has not been barred by a statute of limitations applicable, the second action is in time if brought within one year from the time of the voluntary nonsuit. *Van Kempen v. Latham*, 201 N. C. 505, 160 S. E. 759 (1931).

Where a proceeding for compensation is instituted before the Industrial Commission, and the proceeding is dismissed, an action thereafter begun in the superior court by the widow as administratrix against the employer to recover for the employee's wrongful death will not be considered a continuation of the proceedings before the Industrial Commission so as to relate back to the time of the institution of such proceedings, and the action instituted in the superior court is barred if not brought within one year from the employee's death, there being a distinction between dismissal of proceedings under the compensation act and a nonsuit entered in an action instituted in the superior court entitling plaintiff to institute a new action within one year. *Mathis v. Camp Mfg. Co.*, 204 N. C. 434, 168 S. E. 515 (1933).

Where the original action was instituted in the State court within less than three years after the cause of action accrued, and the present action was instituted in the federal court within less than a year after the nonsuit was taken in the original action, there can be no question as to the protection of this statute being available. *Federal Reserve Bank v. Kalin*, 81 F. (2d) 1003 (1936).

Where plaintiff took a voluntary nonsuit in the federal court on his cause of action to recover the penalty for usury, based on numerous separate transactions between the parties, and within a year thereafter he instituted four separate actions in the State court embracing the identical items declared on in the original action, and if the original action was instituted within the time prescribed, the four separate causes of action would not be barred by the statute of limitations. *Marshall Motor Co. v. Universal Credit Co.*, 219 N. C. 199, 13 S. E. (2d) 230 (1941).

Section as Extension of Time.—This section is an extension of time beyond that allowed by the general statutes in the instances as stated, including nonsuit. *Caldwell Land, etc., Co. v. Hayes*, 157 N. C. 333, 72 S. E. 1078 (1911); *Summers v. Southern R. Co.*, 173 N. C. 398, 92 S. E. 160 (1917).

The time is extended because the new action is considered as a continuation of

the former action, and they must be substantially the same, involving the same parties, the same cause of action, and the same right. *Van Kempen v. Latham*, 201 N. C. 505, 160 S. E. 759 (1931).

Effect of No Cause Stated in First Action.—This section authorizes the commencement of a new action of the same cause of action within one year after reversal of judgment on appeal, though the first complaint was insufficient to state a cause of action. *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881 (1901).

Where the cause of action of the first and second suit are identical this section applies notwithstanding that the first action was dismissed because of a failure to state a cause. *Webb v. Hicks*, 125 N. C. 201, 34 S. E. 395 (1899).

Effect of New Cause of Action.—Where a new cause of action is alleged the original action is no protection as against the statute of limitations. *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881 (1901).

The statutory remedy against defunct corporations must be brought within the prescribed limitation and though an action is brought, but not in the proper manner, against the proper parties, this section will not apply to save the right of action from the statutory bar. *VonGlahn v. DeRosset*, 81 N. C. 467 (1879).

Effect of Agreement Not to Plead Statute.—An agreement in the original action not to plead the statute of limitations does not apply to the new action. *Citizens' Sav., etc., Co. v. Warren*, 204 N. C. 50, 167 S. E. 494 (1933).

Where action begun prior to the bar of the applicable statute of limitations is dismissed for want of service of process on the defendant, a second action on the same cause of action commenced within twelve months after the dismissal, but after the expiration of the statutory limitation, is barred. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819 (1951).

Nonsuit Operates as Res Adjudicata Only Where Second Action Is Substantially Identical with First.—In order for a judgment of nonsuit to operate as res adjudicata in a subsequent action brought under the provisions of this section, it is required that the trial court find as a fact that the second suit is based upon substantially identical allegations and evidence as the first, and where the trial court hears no evidence and finds no facts its judgment dismissing the action upon the plea of estoppel by the former judgment is premature and inadvertently made. *Batson v. City Laundry Co.*, 206 N. C. 371, 174

S. E. 90 (1934); *Ingle v. Cassady*, 211 N. C. 287, 189 S. E. 776 (1937).

While ordinarily a party against whom a judgment of nonsuit has been rendered may commence a new action within one year, where a judgment of nonsuit has been entered, and a new suit has been commenced between the same parties based on substantially identical allegations and supported by substantially identical evidence, and these facts are found by the court, the judgment in the former action will be held res adjudicata and a bar to the maintenance of the second suit. *Smith v. McDowell Furniture Co.*, 232 N. C. 412, 61 S. E. (2d) 96 (1950).

Burden of Proving Identity of Causes.—In action to recover lands wherein the plaintiff depends upon a nonsuit in a former action to repel the bar of the statute of limitation, it is necessary for him to bring himself within the meaning of the statute and show identity of parties, cause of action, and title, or that he is the "heir at law or representative" of the former plaintiff, the second action being regarded as a continuance of the writ in the first one; and it is insufficient if the plaintiff in the second action was a grantee of the plaintiff in the first one before the latter commenced his action. *Quelch v. Futch*, 174 N. C. 395, 93 S. E. 899 (1917).

Parol Evidence to Prove Nature of Action.—In an action to recover land parol testimony that a prior action brought without filing a complaint is identical with the present action is inadmissible. *Young v. Atlantic Coast Line R. Co.*, 189 N. C. 238, 126 S. E. 600 (1925). See also, *Drinkwater v. Western Union Tel. Co.*, 204 N. C. 224, 168 S. E. 410 (1933); *Little v. Bost*, 208 N. C. 762, 182 S. E. 448 (1935).

The question as to whether an action is a continuation of a former one so as to bring it within the provisions of this section is one of law to be decided from the original complaint, and when no complaint is filed in the prior action, the identity of the causes of action may not be shown by parol evidence. *Motsinger v. Hauser*, 195 N. C. 483, 142 S. E. 589 (1928).

Dismissal or nonsuit as to one defendant for misjoinder of parties and causes is a nonsuit within the provisions of this section, permitting plaintiff to institute another action within one year of nonsuit when the original action is instituted within the time prescribed. *Carolina Transp., etc., Co. v. American Alliance Ins. Co.*, 214 N. C. 596, 200 S. E. 411 (1939).

Limitation Where Second Action Brought in Equity.—The fact that more than one year had elapsed before the be-

ginning of the present action, from the termination by nonsuit of the defendant's action to recover for services rendered to her mother from the administrator does not bar her recovery upon her counterclaim, the same being of an equitable nature to which this section has no application, under the facts of the case. *Shell v. Lineberger*, 183 N. C. 440, 111 S. E. 769 (1922).

Dismissals — Want of Jurisdiction.—This section applies where the first action was dismissed because the court in which it was brought had no jurisdiction. *Webb v. Hicks*, 125 N. C. 201, 34 S. E. 395 (1899).

Application Where Statute Not One of Limitation.—This statute contains no exception of cases under § 28-173, or of any other cases where the time prescribed for bringing the original action might not be strictly a statute of limitation. There is no cause why the privilege to commence a new action within a year after nonsuit should not apply equally to all cases of nonsuit. The statute makes no distinction, and there is certainly none in the reason of the thing, which is the same as to that class of cases as in any others. *Meekins v. Norfolk, etc., R. Co.*, 131 N. C. 1, 42 S. E. 333 (1902). See *Williams v. Iron Belt Bldg., etc., Ass'n*, 131 N. C. 267, 42 S. E. 607 (1902).

Same—Actions for Death by Wrongful Act.—While the requirements of § 28-173, giving a right of action for death caused by the wrongful act, etc., is not in strictness a statute of limitation, but a condition affecting the cause of action itself, yet when such suit has been brought within the time specified it comes within the provision of this section. *Trull v. Seaboard Air Line R. Co.*, 151 N. C. 545, 66 S. E. 586 (1909). The maximum time allowed under the two sections when construed together is two years. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532 (1927).

A new action for wrongful death commenced within one year from the date of nonsuit falls within the provisions of this section notwithstanding the provisions of § 28-173, and the fact that the plaintiff has been assessed with additional costs upon motion for reassessment made in the second action and has not paid the cost so reassessed is immaterial. *Swainey v. Great Atlantic, etc., Tea Co.*, 204 N. C. 713, 169 S. E. 618 (1933). See notes to § 28-173.

While the requirement that an action for wrongful death must be instituted within one year, is a condition annexed to the cause of action rather than a statute of limitations, this section applies to actions

for wrongful death. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 533 (1940).

Federal Employers' Liability Act.—This section has been held not applicable to an action brought in a State court under the Federal Employers' Liability Act. *Brooks v. Suncrest Lumber Co.*, 194 N. C. 141, 138 S. E. 532 (1927), citing *Belch v. R. R.*, 176 N. C. 22, 96 S. E. 640 (1918); *King v. R. R.*, 176 N. C. 301, 97 S. E. 29 (1918).

Section Illustrated.—Where an action is begun within the prescribed period, but terminated in a nonsuit after the period has run, this section applies to permit another action within one year from the date of nonsuit. *Hines v. Rowland Lumber Co.*, 174 N. C. 294, 93 S. E. 833 (1917).

Where it does not appear otherwise than that the first suit was commenced in time, and the second was instituted within a year of the nonsuit, this section operates to prevent a bar of the statute. *Bank v. Loughran*, 122 N. C. 668, 30 S. E. 17 (1898).

Effect of Costs Provision.—This section does not forbid the commencement of a second action without paying the costs of the first, but annexes this as a condition to bringing the new action free from the bar of the statute, if pleaded; and a motion to dismiss it before answer filed, upon the ground that the costs of the former one had not been paid, will be denied. *Bradshaw v. Citizens' Nat. Bank*, 172 N. C. 632, 90 S. E. 789 (1916).

But where the appropriate statute has been pleaded and its time expired both before the bringing of the new action and the payment of the cost in the original one, the second action is barred though commenced within the one-year period, when the original case has not been brought in forma pauperis. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922).

In order to be entitled to institute an action within one year after nonsuit in an action instituted prior to the bar of the statute of limitations, plaintiffs must show that the costs in the prior action have been paid or that it was brought in forma pauperis. *Osborne v. Southern Ry. Co.*, 217 N. C. 263, 7 S. E. (2d) 500 (1940).

Same—When Applicable.—The amendment of 1915 requiring the payment of costs has no application when the second action has been brought within the time permitted by the general law. *Summers v. Southern R. Co.*, 173 N. C. 398, 92 S. E. 160 (1917).

Same — Excuse.—It may be shown by plaintiff that his failure to pay costs before commencing his second action upon the same contract was caused by the failure or

the delay of the clerk of the superior court to let him know the amount thereof though the plaintiff had urgently and continuously requested it, and that he would have promptly paid them according to the provisions of the statute had he been able to ascertain them. *Hunsucker v. Corbitt*, 187 N. C. 496, 122 S. E. 378 (1924).

A nonsuit designates the action of the court in ending the case or sending the case out of court where plaintiff is not entitled to proceed to trial because of defect in parties, pleadings or jurisdiction, or where the plaintiff is unable to prove his case and the cause is dismissed as upon a demurrer to the evidence, and in such instances, when the original action is instituted within the time prescribed, complainant is entitled to bring a new action within one year. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553 (1940).

Judgment of Nonsuit on Merits of Case as Bar to Subsequent Action on Same Cause on Substantially Same Evidence.—A plaintiff may bring an action and have it heard upon its merits, and, if a judgment of nonsuit is then entered, he may bring a new suit within one year, or he may have the cause reviewed by the Supreme Court. If the Supreme Court affirms the judgment of the trial court, he may, under this section, bring a new action within the period therein specified. But, if upon the trial of the new action, upon its merits, in either event, it appears to the trial court, and is found by such court as a fact, that the second suit is based upon substantially identical allegation and substantially identical evidence, and that the merits of the second cause are identically the same, thereupon the trial court should hold that the judgment in the first action was a bar or *res adjudicata*, and thus end that particular litigation. *Hampton v. Rex Spinning Co.*, 198 N. C. 235, 151 S. E. 266 (1930).

A judgment of nonsuit does not bar a subsequent action on the same cause instituted within one year unless the evidence is substantially identical, and therefore the plea of *res adjudicata* to the second cause cannot be determined from the pleadings alone. *Craver v. Spaugh*, 227 N. C. 129, 41 S. E. (2d) 82 (1947).

Cross Action. — Plaintiff administratrix was a party defendant in an action for negligence. The administratrix set up a cross action therein against her codefendants for wrongful death prior to the expiration of one year from date of intestate's death. On appeal, the cross action was dismissed because it did not arise out of plaintiff's cause of action. The administratrix within one year of the dismissal instituted this

action for wrongful death against the same defendants upon the same cause. Held: Defendants' demurrer to the complaint stating these facts, on the ground that it appeared upon the face of the complaint that the action was not instituted within one year from intestate's death, was properly overruled, since her cross complaint in the first action should be regarded as the origination of the present action. *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553 (1940).

Propriety of Directed Verdict for Plaintiff Where Record Contains No Evidence of Payment of Costs of Prior Action.—Where, after judgment as of nonsuit, another action has been brought on the same cause of action within one year under the provisions of this section, and defendant moves for judgment of nonsuit and excepts to the trial court's refusal of the motion, and on appeal the only question presented is whether the plaintiff had paid the costs of the prior action as required by the statute, held, the burden is upon the plaintiff to show compliance with the statute and where the record on appeal contains no evidence that the costs of the prior action had been paid, a directed verdict in the plaintiff's favor will be held erroneous, and it cannot be presumed that such evidence was properly before the jury from the fact that the trial court stated at the close of testimony that as he understood the evidence he would have to give a directed verdict that the costs had been paid, to which counsel did not object until after a verdict in the plaintiff's favor. *Southerland v. Crump*, 199 N. C. 111, 153 S. E. 845 (1930).

Effectiveness of doctrine of *lis pendens* ought to prevail so long as equities have not themselves been determined or dismissed, but by appropriate statute are kept within the care of the law and the prospective adjudication by the court. It is difficult to see how this section, intended to accomplish this result, could be made effective in any other way. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510 (1945).

Where a decree of dismissal expressly reserves to plaintiff right to begin another proceeding, such grant of authority continues the operation of the *lis pendens*. A fortiori, this section, giving such permission as a matter of law, must be read into every final judgment of nonsuit entered by any court, and of this law all persons affected must take notice. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510 (1945).

Applied in *Jones v. Bagwell*, 207 N. C.

378, 177 S. E. 170 (1934); *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 226 N. C. 371, 38 S. E. (2d) 214 (1946).

Cited in *Collins v. Smith*, 109 N. C. 468, 14 S. E. 88 (1891); *Midkiff v. Palmetto Fire Ins. Co.*, 198 N. C. 568, 152 S. E. 792 (1930).

§ 1-26. **New promise must be in writing.**—No acknowledgment or promise is evidence of a new or continuing contract, from which the statutes of limitations run, unless it is contained in some writing signed by the party to be charged thereby; but this section does not alter the effect of any payment of principal or interest. (C. C. P., s. 51; Code, s. 172; Rev., s. 371; C. S., s. 416.)

- I. General Consideration.
- II. Acknowledgment or New Promise.
- III. Part Payment.
- IV. Request Not to Sue.

I. GENERAL CONSIDERATION.

Cross Reference.—As to contracts requiring writing, see §§ 22-1 et seq.

See 13 N. C. Law Rev. 57 for comment on this section.

Effect upon Prior Law.—This section does not change the character or quality of the acknowledgment or new promise therefore required to repel the bar of the statute of limitations in an action on contract, except that the new promise should be "in some writing signed by the party to be charged." *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772 (1918); *Peoples Bank, etc., Co. v. Tar River Lbr. Co.*, 221 N. C. 89, 19 S. E. (2d) 138 (1942).

The substituted statute after a fixed time bars the cause of action itself, and does not, as before, obstruct the remedy merely. *McDonald v. Dickson*, 87 N. C. 404 (1882).

The Section Is Mandatory.—*Fleming v. Staton*, 74 N. C. 203 (1876).

Retroactive Effect.—This section has no application where the cause of action had accrued upon the new as well as the old cause. *Farson v. Bowden*, 74 N. C. 43 (1876).

Section as Rule of Evidence.—This section is merely a rule of evidence enacted to prevent fraud and perjury. *Royster v. Farrell*, 115 N. C. 306, 20 S. E. 475 (1894).

Applicability to Judgments.—A judgment is not a contract within the meaning of this section. This is true because a cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Action of One of Class Affecting All of Class.—Where from the condition stated upon a negotiable note, the endorsers sign as sureties, a payment thereon of the maker before the same is barred, suspends the running of the statute of limitations as to all within this class, and a payment

of the interest on the note by one of the sureties will repel the bar of the statute as to all of the sureties thereon. *Dillard v. Farmers Mercantile Co.*, 190 N. C. 225, 129 S. E. 598 (1925).

II. ACKNOWLEDGMENT OR NEW PROMISE.

The English Statute.—The original statute of limitation (21 Jas. I, ch. 16) had no provision as to new promises and acknowledgments. The court made the law on this subject and made it apply to all causes of action that rested on a promise. *Royster v. Farrell*, 115 N. C. 306, 20 S. E. 475 (1894).

Confined to Contracts.—The terms of this section as to written acknowledgments, etc., are confined to actions on contracts and is not applicable to judgments. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Elements Necessary to Valid Promise.—In *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33 (1884), the Supreme Court declared that the promise must be (1) in writing, (2) extend to the whole debt, (but see *Pope v. Andrews*, 90 N. C. 401 (1884)) and must (3) be to pay money and not in something else of value. The promise to pay the debt, too, must be (4) unconditional. *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33 (1884); *Bates & Co. v. Herren & Co.*, 95 N. C. 388 (1886); *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504 (1893); *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771 (1896); *Bryant v. Kellum*, 209 N. C. 112, 182 S. E. 708 (1935).

The promise must be (5) identical and (6) between the original parties—by the same man; and, further, when the original contract is made with another one, and the promise relied on to repel the statute is made with another, who is the plaintiff in the action, the cause of action is the new promise, and it must be declared on; this new promise must be in writing. *Fleming v. Staton*, 74 N. C. 203 (1876); *Pool v. Bledsoe*, 85 N. C. 1 (1881).

It has been held, that the promise must be made to the creditor himself (*Parker v. Shuford*, 76 N. C. 219 (1877), and *Farson v. Bowden*, 76 N. C. 425 (1877)) or to

an attorney or agent for the creditor (*Kirby v. Mills*, 78 N. C. 124 (1878); *Hussey v. Kirkman*, 95 N. C. 63 (1886)), and must be express (*Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28 (1901)), clear and positive (*Hussey v. Kirkman*, 95 N. C. 63 (1886)), to repel the statute.

The new promise must be distinct and specific, and a mere acknowledgment of the debt, though implying a promise to pay, is not sufficient. *Faison v. Bowden*, 76 N. C. 425 (1877); *Riggs v. Roberts*, 85 N. C. 152 (1881). This section provides that the statute is only waived by acknowledgment or new promise, which amounts to "a new or continuing contract." *Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023 (1893).

In *Riggs v. Roberts*, 85 N. C. 152 (1881), the words "distinct and specific," "unequivocal," are really applied to a promise to pay which would revive a debt from which the debtor had been discharged in bankruptcy. While either one of these qualifying words alone would be applicable to the promise or acknowledgment to take the case out of the statute of limitations, there is no special weight superadded by the use of them all at once. *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504 (1893).

In other words there must be such facts and circumstances as to show that the debtor recognized a present subsisting liability and manifested an intention to assume or renew the obligation. This means that the acknowledgment of a debt, which would be sufficient to repel the statute, must manifest an intention to renew the debt as strong and convincing as if there had been a direct promise to pay it. This principle runs through all the decisions of the Supreme Court on this subject. *Simonton v. Clark*, 65 N. C. 525 (1871); *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771 (1896).

A written acknowledgment, or a new promise, certain in its terms, or which can be made certain, is sufficient to repel the operations of the statute of limitations, under this section. It follows that a mere vague declaration of an intention to pay an undefined amount, and without reference to anything that can make it certain, would not be sufficient, but an admission that "the parties are yet to account, and are willing to account and pay the balance then ascertained," would be. *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525 (1889).

In order for a letter signed by the debtor to remove the bar of the statute of limitations it must contain an express, unconditional promise to pay or a definite, unqualified acknowledgment of the debt as a subsisting obligation, and a letter ac-

knowledging the debt at the time defendant left plaintiff's city but claiming that it had been canceled by the creditor's action in selling the debtor's goods of a value greatly in excess of the debt, is not such an acknowledgment of a subsisting obligation as will repel the statutory bar. *Smith v. Gordon*, 204 N. C. 695, 169 S. E. 634 (1933).

Must Be within Statutory Limit Itself.—

The three-year statute of limitations bars a simple action for debt, and where a letter relied on as arresting the running of the statute is written more than three years before the commencement of the action it is ineffective. *Smith v. Gordon*, 204 N. C. 695, 169 S. E. 634 (1933).

When Promise Implied.—Where the debtor has, by a signed written instrument, unqualified by and definitely acknowledged the debt as his subsisting obligation, the law will imply a promise to pay it, and it is sufficient to repel the bar of the statute of limitations unless there is something in the writing to repel such implication. *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772 (1918). See *Smith v. Leeper*, 32 N. C. 86 (1849); *McRae v. Leary*, 46 N. C. 91 (1853); *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481 (1897).

The Writing. — As to expression of opinion in charge on sufficiency of writing, see note to § 1-180.

A new promise to pay, if not in writing, can not defeat the operation of the statute of limitation. *Raby v. Stuman*, 127 N. C. 463, 37 S. E. 476 (1900).

In order to revive a debt which is barred by the statute of limitation, there must be an express unconditional promise to pay the same in writing or a written, definite and unqualified acknowledgment of the debt as a subsisting obligation, signed by the debtor, etc., and from which the law will imply a promise to pay. *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772 (1918). And it is proper to exclude parol evidence that a new promise was made (*Christmas v. Haywood*, 119 N. C. 130, 25 S. E. 861 (1896)), although prior to the section the law was otherwise. *Faison v. Bowden*, 74 N. C. 43 (1876).

It was said in *Flemming v. Flemming*, 85 N. C. 127 (1881), that the oral assertion of a claim to an administrator who remains silent, even if the silence should be construed an admission, is ineffectual because not in writing, see § 1-22.

And so is security given for debts barred by the statute, at least to the extent of the property conveyed. *Taylor v. Hunt*, 118 N. C. 168, 24 S. E. 359 (1896). But an

unaccepted offer to discharge a bond by a conveyance of land (*Riggs v. Roberts*, 85 N. C. 152 (1881)), or an unaccepted offer to pay a debt by a conveyance of land are not such recognition of subsisting liabilities as in law will imply a promise to pay. *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771 (1896); nor is a promissory note barred by the statute of limitations revived by an offer to pay in Confederate currency or bank bills. *Simonton v. Clark*, 65 N. C. 525 (1871).

The accumulation of adjectives used in their application to the words "acknowledgment and promise" in the statute, has produced the impression that it requires more than an ordinary promise in writing to repel the bar of the statute. The old law, before the promise need be in writing, was, "the new promise must be definite and show the nature and amount of the debt, or must distinctly refer to some writing, or to some other means by which the nature and amount of it can be ascertained; or there must be an acknowledgment of a present subsisting debt, equally definite and certain, from which a promise to pay such debt may be implied," *McBride v. Gray*, 44 N. C. 420 (1853); *Faison v. Bowden*, 72 N. C. 405 (1875); *Riggs v. Roberts*, 85 N. C. 152 (1881). Since the statute, the words used are as applicable to this case: "The promise must be unconditional." *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33 (1884). It must be "certain in its terms." *Long v. Oxford*, 104 N. C. 408, 10 S. E. 525 (1889); *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504 (1893).

Same—Illustrations.—A new note embracing an old indebtedness of the maker is a sufficient writing signed by the parties to be charged to bring the old indebtedness within the operation of this section. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867 (1921). The words "I propose to settle," written in answer to a letter demanding payment of a note barred by the lapse of time, amount to an acknowledgment or new promise sufficient to take the case out of the operation of the statute of limitations. *Taylor v. Miller*, 113 N. C. 340, 18 S. E. 504 (1893), but a writing "I am going to pay it as soon as I can" is conditioned upon ability to pay and is therefore insufficient. *Cooper v. Jones*, 128 N. C. 40, 38 S. E. 28 (1901).

A paper-writing signed by a parent certifying that she owes her daughter a sum of money, in a stated amount, for moneys she has borrowed from her at various times, and stating the daughter was to have a certain sum of money from her es-

tate, giving her reasons, is sufficiently definite to imply a promise to pay the amount of the debt, and a new promise, to repel the bar of the statute of limitations. *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772 (1918).

Where a suit had already been commenced to recover an amount alleged to be due upon account, and the defendant set up the statutory bar as a defence, but wrote a letter to the plaintiff's attorney stating that, if he would take five hundred dollars in satisfaction, judgment might go against him at court, the letter is an admission and assumption of the debt to the specified amount (\$500), and operates to remove the bar to the recovery of the time. *Pope v. Andrews*, 90 N. C. 401 (1884). But see *Wells v. Hill*, 118 N. C. 900, 24 S. E. 771 (1896) and citations.

Where a debtor wrote to his creditors declining proffered credit because he was unable to pay what he already owed them (which was barred by the statute), but expressing his confidence in his ability to pay whatever he might contract for in the future it was held, that, as the letter contained no promise to pay the barred debt, the bar of the statute was not removed. *Helm Co. v. Griffin*, 112 N. C. 356, 16 S. E. 1023 (1893).

Acknowledgment as Rebutting Presumption of Satisfaction.—Before the adoption of the Code, proof of a promise, or acknowledgment would rebut the presumption of the satisfaction of a mortgage, as is shown by numerous decisions. *Brown v. Becknall*, 58 N. C. 423 (1860); *Ray v. Pearce*, 84 N. C. 485 (1881); *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889); *Hughes v. Edwards*, 9 Wheat. (22 U. S.) 489, 6 L. Ed. 142 (1824). And now the bar of our present statute of limitations may be overcome by proof of a promise or acknowledgment, but the proof must be in writing, unless the new promise be one that the law implies from a part payment. *Hill v. Hilliard & Co.*, 103 N. C. 34, 9 S. E. 639 (1889); *Royster v. Farrell*, 115 N. C. 306, 20 S. E. 475 (1894).

III. PART PAYMENT.

Editor's Note.—It should be observed that the effect of partial payment stopping the statute is not of statutory origin. It was not in the English statute of James I. and 9 Geo. IV. did nothing more than recognize the common-law right. Thus it originated with the courts and its application depends upon the reasoning in such decisions. This is equally true in North Carolina for this section merely

recognizes the right, leaving the application of the principles to the courts as has always been the case. See *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177 (1895).

Thus the effect of this section is to leave the law as it was prior to the adoption of the Code of Civil Procedure as regards the effect of a partial payment in removing the bar of the statute of limitations. See *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459 (1887); *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377 (1924).

The principle that making a payment on a note repels the statute is not altered by the provisions of this section, for it expressly provides that "this section does not alter the effect of any payment of principal or interest." The decisions treating of this provision hold that the effect of this clause is to leave the law as it was prior to the adoption of this section as regards the effect of a partial payment in removing the bar of the statute of limitations. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643 (1947).

Payment Tantamount to Writing.—This section dispenses with a writing where partial payment is made, because the payment is in effect a written promise. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Provisions Not Applicable to Judgments.—A partial payment voluntarily made on a judgment does not remove the statutory bar. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Elements Essential to Take Case Out of Statute.—The general principle on which part payment takes a case out of the statute is that the party paying intended by it to acknowledge and admit the greater debt to be due. If it was not in the mind of the debtor to do this, then the statute, having begun to run, will not be stopped by reason of such payment, (*Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685 (1907)) for partial payment starts the statute running anew only when it is made under such circumstances as will warrant the clear inference that the debtor recognizes the debt as existing and his willingness or at least his obligation, to pay the balance. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177 (1895). See also, *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290 (1934).

Thus when a payment is made by defendant only in contemplation of an agreed compromise of a debt, such payment will not repel the bar of the statute of limitations as to the balance thereof. *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685 (1907).

Same—Time from Which Statute Starts Anew.—There is no express provision that a partial payment shall prevent the operation of the statute except from the time it was made. The statute merely leaves its effect to be determined by the law as it was before the enactment of the section as to a new promise. *Riggs v. Roberts*, 85 N. C. 152 (1881); *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459 (1887); *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177 (1895); *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685 (1907); *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377 (1924).

Same—Credits on Accounts.—When the running of the statute of limitations would otherwise bar an action upon an account, and there is evidence tending to show a credit thereon was agreed to by the creditor and debtor within the three-year period, and accordingly given, the effect of this credit to repel the bar relates to the time of the agreement made and effected; and an instruction that made it depend upon the time of the debt incurred for which the credit was given, is reversible error to the plaintiff's prejudice. *Kilpatrick v. Kilpatrick*, 187 N. C. 520, 122 S. E. 377 (1924).

The fact that the maker of a note has a claim against the holder which the holder endorses as a credit on the note without the assent of the maker, will not be such a partial payment as will rebut the statute of limitations, but an agreement to apply one existing liability to another is such a partial payment as will stop the operation of the statute, although the endorsement is never actually made on the note. *State Nat. Bank v. Harris*, 96 N. C. 118, 1 S. E. 459 (1887).

An account of transaction between two persons, to be mutual, when kept by only one of them, must be with the knowledge and concurrence of the other, so as to make a credit given to such other repel the bar of the statute of limitations. *Cashmar-King Supply Co. v. Dowd*, 146 N. C. 191, 59 S. E. 685 (1907).

Persons Who May Make—Trustee for Creditors.—Where an assignment for benefit of creditors confers no power on the trustee, as agent of the debtor, to do any act to waive the statute, or to express a willingness or intention to pay the debt after it becomes otherwise barred, a partial payment made by the trustee on a note of the debtor will not arrest the running or remove the bar of the statute of limitations. *Battle v. Battle*, 116 N. C. 161, 21 S. E. 177 (1895).

Same—Principal upon Bond.—Payment

made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (1891).

Payment of interest on a note by the principal, before it is barred by lapse of time, arrests the operation of the statute of limitations as to all the makers, sureties as well as principal, and the statute commences again to run only from the day when the last payment was made. *Green v. Greensboro Female College*, 83 N. C. 449 (1880).

Same—Obligor of Same Class.—Where a payment is made upon a claim, before it is barred by the lapse of time, by one of several obligors of the same class, it becomes the legal act of all, and arrests the operation of the statute as to them but does not revive the liability of others of a different class. *Wood v. Barber*, 90 N. C. 76 (1884). But it was held in *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (1891) that a payment by the principal upon a bond under such circumstances arrests the operator as to the sureties. See "General Consideration," ante this note.

Same—Partner.—In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. *Wood v. Barber*, 90 N. C. 76 (1884).

Burden of Proving Payment.—The burden is upon the plaintiff to show that a partial payment was made at such a time as to save the debt from the operation of the statute. *Riggs v. Roberts*, 85 N. C. 152 (1881).

IV. REQUEST NOT TO SUE.

Statement of Rule.—Where delay in bringing suit is caused by a request of the defendant, or his attorney and his promise to pay the debt and not to avail himself of the plea of the statute, he will not be allowed to plead the statute, as it would be against equity and good conscience. *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702 (1887). This principle is derived from equity as is a new promise or partial payment, and does not depend upon statute. However it is recognized as an exception in the application and instruction of this section. See *Barcraft & Co. v. Roberts & Co.*, 91 N. C. 363 (1884).

So it has been held that notwithstanding this section, when a creditor has delayed action at the request of the debtor, and under his promise, express or implied, to pay the debt and not to plead the statute of limitations, the courts, in the exercise of their equitable jurisdiction, will not permit the debtor to plead the lapse of time and the creditor may bring his action within the statutory time after such promise and request for delay although not in writing. *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481 (1897).

Principles Controlling Application.—In giving effect to request not to sue and promises not to plead the statute, the courts proceed upon the idea of an equitable estoppel, holding that it would be against good conscience and encourage fraud to permit the debtor to repudiate them when by his contract he has lulled the creditor into a feeling of security and has induced him to delay bringing action (*Daniel v. Board*, 74 N. C. 494 (1876); *Haymore v. Commissioners*, 85 N. C. 268 (1881)), and it is now "settled that if plaintiff was prevented from bringing his action during the statutory period by such conduct on the part of the defendant as makes it inequitable to him to plead the statute, or by reason of any agreement not to do so, he will not be permitted to defeat plaintiff's action by interposing the plea." *Tomlinson v. Bennett*, 145 N. C. 279, 59 S. E. 37 (1907); *State v. United States Fidelity, etc., Co.*, 176 N. C. 598, 97 S. E. 490 (1918).

Same—Request without Agreement Insufficient.—A request not to sue will not stay the statute of limitation, but it must be an agreement not to plead it. *Raby v. Stuman*, 127 N. C. 463, 37 S. E. 476 (1900).

It is essential, however, not only that there shall be a new promise and a request for delay, but there must be a promise not to plead the statute if delay is given. *Hill v. Hilliard & Co.*, 103 N. C. 34, 9 S. E. 639 (1889); *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481 (1897).

A simple admission by an executor of the correctness of a claim against the testator's estate, and a verbal promise to pay the same out of the assets prior to the 1881 amendment of § 1-22, will not arrest the running of the statute of limitations, where there is no proof that the creditor refrained from suing at the request of the executor, or that there was any agreement for indulgence. This case falls within the terms of this section. *Whitehurst v. Dey*, 90 N. C. 542 (1884).

Necessity for Writing.—"It is true that

Smith, C. J. for whose learning we have the highest respect, said in a concurring opinion in *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702 (1887), that this statute applied to promises not to plead the statute of limitations, and this is referred to without approval or disapproval by Clark, C. J. in *Brown v. Atlantic Coast Line R. Co.*, 147 N. C. 217, 60 S. E. 985, 16 L. R. A. (N. S.) 645 (1908), but the opinion of the

majority of the court in *Joyner v. Massey* was the other way, and it is expressly decided in *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481 (1897), that the statute has no application, and that request not to sue and promises not to plead the statute of limitations need not be in writing." *State v. United States Fidelity, etc., Co.*, 176 N. C. 598, 97 S. E. 490 (1918).

§ 1-27. Admission by partner or comaker.—No act, admission or acknowledgment by any partner after the dissolution of the copartnership, or by any of the makers of a promissory note or bond after the statute of limitations has barred the same, is evidence to repel the statute, except against the partner or maker of the promissory note or bond doing the act or making the admission or acknowledgment. (C. C. P., s. 50; Code, s. 171; Rev., s. 372; C. S., s. 417.)

Section Changed Law.—In *McIntire & Co. v. Oliver*, 9 N. C. 209 (1822), it was held that the acknowledgment of a subsisting partnership debt by one partner, even after the dissolution of the firm, was binding on all the constituent members and prevented the operation of the statute of limitation. The same doctrine is announced in *Willis v. Hill*, 19 N. C. 231 (1837), and *Walton v. Robinson*, 27 N. C. 341 (1845). In the latter case, the same reviving effect is ascribed to a payment as involving a resumption of the residue of the debt. In consequence of these rulings was passed the act of 1852, now embodied in this section. *Wood v. Barber*, 90 N. C. 76 (1884).

Part payment of a note by the payee who had endorsed it will not repel the bar of the statute of limitations as against the maker, this section, confining the act, admission or acknowledgment as evidence to repel the bar to the associated partners, obligors and makers of a note. *LeDuc v. Butler*, 112 N. C. 458, 17 S. E. 428 (1893). This principle is recognized and distinguished in *Harper v. Edwards*, 115 N. C. 246, 20 S. E. 392 (1894); *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (1899). From the dissenting opinion see the excellent discussion in *Green v. Greensboro Female College*, 83 N. C. 451 (1880).

A payment made by the maker, after the bar of the statute, operates as a renewal as to himself only. *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (1899). Bonds are in the same class as notes. *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512 (1887). It was held in this latter case that co-obligors do not stipulate by implication in the joint obligation that each may bind the other by his admissions made after the obligation is due.

Section Defeated by Payment of Small Sum, etc.—This section may be practically

nullified by triennial payments of insignificant amounts or alleged promises not to plead the statute. See *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (1899); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900) (dis. op.).

Partial Payment Prior to Dissolution or Bar.—In an action against a firm upon a draft accepted by the cashier of a bank who was also a member of the firm, and who made a partial payment upon the same, it was held that, to remove the statutory bar set up by the defendant firm, the burden is on the plaintiff to show in what capacity the acceptor acted in making such payment—whether as cashier or as a member of the firm. The section is not applicable to these facts until a dissolution. *Wood v. Barber*, 90 N. C. 76 (1884).

A payment by the principal on a note, before the bar of the statute, operates as a renewal as to himself, the sureties and endorsers, this section not being applicable. *Green v. Greensboro Female College*, 83 N. C. 451 (1880); *Wood v. Barber*, 90 N. C. 76 (1884); *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (1891); *Garrett v. Reeves*, 125 N. C. 529, 34 S. E. 636 (1899).

As to co-obligors on a note, it was held that a payment by one before the debt was barred would extend the time as to the other, but a promise to pay would not have that effect. The rule as to payment has been applied to all co-obligors who come within the same class as original makers of the instrument, having a community of interest and a common obligation. A payment by a principal or surety, before the debt is barred, will continue the obligation as to both. But the rule would not apply to obligors in different classes, as endorsers and makers. *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934).

New Promise or Payment by Partner.

—Under this section, no new promise or a payment by a partner, after the dissolution of the partnership, will have any effect to bind the other partners. *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934).

Death of Partner.—Since the death of one of the partners dissolves the partnership, payment on a debt by the survivor

will not repel the statute which would otherwise run against the estate of the deceased. *Irvin v. Harris*, 182 N. C. 656, 109 S. E. 871 (1921).

A Default Judgment on Debt Barred.

—A judgment by default suffered by one joint obligor does not renew the note as to the others. *Lane v. Richardson*, 79 N. C. 159 (1878). See also *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512 (1887).

§ 1-28. **Undisclosed partner.**—The statutes of limitations apply to a civil action brought against an undisclosed partner only from the time the partnership became known to the plaintiff. (1893, c. 151; Rev., s. 373; C. S., s. 418.)

§ 1-29. **Cotenants.**—If in actions by tenants in common or joint tenants of personal property, to recover the same, or damages for its detention or injury, any of them are barred of their recovery by limitation of time, the rights of the others are not affected thereby, but they may recover according to their right and interest, notwithstanding such bar. (C. C. P., s. 52; Code, s. 173; Rev., s. 374; C. S., s. 419; 1921, c. 106.)

Section Changes Rule—Realty Not Affected.—This section changes the rule in regard to personalty. It does not affect the law as to real property. *Expressio unius exclusio alterius*. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728 (1906).

Elements of Tenancy in Common.—Under the law of North Carolina, as in New

York, tenancy in common arises whenever an estate in real or personal property is owned concurrently by two or more persons under a conveyance or under circumstances which do not either expressly or by necessary implication call for some other form of cotenancy. *Powell v. Malone*, 22 F. Supp. 300 (1938).

§ 1-30. **Applicable to actions by State.**—The limitations prescribed by law apply to civil actions brought in the name of the State, or for its benefit, in the same manner as to actions by or for the benefit of private parties. (C. C. P., s. 38; Code, s. 159; Rev., s. 375; C. S., s. 420.)

This section abrogated the common-law maxim “nullum tempus occurrit regi” protecting public property from the negligence of public officers. *Furman v. Timberlake*, 93 N. C. 66 (1885).

The maxim no longer obtains in this State, even in the case of collecting taxes, unless the statute applicable to or controlling the subject provides otherwise. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9 (1898); *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521 (1916); *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606 (1945).

When Statute Does Not Apply.—Notwithstanding the inclusive provisions of this section it has been uniformly held that no statute of limitations runs against the State, unless it is expressly provided therein. *Raleigh v. Mechanics, etc., Bank*, 223 N. C. 286, 26 S. E. (2d) 573 (1943).

Hence, where an act authorizing the

collection of arrearages of taxes for past years does not prescribe any limitation, the ten-year statute of limitations does not apply, and the unpaid taxes for any year can be recovered. *Wilmington v. Cronly*, 122 N. C. 388, 30 S. E. 9 (1898).

The three-year statute of limitations does not apply to an action by a municipality to enforce assessment liens for public improvements, since the three-year statute does not apply to actions brought by the State or its political subdivisions in the capacity of its sovereignty. *Charlotte v. Kavanaugh*, 221 N. C. 259, 20 S. E. (2d) 97 (1942).

Insane Presumed to Have Plead Statute.

—In view of the provisions of this section and § 1-16, an insane person is presumed to have plead the statute of limitations against the State. *State Hospital v. Fountain*, 129 N. C. 90, 39 S. E. 734 (1901).

§ 1-31. **Action upon a mutual, open and current account.**—In an action brought to recover a balance due upon a mutual, open and current account, where there have been reciprocal demands between the parties, the cause of action

accrues from the time of the latest item proved in the account on either side. (C. C. P., s. 39; Code, s. 160; Rev., s. 376; C. S., s. 421; 1951, c. 837, s. 1.)

Cross Reference.—As to book accounts as evidence of last settlement between parties in action for less than sixty dollars, see § 8-42.

Editor's Note. — The 1951 amendment changed the catchline of this section from "Action on open account".

Accounts to Which Applicable. — In order that one item being in date shall have the effect of bringing the whole account within date, it must appear that there were mutual accounts between the parties, or an account of mutual dealings, kept by one with the knowledge and concurrence of the other. *Hussey v. Burgwyn*, 51 N. C. 385 (1859).

The mere existence of disconnected and opposing demands, between two parties, one of which demands is of recent date, will not take a case out of the statute of limitations. There must be mutual running accounts, having reference to each other, between the parties, for an item within time to have that effect. *Green v. Caldcleugh*, 18 N. C. 320 (1835).

There must be an assent of both parties that the items of the one account are to be applied to the liquidation of the other. The understanding of the plaintiff alone would not be sufficient. *Green v. Caldcleugh*, 18 N. C. 320 (1835).

The purchase of merchandise on credit, the purchaser paying a certain sum in cash on the account each fall, and the balance due on the account being carried forward into the next year and the next year's purchases being added thereto, is not a mutual, open and current account within the purview of this section, but is an account current, and as to all items purchased within three years from the last cash payment the three-year statute of limitations will begin to run from the date of the last cash payment, and in an action to recover the balance due, instituted more than three years after the last item charged, but within three years from the last cash payment, an instruction that the whole account was barred by the statute of limitations is error. *Richlands Supply Co. v. Banks*, 205 N. C. 343, 171 S. E. 358 (1933).

Same—Mutuality by Implication. — Mutuality of accounts may be the result of direct agreement, or it may be inferred from the dealings of the parties—if established, it renders unavailable the defense of the statute of limitations to both parties. *Stancell v. Burgwyn*, 124 N. C. 69, 32 S. E. 378 (1899).

A mutual account may be inferred where each party keeps a running account of the debits and credits, or where one, with the knowledge of the other keeps it. *Green v. Caldcleugh*, 18 N. C. 320 (1835); *Hussey v. Burgwyn*, 51 N. C. 385 (1859); *Robertson v. Pickerell*, 77 N. C. 302 (1877); *Mauney & Son v. Colt*, 86 N. C. 464 (1882); *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566 (1889).

Same—Extension of Credit.—To constitute a mutual account it must be reciprocal as to the credit extended, so as to imply a promise to pay the balance due, upon whichever side it may fall; and an extension of credit upon the one side alone falls neither within the intent and meaning of our decisions nor the statute applicable. *Hollingsworth v. Allen*, 176 N. C. 629, 97 S. E. 625 (1918).

Same—Running Account All on One Side.—Where there is a running account, all on one side, the statute of limitations begins to run on each item from its date; but where there are mutual accounts, the statute begins to run only from the last dealing between the parties. *Robertson v. Pickerell*, 77 N. C. 302 (1877).

Same—Draft Not Referring to Account.—The bar of the statute of limitations is not repelled by the transmission of a draft by the debtor and its receipt by the creditor within the three years, the former not making any allusion to or recognition of the account, or any debt whatever. *Hussey v. Burgwyn*, 51 N. C. 385 (1859).

When Statute Not Applicable.—This section does not apply to an ordinary store account, though open and continued where the credit is all on one side and the only items of discharge consist in payments on account. In such case limitations will begin to run from the date of each purchase as to the item itself, unless the bar has been repelled in some recognized legal manner. *Brock v. Franck*, 194 N. C. 346, 139 S. E. 696 (1927).

An indefinite promise to pay intermittently from time to time for such services as may be rendered by one party to another is not a mutual, open, and current account with reciprocal demands between the parties within the purview of this section. *Phillips v. Penland*, 196 N. C. 425, 147 S. E. 731 (1929).

Under an agreement with decedent to pay for services to be irregularly rendered from time to time as needed without a definite time fixed for payment, but under a general promise to pay for them, in an

action against the administrator of the deceased promisor for the value of such services: Held, a payment made by the deceased in 1925, intended by him to be made upon the debt, will have the effect of reviving the claim against the statute of limitations only for the three years next preceding his death in 1926, subject to the credit of the payment so made. *Phillips v. Penland*, 196 N. C. 425, 147 S. E. 731 (1929).

Where plaintiff instituted action against administratrix of deceased to recover for services rendered deceased, and it appeared that plaintiff alone kept the account of charges for such services and that he entered thereon from time to time credits for rent for decedent's land, the facts are insufficient to establish mutual,

open, and current accounts, and the statute of limitations began to run against plaintiff's claims from the date of each item. *Tew v. Hinson*, 215 N. C. 456, 2 S. E. (2d) 376 (1939).

Effects of Conflicting Evidence as to Item.—When there is conflicting evidence as to whether the item sued on was to be related to other items upon which the defendant relied it is reversible error for the judge to direct a verdict thereon if the jury believe the evidence. *McKinnie Bros. v. Webster*, 188 N. C. 514, 125 S. E. 1 (1924).

Conflicting evidence as to whether last item entered was proper in mutual, open and current account was for the jury. *Hammond v. Williams*, 215 N. C. 657, 3 S. E. (2d) 437 (1939).

§ 1-32. **Not applicable to bank bills.**—The limitations prescribed by law do not affect actions to enforce the payment of bills, notes or other evidences of debt, issued or put in circulation as money by banking corporations incorporated under the laws of this State. (C. C. P., s. 53; 1874-5, c. 170; Code, s. 174; Rev., s. 377; C. S., s. 422.)

§ 1-33. **Actions against bank directors or stockholders.**—The limitations prescribed by law do not affect actions against directors or stockholders of any banking association incorporated under the laws of this State, to recover a penalty or forfeiture imposed, or to enforce a liability created by law; but such actions must be brought within three years after the discovery by the aggrieved party of the facts upon which the penalty or forfeiture attached, or the liability was created. (C. C. P., s. 54; Code, s. 175; Rev., s. 378; C. S., s. 423.)

When Statute Begins to Run.—It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of

the bank, and did not in truth begin to run upon the actual discovery, later on. *Houston v. Thornton*, 122 N. C. 365, 375, 29 S. E. 827 (1898).

§ 1-34. **Aliens in time of war.**—When a person is an alien subject, or a citizen of a country at war with the United States, the time of the continuance of the war is not a part of the period limited for the commencement of the action. (C. C. P., s. 44; Code, s. 165; Rev., s. 379; C. S., s. 424.)

Editor's Note.—As to right of alien see *Krachanake v. Acme Mfg. Co.*, 175 N. C. 435, 95 S. E. 851 (1918).
enemy to sue in the courts of this State,

ARTICLE 4.

Limitations, Real Property.

§ 1-35. **Title against State.**—The State will not sue any person for, or in respect of, any real property, or the issue or profits thereof, by reason of the right or title of the State to the same—

1. When the person in possession thereof, or those under whom he claims, has been in the adverse possession thereof for thirty years, this possession having been ascertained and identified under known and visible lines or boundaries; which shall give a title in fee to the possessor.

2. When the person in possession thereof, or those under whom he claims, has been in possession under color of title for twenty-one years, this possession

having been ascertained and identified under known and visible lines or boundaries. (R. C., c. 65, s. 2; C. C. P., s. 18; Code, s. 139; Rev., s. 380; C. S., s. 425.)

Cross References. — As to validity of such possession against claimants under the State, see § 1-37. As to statutes of limitation with reference to titles of the State Board of Education, see § 146-91.

Law Prior to Section.—Before the Code of Civil Procedure, to prevent the uncertainty of titles, the courts of this State had adopted the arbitrary rule, that from the adverse possession of land for thirty years a grant from the State should be presumed—a rule so arbitrary that a jury was not permitted to find the fact against the presumption; nor was it necessary that the party in adverse possession should connect himself with those who had preceded him in the possession; nor was it necessary that the adverse possession should have been held up to known and visible boundaries, but only to the extent of the title claimed by the persons in possession, which might be shown by any of those ways which the law permits in the absence of metes and bounds set forth in deeds, or known and visible boundaries, as for instance, by the declarations of old men now dead, the deeds of neighboring tracts of land calling for the land in question by the name by which it was known, upon the principle, *id certum est quod certum reddi potest*. *FitzRandolph v. Norman*, 4 N. C. 564 (1817); *Candler v. Lunsford*, 20 N. C. 542 (1839); *Price v. Jackson*, 91 N. C. 11 (1884).

Same—Nature of Presumption. — The question of the presumption of a grant from adverse possession has never been regarded as one to be decided upon natural presumptions as to facts, but upon a statutory or arbitrary rule established by the legislature, or by the courts, to prevent the uncertainty of titles which would arise if the questions in each case were to be determined by a jury, on their belief of the fact, derived from a consideration of all the circumstances in evidence. *Melvin v. Waddell*, 75 N. C. 361 (1876).

Effect of Section upon Prior Law.—But the law is now changed, and the thirty years' adverse possession which was formerly held to be a presumption of a grant, is now by statute made, under certain circumstances, an absolute bar against the State. *Price v. Jackson*, 91 N. C. 11 (1884).

The State is deemed to have surrendered its right where it permits an adverse occupation of land under colorable title without interruption for twenty-one years, and a title vests in the occupant which can only be divested by a subsequent adverse possession by another till his right in turn

ripens in the same way. *Walker v. Moses*, 113 N. C. 527, 18 S. E. 339 (1893).

Section Not Retroactive.—The right of action which accrued prior to the adoption of the Code of Civil Procedure is not governed by its provisions. *Johnson v. Parker*, 79 N. C. 475 (1878).

Extent and Limitation of Application.—This section may be confined to cases where, by reason of adverse possession of land for the time mentioned in the section, the State is willing to forego her title thereto, and agrees not to sue for the same, nor for any of the issues or profits thereof. It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, on personal actions after the State has parted with the title to the lands, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title, and the State agrees that when the adverse possession has continued for so long a time—thirty years without color and twenty-one years with color—she will not sue the person who has thus held the possession, but surrender her title to him; nor will she sue for the issues or profits. But this does not mean that the time limited for bringing any suit for the rents, issues or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, it should be thirty or twenty-one years. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Adverse Possession against Municipality. — Under the law of this State, as it formerly prevailed, title by adverse occupation could be acquired against a municipality. This was established and recognized as a rule of property not only under our decisions applicable to the question, *Crump v. Mims*, 64 N. C. 767 (1870); *State v. Long*, 94 N. C. 896 (1886); *Moore v. Meroney*, 154 N. C. 158, 69 S. E. 838 (1910); but the principle was embodied in our statute law in 1868, now §§ 1-30 and 1-37. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521 (1916).

Application to Rents, Profits, etc. — It was not intended by this section that the State should not be barred from recovering except by the lapse of thirty years or twenty-one years, for those periods relate only to the adverse possession, without or with color, which will be sufficient to bar the title; nor will she sue for issues or profits. The loss of rents and profits is in-

cidental to the loss of land. But this does not mean that the time limited for bringing any suit for the rents, issues, or profits of land should be lengthened so that instead of being three years, as already specially prescribed by the statute, § 1-52, it should be thirty or twenty-one years. Those periods are not applicable to personal actions, but only to actions for the recovery of land or some interest therein. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Application to Personal Actions.—The limitations as to color for twenty-one years, and without for thirty years, do not apply to personal actions after the State has parted with her title to the lands. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Essential Characteristics of Possession.—In order to put the statute of limitations in motion against the true owner of land, it is necessary that there should be an actual, open, visible occupation of the land by another, begun and continued under a claim of right. The assertion of a mere claim of title, as for instance the payment of taxes thereon, is not sufficient. *Malloy v. Bruden*, 86 N. C. 251 (1882).

A party may show, as against the State, possession under known and visible boundaries for thirty years. *Mobley v. Griffin*, 104 N. C. 113, 10 S. E. 142 (1889).

Sufficiency of Possession.—The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the legislature to ratify the apparent title. *Hedrick v. Gobble*, 61 N. C. 348 (1867).

Possession is insufficient to constitute the basis of adverse possession against the State or a private individual where the plaintiff merely shows that the agent of plaintiff's grantor raked and hauled straw one or two years and plaintiff's father cultivated an acre or two of the land one year. *Prevatt v. Harrelson*, 132 N. C. 251, 43 S. E. 800 (1903).

The evidence was held sufficient to be submitted to the jury on the issue of plaintiffs' actual, open, continuous, notorious, and adverse possession of the lands sufficient to ripen title in plaintiffs under the provisions of this section, and defendants' motion to nonsuit was erroneously granted. *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804 (1936).

Evidence held sufficient to support di-

rected verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this section and § 1-42. *Peterson v. Sucro*, 101 F. (2d) 282 (1939).

Same—Lappage.—The rule, that in controversies between titles of different dates which lap, actual possession of the lappage is required to perfect the color of title of the junior claimant, applies to controversies between the State and citizens who claim under mesne conveyances which extend the boundaries of the original grant. *Hedrick v. Gobble*, 61 N. C. 348 (1867).

Necessity of Continuity.—Thirty years adverse possession is necessary only to bar the State, and this need not be a continuous occupancy, nor need there be any connection between the tenants. *Fitz-Randolph v. Norman*, 4 N. C. 564 (1817); *Candler v. Lunsford*, 20 N. C. 542 (1839); *Reed v. Earnhart*, 32 N. C. 516 (1849); *Davis v. McArthur*, 78 N. C. 357 (1878); *Cowles v. Hall*, 90 N. C. 330 (1884); *Mallett v. Simpson*, 94 N. C. 37 (1886); *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766 (1891); *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894); *Walden v. Ray*, 121 N. C. 237, 28 S. E. 293 (1897); *May v. Mfg. Co.*, 164 N. C. 262, 80 S. E. 380 (1913).

Necessity of Privity of Possession.—A plaintiff, in proving the title out of the State by an adverse possession of thirty years, may avail himself of any possession by others adverse to the State, although he may not be able to connect himself with them. *Melvin v. Waddell*, 75 N. C. 361 (1876). This case was decided under the law prior to this section. See page 366 of the opinion and the authorities cited.—Ed. Note.

In case of a reliance upon thirty years adverse possession the plaintiff must show a privity between himself and those who preceded him in the possession, and also, that the possession was held up to known and visible boundaries. *Price v. Jackson*, 91 N. C. 11 (1884). This decision is in keeping with the express terms of the section.—Ed. Note.

Connection of Occupation with Boundaries.—Where there is a physical occupation with claim extending to certain marked boundaries, there must be some evidence tending to connect such occupation with the boundaries claimed or some exclusive control or dominion over the unoccupied portions of the land. *May v. Manufacturing & Trading Co.*, 164 N. C. 262, 80 S. E. 380 (1913).

Possession Short of Period as Evidence of Grant.—If there has been an adverse possession for any time short of thirty years, it is not a circumstance to be submitted to a jury, either alone or with others of like tendency, as evidence upon which they may find the fact of a grant. But on an adverse possession of thirty years a jury is not at liberty to find that in fact no grant ever issued. *Melvin v. Waddell*, 75 N. C. 361 (1876).

Nature of Possession Is Question for Jury.—Conceding the evidence establishes 30 years' possession, there was still left for the jury's determination the questions as to whether such possession was adverse, and as to whether such possession was held up to known and visible lines and boundaries, as required by this section. *McKay v. Bullard*, 207 N. C. 628, 178 S. E. 95 (1935).

Effect of Running of Statute against State.—When a title is shown out of the State by adverse possession, § 1-38 applies where one thereafter acquires title under a sheriff's deed and holds possession thereunder for seven years. *Walker v. Moses*, 113 N. C. 527, 18 S. E. 339 (1893).

Burden of Showing Good Title—Against State.—Upon the principle that the plaintiff in an action for possession must show title good against the world, including the State under whom all lands are held, it has become a settled rule that where no grant is introduced the burden of proof cannot be shifted to the defendant in such actions without prima facie proof of possession under colorable title for twenty-

one years under subsection (2). *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894).

Effect upon Running Where Grant Made.—Where an occupant is seated on the interference when the overlapping grant is issued, and is claiming colorable title adversely to the State under this section, the statute still continues to run in his favor as to the whole lappage unless the grantee, or those claiming under him, enter upon and occupy some portion of the lappage or bring an action. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894).

If, on the contrary, the occupant of the lappage, wishes to use his adversary's grant to show that the title is out of the State in order to establish it in himself, by virtue of § 1-38, he must prove an adverse occupation for seven years after the grantee's right of action accrued on receiving his grant. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894).

Effect of Patent to Part Possession.—The constructive possession of one claiming under color of title for twenty-one years—the period necessary to give title against the State—is not interrupted by the mere issuance to another of a patent including part of the land claimed by him where his actual possession is within the lappage. *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894).

Cited in *Ware v. Knight*, 199 N. C. 251, 154 S. E. 35 (1930); *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383 (1939).

§ 1-36. Title presumed out of State.—In all actions involving the title to real property title is conclusively deemed to be out of the State unless it is a party to the action, but this section does not apply to the trials of protested entries laid for the purpose of obtaining grants, nor to actions instituted prior to May 1, 1917. (1917, c. 195; C. S., s. 426.)

Section Not Retroactive.—This section, having no retrospective effect, is applicable only to actions commenced since May 1, 1917. *Riddle v. Riddle*, 176 N. C. 485, 97 S. E. 382 (1918); *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

Purpose of Section.—To remove the burdensome and untoward condition growing out of the difficulty of proving title out of the State the legislature enacted this section. It provides that, in actions between individual litigants, title shall be conclusively presumed to be out of the State. But that is the extent and limit of it. There is no presumption in favor of one party or the other, nor is a litigant seeking to recover land otherwise relieved of the burden of showing title in himself.

Moore v. Miller, 179 N. C. 396, 102 S. E. 627 (1920).

"Where either party exhibits a patent to the land in dispute, since the State can no longer assert any claim, it is familiar learning that either the grantee or the party claiming adversely to it after its introduction may, as a general rule, use it to show that the State is no longer a claimant and make good his own claim by proof of possession under colorable title for seven years only. *Gilchrist v. Middleton*, 107 N. C. 663, 12 S. E. 85 (1890); *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894).

This rule also applies where the question of title to land depends upon the true divisional lines between the parties

to the action, adjoining owners, and each has introduced a grant from the State to their lands respectively, which taken together, cover the locus in quo, and either one may then establish title to any part thereof by adverse possession for twenty years. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060 (1916).

Within Legislative Power.—This section affects the remedy—mode of procedure—and is within the power of the General Assembly to pass. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

Plaintiff Must Rely upon Strength of Own Title.—In actions involving title to real property, the State not being a party, title is conclusively presumed out of the State without presumption in favor of either party, and plaintiff must rely upon the strength of his own title. *Smith v. Benson*, 227 N. C. 56, 40 S. E. (2d) 451 (1946).

May Show Title Out of State.—Under this section neither party is required to show title out of the State though either may do so. *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 141 S. E. 570 (1928), citing *Pennell v. Brookshire*, 193 N. C. 73, 136 S. E. 257 (1927). See *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463 (1943).

§ 1-37. Such possession valid against claimants under State.—All such possession as is described in § 1-35, under such title as is therein described, is hereby ratified and confirmed, and declared to be good and legal bar against the entry or suit of any person, under the right or claim of the State. (C. C. P., s. 19; Code, s. 140; Rev., s. 381; C. S., s. 427.)

Sufficiency of Possession as Affecting Application.—This section does not apply where the proof of possession is insufficient under § 1-35. *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800 (1903).

Application against Municipality.—Prior to the enactment of § 1-45, title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this

Sources of Title Available.—And where the plaintiff has sufficiently alleged general ownership of the locus in quo, he is not confined to the location of the adjoining boundary line under his grant, for he may avail himself of any source of title that he may be able to establish by his testimony. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060 (1916).

In an action to recover lands by twenty years adverse possession under § 1-40, it is not required that the plaintiff should show title out of the State, except in cases of protested entries, etc., when the State is not a party to the action. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

And it is error to instruct the jury that the burden of proof is on the plaintiff to show title out of State in addition to sufficient adverse possession to ripen the title in himself. *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 141 S. E. 570 (1928).

Applied in *Berry v. Coppersmith*, 212 N. C. 50, 193 S. E. 3 (1937).

Stated in *Ramsey v. Ramsey*, 224 N. C. 110, 29 S. E. (2d) 340 (1944).

Quoted in *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804 (1936).

Cited in *Ware v. Knight*, 199 N. C. 251, 154 S. E. 35 (1930); *Vance v. Guy*, 224 N. C. 607, 31 S. E. (2d) 766 (1944).

statute sufficient possession of the character required had ripened the title to a part of a street of a city under our statutes, this section and § 1-30, as construed by the decisions, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521 (1916).

§ 1-38. Seven years possession under color of title.—When a person or those under whom he claims is and has been in possession of any real property, under known and visible lines and boundaries and under color of title, for seven years, no entry shall be made or action sustained against such possessor by a person having any right or title to the same, except during the seven years next after his right or title has descended or accrued, who in default of suing within that time shall be excluded from any claim thereafter made; and such possession, so held, is a perpetual bar against all persons not under disability. (C. C. P., s. 20; Code, s. 141; Rev., s. 382; C. S., s. 428.)

I. General Note on Adverse Possession.

A. General Consideration.

B. Character of Possession.

II. Note to Section 1-38.

I. GENERAL NOTE ON ADVERSE POSSESSION.

A. General Consideration.

Cross References.—As to title pre-

sumed out of State, see § 1-36. As to adverse possession of twenty years, see § 1-40.

Editor's Note.—For article on Adverse Possession—Color of Title, see 16 N. C. Law Rev. 149.

Definition.—Adverse possession consists in actual possession, with an intent to hold solely for the possessor to the exclusion of others, and is denoted by the exercise of acts of dominion over the land, in making the ordinary use and taking the ordinary profits of which it is susceptible in its present state, such acts to be so repeated as to show that they are done in the character of owner, in opposition to right or claim of any other person, and not merely as an occasional trespasser. It must be as decided and notorious as the nature of the land will permit, affording unequivocal indication to all persons that he is exercising thereon the dominion of owner. *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347 (1912). See *Williams v. Buchanan*, 23 N. C. 535 (1841); *Loftin v. Cobb*, 46 N. C. 406 (1854).

Possession of real property to be adverse must be actual possession, and must be open, decided and as notorious as the nature of the property will permit, indicating assertion of exclusive ownership, and of intention to exercise dominion over it against all other claimants. The possession must be continuous, though not necessarily unceasing, for the statutory period, and of such character as to subject the property to the only use of which it is susceptible. *Vance v. Guy*, 223 N. C. 409, 27 S. E. (2d) 117 (1943).

Adverse possession is actual possession in the character of owner, evidenced by making the ordinary uses and taking the usual profits of which the property is susceptible in its present state, to the exclusion of all others, including the true owner. *Carswell v. Carswell*, 217 N. C. 40, 7 S. E. (2d) 58 (1940).

Such adverse possession as will ripen into title must be for the prescribed period of time and be clear, definite, positive and notorious. It must be continuous, adverse, hostile, and exclusive during the whole statutory period, and under a claim of title to the land occupied. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907).

In other words, the claim must be adverse and accompanied by such an invasion of the rights of the opposite party as to give him a cause of action. It is the occupation with the intent to claim against the true owner which renders the entry and possession adverse. *Snowden v. Bill*, 159 N. C. 497, 75 S. E. 721 (1912).

There must be known and visible boundaries such as to apprise the true owner and the world of the extent of the possession claimed. *Barfield v. Hill*, 163 N. C. 262, 79 S. E. 677 (1913) and cases cited.

Color of title is defined in *Smith v. Proctor*, 139 N. C. 314, 51 S. E. 889 (1905), as "a paper-writing (usually a deed) which professes and appears to pass the title, but fails to do so." A deed to which the required privy examination of a married woman was not taken was color of title. *Norwood v. Totten*, 166 N. C. 648, 82 S. E. 951 (1914); *Barbee v. Bumpass*, 191 N. C. 521, 132 S. E. 275 (1926); *Booth v. Hariston*, 193 N. C. 278, 136 S. E. 879 (1927). In *Garner v. Horner*, 191 N. C. 540, 132 S. E. 290 (1926), it is held: Failure to comply with § 52-12, renders a deed void, although it is good as color of title. *Whitten v. Peace*, 188 N. C. 298, 124 S. E. 571 (1924); *Best v. Utley*, 189 N. C. 356, 127 S. E. 337 (1925); *Ennis v. Ennis*, 195 N. C. 320, 142 S. E. 8 (1928).

Whether a deed is champertous which conveys to the grantor's son certain described lands, reserving to the grantor and his wife a life estate, given in consideration of the grantee's successfully maintaining a suit to clear the title to the lands conveyed, it is sufficient color of title after registration and after the falling in of the reserved life estate, to ripen the title in the grantee under this section. *Ennis v. Ennis*, 195 N. C. 320, 142 S. E. 8 (1928).

An unregistered deed ordinarily is not color of title, except as between the original parties. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

And where the probate of a deed to lands is fatally defective it is not color of title against the grantor in a later registered deed, under sufficient probate, from a common grantee. *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929).

Property Subject to Adverse Possession.—The title to property of the State (See § 1-35), and this included the property of the political subdivision prior to the enactment in 1891 of what is now § 1-45 which changed the rule, may be acquired by adverse possession. But § 1-44 provides that property belonging to public service companies is not generally subject to title by prescription. It is the general rule that the property of private persons is always subject to title by adverse possession. See §§ 1-38, 1-42.

Against Whom Adverse Possession May Be Claimed.—Adverse possession and prescription may be had against a trustee and this though the cestui que trust is under a disability and out of the State. *Blake v.*

Allman, 58 N. C. 407 (1860). And where the title is lost by the trustee, the cestui que trust is also concluded. *King v. Rhew*, 108 N. C. 696, 13 S. E. 174 (1891); *Cameron v. Hicks* 141 N. C. 21, 53 S. E. 728 (1906).

Joint tenants and tenants in common may lose their property by adverse possession and what is sufficient against one is sufficient against all. *Cameron v. Hicks*, 141 N. C. 21, 53 S. E. 728 (1906).

There may be an entry or possession of one tenant in common which may amount to an actual ouster, so as to enable his cotenant to bring ejectment against him, but it must be by some clear, positive, and unequivocal act equivalent to an open denial of his right and to putting him out of the seizin. Such an actual ouster, followed by possession for the requisite time, will bar the cotenant's entry. *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870 (1906).

So where a mortgage is made to a tenant in common by the other tenants therein, it is an ouster that puts them to their action and commences the running of the statute of limitations, either under seven years color or under twenty years otherwise (§ 1-40). *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

And where the plaintiffs seek to be let into the possession of lands as tenants in common, and it appears without conflicting evidence that the defendants have been in peaceful possession under a mortgage from ancestor for more than thirty years after ouster, no issue of fact is raised for the determination of the jury the title being complete in the adverse possessors. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

The statute will not ordinarily begin running against a remainderman until the falling in of the life estate. *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690 (1921). See post this note, catchline "Title to Remainder During Life Estate."

Effect of Holding Portion of Land under Colorable Title.—Where one enters into possession of land under a colorable title which describes the land by definite lines and boundaries, and occupies and holds adversely a portion of the land within the bounds of his deed, by construction of law his possession is extended to the outer bounds of his deed, and possession so held adversely for seven years ripens his title to all the land embraced in his deed which is not actually occupied by another. *Vance v. Guy*, 223 N. C. 409, 27 S. E. (2d) 117 (1943).

Where the title deeds of two rival claimants lap upon each other, and neither is in

the actual possession of any of the land covered by both deeds, the law adjudges the possession of the lappage to be in the one who has the better title. If one be seated on the lappage and the other not, the possession of the whole interference is in the former. If both have actual possession of some part of the lappage, the possession of the true owner, by virtue of his superior title, extends to all not actually occupied by the other. *Vance v. Guy*, 224 N. C. 607, 31 S. E. (2d) 766 (1944). See *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

Where there is a lappage in the specific descriptions in respective deeds to adjacent lots derived from a common source, each deed constitutes color of title as to the lappage under the lines and boundaries called for in the deed, but seven years' use and occupancy of the lappage by respondent or those under whom she claims, ripens title in her even though her deed was executed subsequent to the deed for the adjacent lot, there being no evidence of actual occupation of any part of the lappage by the owner of the adjacent lot. *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

Persons in possession pursuant to foreclosure of tax sale certificate conveying only title of life tenant may not maintain that their possession is adverse to the remaindermen on the ground that the life tenant's failure to pay taxes forfeited her estate to the remaindermen and thus gave them immediate right to possession, since such forfeiture under § 105-410 is not automatic but must be judicially determined in an appropriate proceeding. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

Applied in United States v. Rose, 20 F. Supp. 350 (1937).

B. Character of Possession.

Must Be Actual.—There can be no adverse possession without an actual possession of the locus in quo, *Cutler v. Blockman*, 4 N. C. 368 (1816), and no constructive possession will ripen into a good title. *Williams v. Wallace*, 78 N. C. 354 (1878).

Thus the payment of taxes and the employment of agents in respect to land are insufficient acts to constitute possession. *Ruffin v. Overly*, 88 N. C. 369 (1883). As was said by the court in considering § 1-38, and this applies with equal force to all the statutes, "the adverse claimant should either possess it in person, or by his slaves, servants or tenants; for feeding of cattle or hogs, or building hog pens, or cutting wood from off the land, may be done so

secretly as that the neighborhood may not take notice of it; and if they should, such facts do not prove an adverse claim, as all of these are but acts of trespass: Whereas, when a settlement is made upon land, houses erected, lands cleared and cultivated, and the party openly continues in possession, such acts admit of no other construction than this, that the possessor means to claim the land as his own." *Grant v. Winborne*, 3 N. C. 56 (1798). See *Andrews v. Mulford*, 2 N. C. 311 (1796). It has been held that cutting timber and making shingles in a swamp unfit for cultivation continuously for seven years (See § 1-38) is a good possession. *Tredwell v. Reddick*, 23 N. C. 56 (1840), cited in *Lofstin v. Cobb*, 46 N. C. 406 (1854).

Sufficiency of Possession.—In actions between individual litigants when one claims title to land by adverse possession and shows such possession (1) for seven years under color, or (2) for twenty years without color, either showing is sufficient to establish title in this jurisdiction. *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463 (1943).

Same—Test for Determining Sufficiency.—As stated above in this note, using the land continuously and openly a sufficient length of time for the only purpose for which it is fit, is all that is required. Thus maintaining fish traps, erecting and repairing dams and using the property every year during the fishing season for a sufficient number of years is sufficient possession of a non-navigable stream. *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347 (1912), and citations. However cutting trees and feeding hogs upon land susceptible of other uses, is insufficient. *Lofstin v. Cobb*, 46 N. C. 406 (1854); *Vanderbilt v. Johnson*, 141 N. C. 370, 54 S. E. 298 (1906), sets forth sufficient evidence of adverse possession.

Applying the "use of which the land is capable" test the court has decided that the following acts were sufficient: Over-flowing land under certain circumstances, see *LaRoque v. Kennedy*, 156 N. C. 360, 72 S. E. 454 (1911); erecting dams and fish traps, *Gudger v. Kensley*, 82 N. C. 482 (1880); operating lime kiln, *Moore v. Thompson*, 69 N. C. 120 (1873); making turpentine, *Gudger v. Kensley*, 82 N. C. 482 (1880); cultivation, *Burton v. Carruth*, 18 N. C. 2 (1834) and citations; *Wallace v. Maxwell*, 32 N. C. 110 (1849); *Smith v. Bryan*, 44 N. C. 180 (1852); pasturage, *Andrews v. Mulford*, 2 N. C. 311 (1796); and cutting timber, *Staton v. Mullis*, 92 N. C. 624 (1885); *Wall v. Wall*, 142 N. C. 387, 55 S. E. 283 (1906).

The following acts were held insufficient

because of lack of continuity or insufficient duration. *Cultivation*, *Hamilton v. Icard*, 114 N. C. 532, 19 S. E. 607 (1894); *State v. Suttle*, 115 N. C. 784, 20 S. E. 725 (1894); *Hamilton v. Icard*, 117 N. C. 477, 23 S. E. 354 (1895); *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800 (1903); gold hunting, *Ward v. Herrin*, 49 N. C. 23 (1856), and citations; cutting timber, *Barlett v. Simmons*, 49 N. C. 295 (1857); *Shaffer v. Gaynor*, 117 N. C. 15, 23 S. E. 154 (1895); *Campbell v. Miller*, 165 N. C. 51, 80 S. E. 974 (1914); *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687 (1914).

Same—Payment of Taxes.—Paying taxes is not enough to constitute an adverse possession. The payment of taxes is an assertion of a mere claim of title and therefore is insufficient because it is not an actual, open, visible occupation begun and continued under a claim of right. *Malloy v. Bruden*, 86 N. C. 251 (1882). However it does constitute a relevant fact in establishing a claim of title and may be considered along with evidence of possession in proving adverse possession. *Austin v. King*, 97 N. C. 339, 2 S. E. 678 (1887); *Christman v. Hillard*, 167 N. C. 4, 82 S. E. 949 (1914).

The possession of one tenant in common is in law the possession of all his cotenants, unless and until there has been an actual ouster or a sole adverse possession for twenty years, receiving rents and profits and claiming the land as his own from which actual ouster would be presumed. *Winstead v. Woolard*, 223 N. C. 814, 28 S. E. (2d) 507 (1944).

Title to Remaindermen During Life Estate.—Title by adverse possession cannot be had against the remaindermen before the life estate has ended, because no actual possession of the remainder may be had, but title to the life estate may be gained at such time. *Brown v. Brown*, 168 N. C. 4, 84 S. E. 25 (1915). The statutes cannot begin to run against remaindermen until the expiration of the particular estate. *Honeycutt v. Brooks*, 116 N. C. 738, 21 S. E. 558 (1895); *Roe v. Journigan*, 181 N. C. 180, 106 S. E. 690 (1921).

Where Remaindermen Not Parties.—Plaintiffs claimed under foreclosure of a tax sale certificate in a proceeding instituted solely against the life tenant and in which the remaindermen were neither parties nor brought before the court in any manner sanctioned by law. It was held that while commissioner's deed of foreclosure did not affect the interest of the remaindermen, it did convey the interest of the life tenant, and plaintiffs were entitled to possession during the continuance of

the life estate, which possession could not be adverse to the remaindermen until the death of the life tenant gave them legal power to sue. *Eason v. Spence*, 232 N. C. 579, 61 S. E. (2d) 717 (1950).

Adjoining Boundaries.—If two persons own adjoining lands, and one runs a fence so near the line as to induce the jury to believe that any slight encroachments were inadvertently made, and that it was the design to run on the line, the possession constituted by the inclosure might be regarded as permissive, and could not be treated as adverse, even for the land within the fence, except as it furnished evidence of the line in a case of disputed boundary. The line being admitted, it would not make a title, where a naked adverse possession will have that effect, because there was no intention to go beyond his deed, but an intention to keep within it, which by a mere mistake he had happened not to do. *Currie v. Gilchrist*, 147 N. C. 548, 61 S. E. 581 (1908); *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862 (1916).

Necessity of Being Visible and Notorious.—It was suggested under the definition that the possession must be as notorious as the nature of the property will permit. The illustrations given under the preceding catchline and the rule therein developed are but illustrations of this rule. The possession must always be as actual, as well as notorious, as the nature of the property will permit, but, although the possession must always be so notorious as to be visible, it is not necessary that the true owner have actual knowledge. It is sufficient if the possession would be notice of the adverse character to the ordinary person, if he should make the observation that the ordinary owner would make of his own property. The owner is bound to ascertain the nature of the claim after notice has been given him. *Kennedy v. Maness*, 138 N. C. 35, 50 S. E. 450 (1905).

The possession spoken of must be constituted by such acts as would expose the party to a suit by the State, or by some person claiming under the State; for it is the forbearance to sue that raises such a presumption of right as induced the legislature to ratify the apparent title. *Hedrick v. Gobble*, 61 N. C. 348 (1867).

Posting land and keeping away trespassers is insufficient because it is not a visible and notorious possession. *Berry v. Richmond Cedar Works*, 184 N. C. 187, 113 S. E. 772 (1922).

Continuity and Duration.—The duration of the possession to ripen into title is always fixed by the statutes. The ordinary periods are fixed; as against the State by

§ 1-35, private individuals under color, § 1-38, and without color, § 1-40. Certain limitations and exceptions are imposed upon these sections by §§ 1-44 and 1-45.

Proof that land was cultivated under one claiming title and that timber was cut thereon as needed, unaccompanied by any evidence of the length of time of the occupancy by cultivation, did not establish title by adverse possession without color of title under § 1-40. *Betts v. Gahagan*, 212 F. 120 (1914).

The continuity is largely a matter of interpretation and construction of these sections for none of them expressly indicate the extent to which the possession must be continuous.

In proving continuous adverse possession nothing must be left to mere conjecture. The testimony must tend to prove the continuity of possession for the statutory period, either in plain terms or by "necessary implication." *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251 (1890). The possession need not be unceasing, but the evidence should be such as to warrant the inference that the actual use and occupation have extended over the required period, and that during it the claimant has, from time to time, continuously subjected the disputed land to the only use of which it was susceptible. *Locklear v. Savage*, 159 N. C. 236, 74 S. E. 347 (1912); *Cross v. S. A. L. Co.*, 172 N. C. 119, 90 S. E. 14 (1916). Occasional trespasses are not sufficient, for the possession must be of such character as to continually expose the party to suit by the true owner. *Alexander v. Richmond Cedar Works*, 177 N. C. 137, 98 S. E. 312 (1919). The illustrations and the rule stated under the catchline "Actual Possession," in this note expound the true rule of continuity. It must be just as continuous as the nature of the property will permit provided it is sufficient to meet the requirement as to notoriety.

So, where the plaintiff showed a sufficient and connected title to the land in controversy in himself, as contemplated by § 1-42, it is necessary for the defendant, claiming by adverse possession under a deed to his ancestor, as color, to show a continuity of such possession for seven years. *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687 (1914).

It has been held that the possession by a tenant of defendant's ancestor for one year, under his deed, and the occasional entry upon the land by his heirs at law after his death, for the purpose of cutting a few logs, is insufficient evidence of adverse possession in character and continuity to be submitted to the jury. *Blue Ridge Land*

Co. v. Floyd, 167 N. C. 686, 83 S. E. 687 (1914).

An intervening period of five months, *Holdfast v. Shephard*, 28 N. C. 361 (1846), and one year, *Ward v. Herrin*, 49 N. C. 23 (1856); *Malloy v. Bruden*, 86 N. C. 251 (1882), have been held to be sufficient intervals to defeat title by adverse possession.

A gap occurring during the period of a suspension of the statute is sufficient to destroy the continuity. *Malloy v. Bruden*, 85 N. C. 251 (1881).

Same—Reasons for Rule as to Continuity.—The reason for the rule of continuity is that at all times there is a presumption in favor of the true owner, and he is deemed by law to have possession coextensive with his title except during the periods he is actually ousted by the personal occupation of another, so that whenever the occupation of another actually ceases, the title again draws to it the possession, and the seizin of the owner is restored. A subsequent entry even by the same wrongdoer and under the same claim of title constitutes a new disseizin from the date of which the statute takes a fresh start. *Malloy v. Bruden*, 86 N. C. 251 (1882). But it is not to be understood that the possession is interfered with by the casual entry of a trespasser sufficiently to defeat title. *Hayes v. Lumber Co.*, 180 N. C. 252, 104 S. E. 527 (1920).

From the above authorities it would seem that the true rule is that whenever an occupation ceases for a period ever so brief the statute stops running but if the nature of the only use to which the land can be subjected is such or the actual and continuous occupation is such that from the very nature of things there are periods of time when the adverse possessor is not actually upon the land but is in fact occupying it under his claim the possession is not sufficiently interrupted to defeat title when so held for a sufficient period of time.—Ed. Note.

The discussion under this catchline is limited to actions against private individuals. The rule regarding the continuity of the possession as against the State is converse to that respecting continuity as against private individuals. See note to § 1-35.

Tacking Possessions—Privity.—It is not necessary that the adverse claimant hold the possession for the statutory period provided he can establish a privity in claim, possession, etc., with the prior possessors, which when taken together will constitute the period of time necessary to give title. *Campbell v. Everhart*, 139 N. C. 503, 52 S.

E. 201 (1905). This privity is necessary where the claimant has not had possession for the statutory period for he cannot derive any benefit from the possession of a third party, or of others claiming under the third party, where he fails to connect himself with such third party's title. *Johnston v. Case*, 131 N. C. 491, 42 S. E. 957 (1902).

This rule of privity applies alike to cases of adverse possession against the State and private individuals, whether with or without color of title, *Johnston v. Case*, 131 N. C. 491, 42 S. E. 957 (1902); *May v. Mfg., etc., Co.*, 164 N. C. 262, 80 S. E. 380 (1913); although prior to § 1-35 the rule was otherwise as against the State. *Price v. Jackson*, 91 N. C. 11 (1884); *Phipps v. Pierce*, 94 N. C. 514 (1886).

It has been held that to constitute privity, the later occupant must enter under a prior one and obtain his possession either by purchase or descent from him. Privity means privity of possession and not privity in blood for a "privity in blood" is one who derives his title by descent and applies to a real title which can descend and not to a mere colorable title. By this is meant, of course, that the possession descends and the heirs must take immediate possession to prevent a gap. Upon such entry the possession of the ancestor may be tacked to that of the heirs as if he possessed the land under color of title, the heirs, by descent so possess it. *Trustees v. Blount*, 4 N. C. 455 (1816); *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748 (1896); *Barrett v. Brewer*, 153 N. C. 547, 69 S. E. 614 (1910). In a like manner the widow may tack her possession to that of her husband where she immediately possesses the property as a part of her homestead, (*Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903)) or dower. *Jacobs v. Williams*, 173 N. C. 276, 91 S. E. 951 (1917).

The possession of a widow under a homestead inures to the benefit of the heirs, and for the purpose of perfecting title in them by adverse possession may be tacked to that of the husband. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903).

For the reason explained above possession by the legal representative is a continuation of the possession of the deceased. *Trustees v. Blount*, 4 N. C. 455 (1816).

The possession of a tenant is the possession of the landlord and is to be added to that of the landlord in person. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748 (1896).

The same rule applies where a vendee holds possession under articles of purchase and his possession enures to ripen the de-

fective title of the vendor. *Rhodes v. Brown*, 13 N. C. 195 (1828). This rule was applied as against cotenants of a husband, notwithstanding that the husband, who held entire possession and while so holding deeded the property to his wife, was later decreed a tenant in common, the wife not being a party to the proceedings. *Gill v. Porter*, 176 N. C. 451, 97 S. E. 381 (1918).

It should be observed in this connection that the possession of a grantor who had no color of title cannot be tacked to that of his grantee in order to make up the seven years' possession under color of title as required by § 1-38. *Morrison v. Craven*, 120 N. C. 327, 26 S. E. 940 (1897).

In cases where the claimant is holding possession under color of title he cannot tack his possession of the land not covered by his color to the possession of his grantor. This is an application of the rule that possession cannot be tacked to make out title by prescription when the deed under which the last occupant claims title does not include the land in dispute. See *Blackstock v. Cole*, 51 N. C. 560 (1859); *Jennings v. White*, 139 N. C. 22, 51 S. E. 799 (1905).

Same—Hostile Character.—It may be stated as a general proposition that the possession must be hostile to the true owner. This question becomes especially important where a person standing in a fiduciary relation has possession of the property in such capacity or where a tenant, a licensee, vendor or some other such person gains title in subordination to the true owner. See *Rogers v. Mabe*, 15 N. C. 180 (1833); *Foscue v. Foscue*, 37 N. C. 321 (1842); *Johnson v. Farlow*, 35 N. C. 84 (1851). Such person cannot hold possession adversely until he commits some act sufficient to apprise the true owner of the fact that he is holding adversely to his interest under a claim of ownership.

Whenever the possessor holds in subordination to the true owner whether in such capacity as named above or by having recognized a superior title in another, his possession will not ripen into title. *Gwyn v. Stokes*, 9 N. C. 235 (1822).

Thus there is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to show such possession to have been continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907).

An adverse possession by one tenant in common is indicated by a hostile attitude apparent to the court or jury, from which it may be seen by some act done that the intent to hold alone is manifested to the cotenants, as if they attempt to assert their claim, as to enter, or to demand an account of rents, etc., which is resisted by the occupant, his possession becomes adverse, and the statute begins to run. *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608 (1900).

Burden of Proof—Presumptions.—When the title is claimed by adverse possession, the burden is on him who relies upon such claim to show continuous possession. There is no presumption that the possession of real estate is adverse. *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345 (1904); *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907). See § 1-42.

II. NOTE TO SECTION 1-38.

Cross Reference.—See note to § 1-39.

Generally.—When title to land is out of the State, seven years' adverse possession under color of title is sufficient to ripen title in ordinary cases. *Virginia-Carolina Tie, etc., Co. v. Dunbar*, 106 F. (2d) 383 (1939).

Title is deemed to be out of the State where the State is not a party to the action. *Duke Power Co. v. Toms*, 118 F. (2d) 443 (1941).

Relation to § 1-56.—This section and § 1-40 apply to actions for the recovery of real estate to the exclusion of § 1-56. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877 (1898).

This section has no reference to titles good in themselves, but is intended to protect apparent titles void in law. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263 (1946).

Effect of disability.—Seven years' adverse possession under color, is no bar to an action of ejectment, where the person entitled to commence the same is an infant at the time the title to the land descended to him, and sues within three years next after full age. *Clayton v. Rose*, 87 N. C. 106 (1882).

But a married woman who acquired no title by another junior grant issued to her cannot use her disability to defeat the right of the plaintiffs. *Berry v. Lumber Co.*, 141 N. C. 386, 54 S. E. 278 (1906).

Connection with Grant as Requisite to Pleading Section.—The plaintiff may show title out of the State by offering a grant to a stranger, without connecting himself with it, and then offer proof of open, notorious, continuous adverse possession, under color of title in himself and those un-

der whom he claims, for seven years before the action was brought. *Blair v. Miller*, 13 N. C. 407 (1830); *Isler v. Dewey*, 84 N. C. 345 (1881); *Christenbury v. King*, 85 N. C. 229 (1881); *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142 (1889).

Boundaries.—In an action to quiet title the fact that, as a result of the impounding of water some of the boundaries have been submerged and could not be located did not destroy the value of the testimony as to their location at the time of the adverse possession relied on, and it was clearly competent for a witness to testify that he knew the land described in the deed and to the acts of possession occurring on that land. *Duke Power Co. v. Toms*, 118 F. (2d) 443 (1941).

Sufficiency of Paper to Constitute Color.—There can be no color of title without some paper writing attempting to convey title, but which does not do it either because of want of title in the person making it or because of the defective mode of conveyance used; and, semble, that under the act of 1891 it must not be so plainly and obviously defective that a man of ordinary capacity could be misled by it. This is true notwithstanding the holding in *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877 (1898); *Neal v. Nelson*, 177 N. C. 394, 23 S. E. 428 (1919).

An instrument is none the less color of title because of defects discoverable from the record, the purport of this section being to afford protection to apparent titles, void in law, and supply a defense where none existed without its aid. *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941).

Same—Bond for Title as Color.—Where a bond for title is unconditional and calls for no future payment, the presumption, in the absence of any evidence to the contrary, is that the price was paid before or at the time of the signing, so that it is "color of title" to support adverse possession within this section. *Betts v. Gahagan*, 212 F. 120 (1914).

"After payment of the purchase money, a bond for title is 'color of title' to support adverse possession even against the vendor. *Avent v. Arrington*, 105 N. C. 377, 10 S. E. 991 (1890)." *Betts v. Gahagan*, 212 F. 120 (1914).

Same—Deed for Partition as Color.—A deed by the heirs of a deceased owner of land for partition thereof is not color of title within this section. *Betts v. Gahagan*, 212 F. 120 (1914).

A deed by a grantee in a deed of partition by heirs of the deceased owner to a third person of the land conveyed to the

grantee in the partition is color of title within this section, where the third person had no interest in the land outside of the deed. *Betts v. Gahagan*, 212 F. 120 (1914).

Where the possession of a widow, when tacked to the possession of her husband, is sufficient to confer title to the land on the heirs of the husband by adverse possession, under § 1-40, whether a certain deed of a commissioner in a partition preceding constituted color of title so as to complete the title of the heirs by adverse possession under this section is immaterial. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903).

Where land devised to testator's children with remainder to testator's grandchildren was sold under order of court by a commissioner to one of the life tenants, and defendants were the purchasers by mesne conveyances from the life tenant, the deed executed by the commissioner, being similar to a deed from a stranger, constituted color of title. *Perry v. Bassenger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941).

Same—Unregistered Deed.—An unregistered deed is not color of title as against judgment creditors of the grantor. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

While an unregistered deed is not color of title as against subsequent grantees under registered deeds and creditors of the grantor, where the grantee in the unregistered deed conveys by registered deed, and mesne conveyances from him are duly registered, such registered deeds are color of title, under this section, and where the land is held by actual possession successively by the grantees in such chain of title continuously for over seven years prior to the filing of a judgment against the grantor in the unrestricted deed, the grantor in the unregistered deed is divested of title by adverse possession prior to the filing of the judgment, and the judgment does not constitute a lien against the land. *Glass v. Lynchburg Shoe Co.*, 212 N. C. 70, 192 S. E. 899 (1937).

Same—Voidable Deed.—A voidable deed is sufficient color although it is a distinct and separate source of title from the one under which entry was first made. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217 (1921).

Same—Void Deed.—A void deed constitutes color of title. *Bond v. Beverly*, 152 N. C. 56, 67 S. E. 55 (1910).

A wife's deed to her husband is color of title even if it be void, and his sufficient adverse possession for seven years, under this section, will ripen the fee-simple title in him. *Potts v. Payne*, 200 N. C. 246, 156 S. E. 499 (1931).

Same—Deed by Mortgagor in Possession.—A deed by the mortgagor in posses-

sion to a third party, with notice of the mortgage, conveys only the equity of redemption, and does not pass such a colorable title as may ripen by possession into an absolute legal estate. *Parker v. Banks*, 79 N. C. 480 (1878).

Same—Sheriff's Deed after Judgment against Nonresident.—A sheriff's deed at an execution sale under a judgment obtained against the nonresident owner by his wife to recover for maintenance and necessities furnished by her to their minor children, in which action attachment was levied on the land, is at least color of title under this section, the judgment not being void. *Campbell v. Campbell*, 221 N. C. 257, 20 S. E. (2d) 53 (1942).

Same—Deed after Husband Abandons Wife.—After abandonment, the wife's possession as purchaser at execution sale of a judgment obtained against him, is adverse to the husband, and her possession for the period required by this section, will bar him. *Campbell v. Campbell*, 221 N. C. 257, 20 S. E. (2d) 53 (1942).

The evidence tended to show that plaintiff, the owner of the locus in quo, left the State and abandoned his wife and children, that thereafter a tax lien on the locus in quo was foreclosed and deed was made by the commissioner to plaintiff's attorney, who, by direction of plaintiff, executed a quitclaim deed to plaintiff's youngest child. That some 13 years prior to the institution of the action, relying upon the belief that the husband was dead, the wife executed quitclaim deed and the other children executed deed to the youngest child, and that the following day the youngest child and her husband executed deed of trust upon the property in which she represented that her father was dead and that she had title. Defendants claim title as grantee from the purchaser at the foreclosure sale of the deed of trust. It was held that the tax deed and the deeds of the wife and the other children to the youngest child constituted color of title, and defendant's evidence that the youngest child went into possession under such color of title and remained in possession for a period in excess of 7 years is sufficient to take the case to the jury upon defendants' contention that they had acquired title to the locus in quo by adverse possession under this section, and the verdict of the jury under correct instructions from the court is determinative of the question. *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941).

Same—Deed of Non Compos Mentis.—The deed of a person non compos is color of title, and possession under it for seven

years ripens into title against those not under disability. *Ellington v. Ellington*, 103 N. C. 54, 9 S. E. 208 (1889).

Character of Possession under Section.—Chief Justice Ruffin in *Green v. Harman*, 15 N. C. 158 (1833), said: "The operation of the statute of limitations depends upon two things: The one is possession continued for seven years; and the other the character of that possession—that it should be adverse. It has never been held that the owner should actually know of the fact of possession, nor have actual knowledge of the nature or extent of the possessor's claim. It is presumed, indeed, that he will acquire the knowledge, and it is intended that he should." *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862 (1916).

Where deed was regular upon its face and purported to convey title without limitation, reservation or exception, it was at least color of title to the entire interest in the land it purported to convey so that grantee and those claiming under her who immediately went into possession and remained in exclusive possession thereof for "12 or 15 years" acquired title by their adverse possession under color, if not by their deed. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263 (1946).

Adverse possession must be possession under known and visible lines and boundaries, and under colorable title. *Berry v. Coppersmith*, 212 N. C. 50, 193 S. E. 3 (1937).

The possession of one under color is sufficient notice of his claim of title to the lands. *Butler v. Bell*, 181 N. C. 85, 106 S. E. 217 (1921).

The adverse possession for seven years under color, which bars the entry of the true owner, must be open, continuous, uninterrupted, and manifested by distinct and unequivocal acts of ownership, the burden being upon him who asserts that he has thus acquired the title, to show such actual adverse possession. *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345 (1904); *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907); *Stewart v. McCormick*, 161 N. C. 625, 77 S. E. 761 (1913). For full treatment see part 1 of this note, supra.

If the character of the possession is insufficient to ripen a perfect title, the question of color of title does not arise. *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458 (1921).

Charging § 1-40.—Where, in an action for the recovery of land, defendant relied on this section and § 1-40, and the evidence justified a finding in his favor under this section, but there was no evidence to support a verdict under § 1-40, the error in re-

fusing to charge that defendant could not hold under § 1-40 was not reversible, since it could not be inferred that the verdict was based on a finding of adverse possession for twenty years merely because the court refused to charge there was no evidence of adverse possession for twenty years. *Betts v. Gahagan*, 212 F. 120 (1914).

Conflict Making Jury Question.—Where the defendant in ejectment claims the locus in quo by sufficient evidence of adverse possession with and without "color," as against plaintiff's chain of paper title, and the defendant denies the genuineness of a lease to his predecessor which the plaintiff has introduced, an issue of fact is raised for the determination of the jury. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646 (1926).

Compulsory Reference.—An action in ejectment in which defendants plead the twenty and the seven-year statutes of limitation is not subject to compulsory reference pursuant to § 1-189. *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632 (1951).

Effect on Lien of Judgment Creditor.—Adverse possession against a judgment

debtor for a period of seven years under color of title does not affect the lien of a judgment creditor, the judgment creditor having no right of entry or cause of action for possession, but only a lien enforceable according to the prescribed procedure, and as to him the possession is not adverse. *Moses v. Major*, 201 N. C. 613, 160 S. E. 890 (1931).

Applied in *Layden v. Layden*, 228 N. C. 5, 44 S. E. (2d) 340 (1947); *Hughes v. Oliver*, 228 N. C. 680, 47 S. E. (2d) 6 (1948); *Grady v. Parker*, 230 N. C. 166, 52 S. E. (2d) 273 (1949).

Cited in *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 141 S. E. 570 (1928); *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804 (1936); *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657 (1941); *Parham v. Henley*, 224 N. C. 405, 30 S. E. (2d) 372 (1944); *Perry v. Alford*, 225 N. C. 146, 33 S. E. (2d) 665 (1945); *Ramsey v. Nebel*, 226 N. C. 590, 39 S. E. (2d) 616 (1946); *Smith v. Benson*, 227 N. C. 56, 40 S. E. (2d) 451 (1946); *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446 (1950).

§ 1-39. Seizin within twenty years necessary.—No action for the recovery or possession of real property shall be maintained, unless it appears that the plaintiff, or those under whom he claims, was seized or possessed of the premises in question within twenty years before the commencement of the action, unless he was under the disabilities prescribed by law. (C. C. P., s. 22; Code, s. 143; Rev., s. 383; C. S., s. 429.)

Section Not Retroactive.—This salutary provision did not extend to actions already commenced or rights of actions already accrued at the ratification of the Code. *Covington v. Stewart*, 77 N. C. 148 (1877).

Legal Title Prima Facie Evidence of Possession.—If a plaintiff establishes on the trial a legal title to the premises, he will be presumed to have been possessed thereof within the time required by law, unless it is made to appear that such premises have been held and possessed adversely to such legal title for the time prescribed by law before the commencement of such action. *Johnston v. Pate*, 83 N. C. 110 (1880); *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42 (1900).

Same—Section Construed with § 1-42.—In cases where there is no tenancy in common this section must be construed with § 1-42, for this section is explained in § 1-42 by the further declaration that the person who establishes a legal title to the premises shall be presumed to have been possessed thereof within the time required by law, etc. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42 (1900).

Same—Effect of Plea of Section by Adversary.—The pleading by a defendant of this section does not shift upon the plaintiff the burden of showing that he has been in the possession within twenty years before the commencement of the action, but the presumption created by § 1-42 can only be rebutted by proof on the part of the defendant that the defendant had been in adverse possession of the premises for twenty years. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42 (1900).

Same—Character of Defendants' Possession as Affecting Application.—This section does not apply when the plaintiffs have shown legal title and it appears that the defendants' possession has not been for twenty continuous years. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907). See also *Clendenin v. Clendenin*, 181 N. C. 465, 107 S. E. 458 (1921) where it was held that the other entry must be openly and notoriously adverse or some act must be done to clearly indicate that it has become adverse, and that the occupation of the mother-in-law's land after her death, where original entry was in subordination to her title, is insufficient. See also *Rut-*

ledge & Co. v. Griffin Mfg. Co., 183 N. C. 430, 111 S. E. 774 (1922).

Same—Where Previously Gained by Adverse Possession.—Where plaintiffs acquired the title by adverse possession of the land under color for more than thirty years, it follows that they had at least constructive seizin or possession within twenty years before this suit was brought, which would satisfy the requirement, as seizin follows the title, if there is no actual possession and it is not incumbent on them to show an actual seizin or possession of the premises in question for twenty years before the commencement of the action. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907); *Stewart v. McCormick*, 161 N. C. 625, 77 S. E. 761 (1913).

Notwithstanding that a judgment was rendered against a party in an action to recover lands, if he subsequently enter, inclose and use the lands for the statutory period, he will acquire a new estate by disseizin and acquiescence and will be presumed to have been in possession within

the past twenty years. *Moore v. Curtis*, 169 N. C. 74, 85 S. E. 132 (1915).

Where one tenant in common claims sole seizin and adverse possession under a void judgment, his status as to any title by adverse possession must be determined by this section, rather than the seven-year statute, § 1-38. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521 (1944).

Evidence Sufficient under Section.—The evidence in *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576 (1904), was sufficient to sustain a finding under this section that the defendant held adversely to the plaintiff.

State statutes of limitation neither bind nor have any application to the United States, when suing to enforce a public right or to protect interests of its Indian wards. *United States v. 7,405.3 Acres of Land*, 97 F. (2d) 417 (1938).

Cited in *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928); *Reid v. Reid*, 206 N. C. 1, 173 S. E. 10 (1934); *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632 (1951).

§ 1-40. Twenty years adverse possession.—No action for the recovery or possession of real property, or the issues and profits thereof, shall be maintained when the person in possession thereof, or defendant in the action, or those under whom he claims, has possessed the property under known and visible lines and boundaries adversely to all other persons for twenty years; and such possession so held gives a title in fee to the possessor, in such property, against all persons not under disability. (C. C. P., s. 23; Code, s. 144; Rev., s. 384; C. S., s. 430.)

Cross Reference.—As to adverse possession for seven years under color of title, see § 1-38.

Editor's Note.—The first part of the annotations under § 1-38 are devoted to a treatment of the general principles of adverse possession and that treatment is just as pertinent to this section as to § 1-38.

Proof out of State as Prerequisite to Pleading Section.—Prior to the passage of § 1-36, in 1917, before one could establish title to property under this section, title must have been proved to be out of the State.—Ed. Note.

Thus, where adjoining owners were litigating with respect to their boundaries and each introduced a grant from the State to their lands respectively, which taken together, covered the locus in quo, title was shown out of the State and either party could establish title to any part thereof by adverse possession for twenty years under this section. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060 (1916).

But since the passage of § 1-36 the title is conclusively presumed to be out of the State and such proof is not now necessary except in the cause specified.—Ed. Note.

Effect of Section upon Prior Law.—

The possession for twenty years which raised a presumption of title, as the law has been heretofore administered, has now the force and effect of giving an actual title in fee by the provisions of this section. *Covington v. Stewart*, 77 N. C. 148 (1877).

Section Prescribes Maximum Required.—It is error to charge that the adverse claimant must maintain open and continuous possession without break for thirty years before the bringing of his action as only twenty years adverse possession is required to give a title in fee to the possessor, as against all persons not under disability, except the State, see § 1-35. *Walden v. Ray*, 121 N. C. 237, 28 S. E. 293 (1897).

Section 1-38 Immaterial When This Section Applicable.—Where title by adverse possession can be established under this section, the question of whether a color of title is sufficient under § 1-38 is immaterial. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903).

Even if there is a deed, with metes and bounds, the adverse possession of twenty years would bar the defendant under the statute of limitations. *Railroad v. Olive*,

142 N. C. 257, 55 S. E. 263 (1906); cited and distinguished. *May v. Atlantic Coast Line R. Co.*, 151 N. C. 388, 66 S. E. 310 (1909).

Section Applicable to Exclusion of § 1-56. — This section and § 1-38 apply to actions for the recovery of real estate to the exclusion of § 1-56. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877 (1898).

Applicability of General Rule Where United States Is Nominal Party. — The principle that the United States is not bound by any statute of limitations, nor barred by any laches of its officers, however gross, does not apply where United States is a mere nominal party so as to preclude adverse possessor from asserting an adverse claim against Indians, who are the real parties in interest. *United States v. Rose*, 20 F. Supp. 350 (1937).

Presumption of Deed to Possession. — There is no error in a judge charging that where title is out of the State and the evidence shows possession for 20 years the jury might presume a deed to the possessor from any person having title. This is settled law. *Melvin v. Waddell*, 75 N. C. 361 (1876).

Deed as Evidence of Possession. — Deed of sheriff to grantor of plaintiff in ejectment is no evidence of possession. *Prevatti v. Harrelson*, 132 N. C. 250, 43 S. E. 800 (1903).

Elements of Possession Necessary. — See general note under § 1-38.

Tenants in Common — Possession of One Possession of All. — The possession of one tenant in common is presumed to be the possession of all. *Tharpe v. Holcomb*, 126 N. C. 365, 35 S. E. 608 (1900).

The possession of one tenant in common is the possession of all his cotenants unless and until there has been an actual ouster or sole adverse possession for twenty years. *Parham v. Henley*, 224 N. C. 405, 30 S. E. (2d) 372 (1944).

Where plaintiff and defendants were tenants in common, the possession of the defendants, not having been adverse for twenty years, was the possession of the plaintiff. *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42 (1900).

To ripen title under a deed from a tenant in common twenty years' adverse possession is necessary and this applies to one to whom the alienee of a tenant has attempted to convey the entire estate. *Bradford v. Bank*, 182 N. C. 235, 108 S. E. 750 (1921).

One may assert title to land embraced within the bounds of another's deed by showing adverse possession of the portion

claimed for twenty years under known and visible lines and boundaries but his claim is limited to the area actually possessed, and the burden is upon the claimant to establish his title to the land in that manner. *Wallin v. Rice*, 232 N. C. 371, 61 S. E. (2d) 82 (1950).

Where the owner of a lot encroaches upon a strip of the adjacent lot and builds structures located partly thereon, the owner of the adjacent lot is not estopped by his silence and failure to object from asserting his title thereto in an action in ejectment, and does not lose his title thereto until such adverse user has continued for the twenty years necessary to ripen title by adverse possession, under this section, the user not being under color of title. *Ramsey v. Nebel*, 226 N. C. 590, 39 S. E. (2d) 616 (1946).

A grantee cannot tack adverse possession of predecessor in title as to land not embraced within the description in his deed, and therefore where he has been in possession for less than twenty years, he cannot establish title by adverse possession to land lying outside the boundaries of his deed. *Ramsey v. Ramsey*, 229 N. C. 270, 49 S. E. (2d) 476 (1948); *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Recovery of Right of Way Not Used for Railroad Purposes. — The owner of the fee is not barred from maintaining an action in ejectment against a railroad company or its lessee to recover for that part of the right of way no longer used for railroad purposes until the expiration of twenty years. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N. C. 589, 61 S. E. (2d) 700 (1950).

In an action to establish a resulting trust instituted shortly after the guardian's death upon evidence that the lands were conveyed to the guardian personally but were paid for with guardianship funds, it is error to enter nonsuit upon the plea of laches and the statutes of limitations upon evidence that the guardian remained in possession for over forty years and devised same to plaintiffs by will when defendants offer evidence that the guardian acknowledged the existence of the trust some six years prior to his death, and there is no evidence of disavowal of the trust or adversary holding during the life of the guardian. *Cassada v. Cassada*, 230 N. C. 607, 55 S. E. (2d) 77 (1949).

Evidence of Possession Sufficient to Sustain Charge. — Where the plaintiff introduced evidence to show that he had open and continuous adverse possession of

the lands under known and visible metes and bounds for more than twenty years, it is sufficient under this section to sustain a charge of the court to the jury as to his title by adverse possession. *Stewart v. Stephenson*, 172 N. C. 81, 89 S. E. 1060 (1916).

Adverse possession sufficient to ripen title is the exclusive use of the claimant for twenty years, continuously taxing the exclusive benefits such as the land in question is capable of yielding, under known and visible metes and bounds. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

Priority over Judgment Lien.—Where a judgment debtor has lost title to lands by adverse possession, prior to the acquisition and registration of the judgment, the judgment creditor under § 1-234, is not entitled to execution on the locus in quo, the judgment debtor having no title at the time of the judgment, and this result is not affected by the giving of a deed by the debtor to the claimant, which was not registered until after the judgment. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

Effect of Exclusive Dominion after Dedication to Public.—Where the owner of land has platted and sold it by deeds referring to streets, parks, etc., according to a registered map, the grantees have an easement therein, but where he has later fenced off a part of the land so offered for dedication to the public and under known metes and bounds has exercised exclusive and adverse dominion over the enclosed lands, asserting absolute title, the statute of limitations will begin to run against the easements of the grantees thus acquired, which will ripen title to the enclosed lands in favor of the owner or his grantee under the provisions of this section, by twenty years' adverse possession. *Gault v. Lake Waccamaw*, 200 N. C. 593, 158 S. E. 104 (1931).

Burden of Proof.—See note under § 1-42.

Question for Jury.—Where there is evidence that title to the lands had been acquired under twenty years' adverse possession this question should be submitted to the jury. *McClure v. Crow*, 196 N. C. 657, 146 S. E. 713 (1929).

Evidence of plaintiffs' testator's actual, open and notorious adverse possession of the land in question under known and visible metes and bounds, in the character of owner and adverse to the claims of all other persons held sufficient to be submitted to the jury under this section. *Reid v. Reid*, 206 N. C. 1, 173 S. E. 10 (1934);

Caskey v. West, 210 N. C. 240, 186 S. E. 324 (1936); *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804 (1936).

Where it is alleged that defendant's predecessor in title went into possession of the locus in quo pursuant to a parol partition between him and his cotenants in common, and that each tenant thereafter held his share so allotted in severalty and hostilely to his cotenants for more than twenty years, the allegations are sufficient to raise the issue of title by adverse possession in the tenant in common, and it is error for the trial court to disregard the plea of title by adverse possession and refuse to submit the case to the jury. *Martin v. Bundy*, 212 N. C. 437, 193 S. E. 831 (1937).

Mines and Mineral Rights.—Plaintiff claiming mineral rights by adverse possession without color of title must show such possession under known and visible lines and boundaries for twenty years. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417 (1941).

Mere prospecting does not constitute possession of mine and mineral rights. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417 (1941).

Where plaintiffs' evidence tended to show that they worked the fertilizer minerals at various places on the locus in quo for over twenty years but did not otherwise locate such work, and since plaintiffs do not claim under color of title, there can be no presumption that their possession was to the outer boundaries of their claim, and the evidence is insufficient to show adverse possession of the mining rights under known and visible lines and boundaries. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417 (1941).

In an action to remove cloud on title to the mineral rights in the locus in quo, which had been severed from the title to the surface, and for possession thereof by adverse possession, plaintiffs did not claim under paper title or under color of title. It was held that plaintiffs may not rely upon the weakness of defendant's title but must establish their own title good against the world or good against defendants by estoppel, and there being no question of estoppel involved, plaintiffs must prove title to the mineral rights by adverse possession for a period of twenty years under known and visible lines and boundaries. *Davis v. Federal Land Bank*, 219 N. C. 248, 13 S. E. (2d) 417 (1941).

Claim to Timber — Evidence.—As to competency of evidence where question

depended upon high and low water marks, see *Rutledge & Co. v. Griffin Mfg. Co.*, 183 N. C. 430, 111 S. E. 774 (1922).

Where the possession of one cotenant is pursuant to an agreement of all cotenants, his possession for more than twenty years is insufficient to bar his cotenants or their privies. *Stallings v. Keeter*, 211 N. C. 298, 190 S. E. 473 (1937).

Compulsory Reference. — An action in ejectment in which defendants plead the twenty and the seven-year statutes of limitation is not subject to compulsory refer-

ence under § 1-189. *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632 (1951).

Cited in *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142 (1889); *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576 (1904); *Dill-Cramer-Truitt Corp. v. Downs*, 195 N. C. 189, 141 S. E. 570 (1928); *Glass v. Lynchburg Shoe Co.*, 212 N. C. 70, 192 S. E. 899 (1937); *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941); *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

§ 1-41. Action after entry.—No entry upon real estate shall be deemed sufficient or valid, as a claim, unless an action is commenced thereupon within one year after the making of the entry, and within the time prescribed in this chapter. (C. C. P., s. 24; Code, s. 145; Rev., s. 385; C. S., s. 431.)

Editor's Note. — At common law any person who had a right of possession could assert it by a peaceful entry, without the formality of a legal action, and being so in possession, could retain it, and plead that it was his soil and freehold. This was allowed in all cases where the original entry of the wrongdoer was unlawful. See 1 *Bouv. Law Dict.*, title "Entry." This section seems to be a limitation upon the rule in that while an entry may be made, it must be followed by a suit within one year and within the period of limitation (either 20, 7, 30 or 21 years after the statute began

running, as this case might be) prescribed by the various sections of the chapter. The effect seems to be that the common-law entry without maintaining a suit within one year thereof is insufficient so that one cannot repossess himself by an entry without also maintaining an action. The latter part of this section "and within the time prescribed in this chapter" is but a recognition of the statutes prescribing the various periods necessary for an adverse possession ripening into title.

Cited in *Clayton v. Cagle*, 97 N. C. 300, 1 S. E. 523 (1887).

§ 1-42. Possession follows legal title; severance of surface and sub-surface rights.—In every action for the recovery or possession of real property, or damages for a trespass on such possession, the person establishing a legal title to the premises is presumed to have been possessed thereof within the time required by law; and the occupation of such premises by any other person is deemed to have been under, and in subordination to, the legal title, unless it appears that the premises have been held and possessed adversely to the legal title for the time prescribed by law before the commencement of the action.

In all controversies and litigation wherein it shall be made to appear from the public records that there has been at some previous time a separation or severance between the surface and the subsurface rights, title or properties of an area, no holder or claimant of the subsurface title or rights therein shall be entitled to evidence or prove any use of the surface, by himself or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said surface rights or title; and likewise no holder or claimant of the surface rights shall be entitled to evidence or prove any use of the subsurface rights, by himself, or by his predecessors in title or of lessees or agents, as adverse possession against the holder of said subsurface rights, unless, in either case, at the time of beginning such allegedly adverse use and in each year of the same, said party or his predecessor in title so using shall have placed or caused to be placed upon the records of the register of deeds of the county wherein such property lies and in a book therein kept or provided for such purposes, a brief notice of intended use giving (a) the date of beginning or recommencing of the operation or use, (b) a brief description of the property involved but sufficiently adequate to make said property readily locatable therefrom, (c) the name and, if known, the address of the claimant of the right under which the operation or

use is to be carried on or made and (d) the deed or other instrument, if any, under which the right to conduct such operation or to make such use is claimed or to which it is to be attached. (C. C. P., s. 25; Code, s. 146; Rev., s. 386; C. S., s. 432; 1945, c. 869.)

Cross References. — As to title against the State, see § 1-35. As to adverse possession of seven years under color of title, see § 1-38. As to adverse possession of twenty years, see § 1-40.

Editor's Note. — The 1945 amendment added the second paragraph relating to the severance of surface and subsurface rights. For comment on the amendment, see 23 N. C. Law Rev. 355.

Necessity of Showing Legal Title.—The statutory presumption as to possession and occupation of land in favor of the true owner, from the express language of the provision, will arise and exist only in favor of a claimant who has shown "a legal title", and until this is made to appear the presumption is primarily in favor of the occupant, that he is in possession asserting ownership. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627 (1920).

Presumption of Subordination. — When the defendant relies on a deed made to his ancestor as color, and adverse possession of others thereunder to ripen his title, it is necessary to show that their occupancy was under or connected with the deed under which he claims, or the presumption will obtain that they were under the true title shown by the plaintiff. *Blue Ridge Land Co. v. Floyd*, 167 N. C. 686, 83 S. E. 687 (1914).

When the plaintiff in ejectment shows title to the locus in quo, and the defendant claims title by adverse possession, the latter must establish such affirmative defense by the greater weight of the evidence; otherwise, under this section, the defendants' occupation is deemed to be under and in subordination to the legal title. *Hayes v. Cotton*, 201 N. C. 369, 160 S. E. 453 (1931).

Presumption of Possession and Rebuttal. — The presumption that one who proves legal title in himself has been in possession within twenty years is not rebutted by proof that an adverse claimant has been in possession where the claimant holds under a deed from a tenant in common with the devisor of the holder of the legal title. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

It is not necessary to consider the effect of this section where, conceding the presumption raised thereby, it is rebutted by the admission in the case agreed. *Kirkman v. Holland*, 139 N. C. 185, 51 S. E. 856 (1905).

Same—Where Neither in Possession.—

Where the defendants have not shown twenty years' possession, and, the plaintiffs having shown the legal title, the law carries the seizin to the party having the legal title, when neither is in possession. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907).

Title acquired by adverse possession is legal title, and occupancy of the land thereafter will be presumed to be in subordination to such title, unless held adversely to such title for the statutory period. *Purcell v. Williams*, 220 N. C. 522, 17 S. E. (2d) 652 (1941).

Construed with § 1-39. — Where the plaintiff by proving legal title has raised the presumption under this section that he has been in possession within twenty years the presumption operates to satisfy the requirements of § 1-39 so that the plaintiff does not have to prove such possession. The two sections are to be construed together—the defendant must show that he himself has been in possession adversely for twenty years. *Johnston v. Pate*, 83 N. C. 110 (1880); *Conkey v. Roper Lumber Co.*, 126 N. C. 499, 36 S. E. 42 (1900).

Presumption as to Possession of One Not True Owner.—It was held, in *Ruffin v. Overby*, 88 N. C. 369 (1883): "... every possession of land by one other than the claimant is deemed to be adverse until proof to the contrary is made." And it seems that the holding is in conflict with this section. This may be explained by reference to the fact that the ouster in that case occurred prior to 1868, as it did in *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766 (1891). Thus there is no presumption under the section that the possession of the plaintiffs and those under whom they claim is adverse. *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345 (1904).

There is no presumption that the possession of one under and in subordination to the legal title is adverse, and when the title is thus claimed by adverse possession, or for seven years under color, the burden is upon him who relies thereon to prove possession. *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907).

But even if *Ruffin v. Overby*, 88 N. C. 369 (1883), is in conflict with this section, the section does not profess to be conclusive. The presumption does not arise until the claimant "establishes a legal right to the premises," and not then even,

if "it appears that such premises have been held and possessed adversely to such legal title." *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345 (1904) (dis. op.).

Disability Exception Limited to Persons Having Right of Entry, etc.—Adverse possession relates only to the true title, and the exceptions in this statute as to those under disability can apply only to one having by virtue of his title a right of entry or of action. *Berry v. Lumber Co.*, 141 N. C. 386, 54 S. E. 278 (1906).

Application to Claims from Common Source.—Where the parties claimed title from a common source, the plaintiff's deed being the older, but the defendant's having been recorded first, and possession for many years was in defendant, there being no evidence of the plaintiff ever having possession, this section does not apply. *Mintz v. Russ*, 161 N. C. 538, 77 S. E. 851 (1913).

Burden and Sufficiency of Proof.—The defendant in an action to recover lands, depending upon adverse possession thereof under color of title, where the plaintiff has proved a perfect chain of paper title, has the burden of proving this defense by the greater weight of the evidence, under this section; and while an instruction thereon that the defendant must satisfy the jury thereof has been held sufficient, a further charge in connection therewith, that the defendant need not satisfy the jury by the greater weight of the evidence, is in effect a charge that the jury may be satisfied by less than the greater weight of the evidence, and constitutes reversible error. *Ruffin v. Overby*, 105 N. C. 78, 11 S. E. 251 (1890); *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766 (1891); *Monk v. Wilmington*, 137 N. C. 322, 49 S. E. 345 (1904); *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907); *Steward v. McCormick*, 161 N. C. 625, 77 S. E. 761 (1913); *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862

(1916).

Evidence held sufficient to support directed verdict for the holder of paper title on theory that defendants did not establish title by adverse possession as contemplated by this section and § 1-35, subdivision 2. *Peterson v. Sucro*, 101 F. (2d) 282 (1939).

The use of the word "satisfied" in a charge upon the sufficiency of evidence under this section did not intensify the proof required to entitle the plaintiffs to their verdict.

The weight of the evidence must be with the party who has the burden of proof, or else he cannot succeed. But surely the jury must be satisfied, or, in other words, be able to reach a decision or conclusion from the evidence and in favor of the plaintiff which will be satisfactory to themselves. The plaintiff's proof need not be more than a bare preponderance; but it must not be less. *Frale y v. Fraley*, 150 N. C. 501, 64 S. E. 381 (1909); *State v. McDonald*, 152 N. C. 802, 67 S. E. 762 (1910); *Blue Ridge Land Co. v. Floyd*, 171 N. C. 543, 88 S. E. 862. (1916).

The burden of proving title by sufficient adverse possession is on the defendant in ejectment relying thereon, and where the evidence of the plaintiff has tended to show a perfect chain of paper title, the defendant's title is deemed to be in subordination thereto under this section, and it is reversible error for the trial judge in effect to instruct the jury that the burden of disproving the defendant's evidence is on the plaintiff. *Virginia-Carolina Power Co. v. Taylor*, 194 N. C. 231, 139 S. E. 381 (1927).

Applied in *Johnston v. Pate*, 83 N. C. 110 (1880).

Cited in *Ownbey v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900 (1942).

§ 1-43. Tenant's possession is landlord's.—When the relation of landlord and tenant has existed, the possession of the tenant is deemed the possession of the landlord, until the expiration of twenty years from the termination of the tenancy; or where there has been no written lease, until the expiration of twenty years from the time of the last payment of rent, notwithstanding that the tenant may have acquired another title, or may have claimed to hold adversely to his landlord. But such presumptions shall not be made after the periods herein limited. (C. C. P., s. 26; Code, s. 147; Rev., s. 387; C. S., s. 433.)

Cross Reference.—As to provisions concerning landlord and tenant generally, see §§ 42-1 et seq.

Section Operates as Estoppel.—The plaintiff can prove title by estoppel, as by showing that the defendant was his tenant (or derived his title through his tenant)

when the action was brought. *Melvin v. Waddell*, 75 N. C. 361 (1876); *Conwell v. Mann*, 100 N. C. 234, 6 S. E. 782 (1888); *Mobley v. Griffin*, 104 N. C. 112, 10 S. E. 142 (1889); *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627 (1920).

Section Fixes Maximum Period.—The

presumption which attaches to the possession of a tenant following the termination of tenancy, is only a presumption for the periods limited in the statute, and after the expiration of such periods, the presumption no longer exists. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646 (1926), citing *Melvin v. Waddell*, 75 N. C. 361 (1876).

Loyalty Is to Title and Not to Landlord.—The rule that tenant's possession is possession of the landlord, and that tenant under lease may not maintain an action against his landlord involving title during the period of lease without first surrendering the possession he has under the lease, does not apply where after the renting title of landlord has terminated or has been transferred either to third person or the tenant himself, for, under the doctrine as it now prevails, the loyalty required is to the title, not to the person of the landlord. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263 (1946).

Where tenant acquired the title of his landlord tenant's leasehold estate was merged in the greater estate conveyed by his deed, and thereafter he was under no obligation to recognize his former landlord as such or to surrender possession to him before asserting title thus acquired. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263 (1946).

Section Does Not Apply Where Tenant's Claim Is Based on Landlord's Title.

—The rule that the possession of the tenant is possession of the landlord, precluding adverse possession by tenant without first surrendering the possession he has under the lease, obtains only when tenant seeks to assert a title adverse to that of the landlord or assumes an attitude of hostility to his title or claim of title, and does not obtain where tenant, or those claiming under him, do not assert title hostile to that of the landlord, but are acknowledging, asserting, and relying upon that title, as acquired in due course by them. The strength of his title is the foundation of their claim. *Lofton v. Barber*, 226 N. C. 481, 39 S. E. (2d) 263 (1946).

Establishment of Tenancy—Question of Fact.—Where the plaintiff in ejectment has shown paper title by mesne conveyances from a State grant of the lands in controversy, and the defendant, claiming under sufficient evidence of adverse possession with and without color, and denies a lease introduced by the plaintiff to the defendant's predecessor in title: Held, reversible error for the court to instruct the jury that defendant's possession is conclusively presumed to be that of a tenant for

twenty years under the provisions of this section and exclude evidence of ownership of his predecessor in title during the continuance of the lease and for twenty years thereafter. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646 (1926).

Parol Gift as Rebuttal of Tenancy.—A parol gift of land will not convey title but it will rebut the idea of tenancy and possession under it will ripen into title if continued for twenty years. *Wilson v. Wilson*, 121 N. C. 525, 34 S. E. 685 (1897); *Dean v. Gupton*, 136 N. C. 141, 48 S. E. 576 (1904).

How Tenant May Maintain Action Involving Title.—A tenant under lease may not maintain an action against his lessor involving title during the period of the lease without first surrendering the possession he has under the lease. *Abbott v. Cromartie*, 72 N. C. 292 (1875); *Lawrence v. Eller*, 169 N. C. 211, 85 S. E. 291 (1915).

Eviction under Legal Process and Re-Entry.—Although where a tenant has been evicted by legal process and has entered under another claim, etc., the fact may be set up against the landlord and the principle of this section does not apply, if the eviction is the result of a collusion and the tenant then enter under the evictor, his property not having been moved from the premises, the court will not permit a defect of the landlord's title but will apply the principle of this section notwithstanding the eviction. *Pate v. Turner*, 94 N. C. 47 (1886).

Effect of Failure of Landlord to Prove Title.—Where the plaintiff fails to show any title in himself, and relies entirely on estoppel by this section, the judgment should be limited to a recovery of the possession, leaving the tenant free to assert any title he may have in another action. *Benton v. Benton*, 95 N. C. 559 (1886).

Competency of Evidence Respecting Tenancy.—Where a defendant in partition proceedings claims title by adverse possession, evidence that defendant entered as tenant is competent. *Alexander v. Gibbon*, 118 N. C. 796, 24 S. E. 748 (1896); *Shannon v. Lamb*, 126 N. C. 38, 35 S. E. 232 (1900); *Hatcher v. Hatcher*, 127 N. C. 200, 37 S. E. 207 (1900); *Bullock v. Bullock*, 131 N. C. 29, 42 S. E. 458 (1902).

Application to Tenants in Common.—Where a tenancy in common is shown, the possession of one is the possession of all—and the rule is the same, when one enters to whom a tenant in common has by deed attempted to convey the whole land. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

The ouster of one tenant in common by

another will not be presumed from an exclusive use of the common property and appropriation of the profits, for less period than twenty years; and the result is not changed when one enters to whom a tenant in common has by deed attempted to convey the entire tract. *Roscoe v. Roper Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

Evidence that a tenant in common with defendant in ejectment claiming the locus in quo by adverse possession, paid rent to another, prior to the existence of the cotenancy, is not evidence that the defendant entered into possession under the title of such other person. *Virginia-Carolina Power Co. v. Taylor*, 191 N. C. 329, 131 S. E. 646 (1926).

§ 1-44. No title by possession of right of way.—No railroad, plank road, turnpike or canal company may be barred of, or presumed to have conveyed, any real estate, right of way, easement, leasehold, or other interest in the soil which has been condemned, or otherwise obtained for its use, as a right of way, depot, stationhouse or place of landing, by any statute of limitation or by occupation of the same by any person whatever. (R. C., c. 65, s. 23; C. C. P., s. 29; Code, s. 150; Rev., s. 388; C. S., s. 434.)

Reason for Section.—The provisions of this section are justified upon the ground that the right of way is dedicated to a public use and for this reason is protected against loss by adverse possession. One using the right of way is at most a permissive licensee. *Carolina, etc., R. Co. v. McCaskill*, 94 N. C. 746 (1886); *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906); *Muse v. R. R. Co.*, 149 N. C. 443, 63 S. E. 102 (1908).

When Section Applies.—This section applies, it would seem, only after the company has acquired and taken possession of a right of way and has no application where there is merely an executory contract. The decisions seem to go the length of holding that the section does not apply unless the company has operated the road. See *May v. Atlantic, etc., R. Co.*, 151 N. C. 388, 66 S. E. 310 (1909).

So the grant to a railroad company of an undefined or "floating" right of way over the owner's lands is of an executory nature, and where no consideration has been paid by the company, the right may be lost by lapse of ten years upon failure of entry and of location by the company. *Wiley v. Norfolk, etc., R. Co.*, 96 N. C. 408, 1 S. E. 446 (1887); *Hemphill v. Annis*, 119 N. C. 518, 26 S. E. 152 (1896); *May v. Atlantic, etc., Co.*, 151 N. C. 388, 66 S. E. 310 (1909).

Before this section can apply the company must have secured or acquired the right of way either by condemnation or

A delay by feme covert, tenant in common, for three years and a few months after the death of her husband, and for seven years and a few months after the falling in of the life estate of her father does not raise a presumption of an actual ouster by her cotenants in common, so as to defeat her title, and under the statute of limitations bar her action. *Day v. Howard*, 73 N. C. 1 (1875).

Principle stated in *McNeill v. Fuller*, 121 N. C. 209, 28 S. E. 299 (1897); *Prevatt v. Harrelson*, 132 N. C. 250, 43 S. E. 800 (1903).

Cited in *Pitman v. Hunt*, 197 N. C. 574, 150 S. E. 13 (1929); *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941).

otherwise and an executory contract to convey is not sufficient to meet the requirement. Even if an instrument is drawn for the purpose of making the conveyance it must meet the formalities required of such an instrument or it will be deemed insufficient for the purpose of bringing it within the purview of this section. *Beattie v. Carolina R. Co.*, 108 N. C. 425, 12 S. E. 913 (1891).

Same—Where Grant Presumed by Charter.—Where a company acquired an easement by a provision of its charter and not by condemnation or purchase, it would seem that the principle of this section applies so that although a part of its right of way might be used by the owner it has a right of entry whenever it needs the property for its use. *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746 (1886); *Railroad v. Sturgeon*, 120 N. C. 225, 26 S. E. 779 (1897); *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906); *Earnhardt v. Sou. R. Co.*, 157 N. C. 358, 72 S. E. 1062 (1911).

Effect of Section.—Under this section the possession by the defendants of the land covered by the right of way cannot operate as a bar to or be the basis for any presumption of abandonment by the railroad of its right of way. *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

The title of the railroad to the right of way once acquired, can not be lost by occupancy as to any part of it by the lapse of time. *Carolina Central R. Co. v. Mc-*

Caskill, 94 N. C. 746 (1886); Purifoy v. Richmond, etc., R. Co., 108 N. C. 100, 12 S. E. 741 (1891).

Same—Effect of Permitting Improvements.—Mere silence while a trespasser is improving real estate as if it was his own, while it may sustain a claim for the value of such improvements when made in good faith, cannot be allowed to transfer the property itself to such trespasser. *Carolina Central R. Co. v. McCaskill*, 94 N. C. 746 (1886).

Effect upon Power of State, etc., to Change Grade.—This section does not affect the State or a municipality in the assertion of its right to require a railroad company to change the grade of its roadbed where it is crossed by streets, so that public travel and drainage may not be impeded. *Atlantic, etc., R. v. Goldsboro*, 155 N. C. 356, 71 S. E. 514 (1911), *aff'd* 232 U. S. 548, 34 S. Ct. 364, 58 L. Ed. 721.

§ 1-45. **No title by possession of public ways.**—No person or corporation shall ever acquire any exclusive right to any part of a public road, street, lane, alley, square or public way of any kind by reason of any occupancy thereof or by encroaching upon or obstructing the same in any way, and in all actions, whether civil or criminal, against any person or corporation on account of an encroachment upon or obstruction or occupancy of any public way it shall not be competent for a court to hold that such action is barred by any statute of limitations. (1891, c. 224; Rev., s. 389; C. S., s. 435.)

Prior Law.—Prior to the enactment of this section title to lands by adverse possession could be acquired against a State or a municipal corporation, which is a political agent of the State; and where before the enactment of this statute sufficient possession of the character required had ripened the title to a part of a street of a city under what are now §§ 1-30, 1-35, as construed by the decisions of our Supreme Court, the municipality may not reassert the lost ownership except under the power of eminent domain vested in it by the law and for the public benefit. *Threadgill v. Wadesboro*, 170 N. C. 641, 87 S. E. 521 (1916).

For cases decided prior to section, see *Crump v. Mims*, 64 N. C. 767 (1870); *State v. Long*, 94 N. C. 896 (1886); *Moose v. Carson*, 104 N. C. 432, 10 S. E. 689 (1889); *Turner v. Com.*, 127 N. C. 153, 37 S. E. 191 (1900).

Same—Effect of Section upon Title Acquired.—Where an owner has acquired title by adverse possession to a part of a street under the Code of 1868 and the construction placed thereon by the decisions of the Supreme Court, the reversal of the principle thereafter by this court cannot disturb the title theretofore acquired. *Threadgill v. Wadesboro*, 170 N. C. 641,

Section Not Applicable.—An incorporated city or town may obtain title to streets located upon the right of way of a railroad company by long and continuous, open, and adverse use thereof for such purpose, and where the city has so used the land for a long period of time there is a presumption of an original condemnation by the city, and this section has no application as to the rights of municipalities to acquire the land. In the Matter of Assessment against Property of Southern Ry. Co., 196 N. C. 756, 147 S. E. 301 (1929).

Cited in *Durham v. R. R.*, 104 N. C. 261, 10 S. E. 208 (1889); *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741 (1891); *Bass v. Roanoke, etc., Power Co.*, 111 N. C. 439, 16 S. E. 402 (1892); *Loven v. Parson*, 127 N. C. 301, 37 S. E. 271 (1900); *Railroad v. Olive*, 142 N. C. 257, 55 S. E. 263 (1906).

87 S. E. 521 (1916).

Application of Section.—Possession of the street by any one claiming it adversely cannot divest or destroy the right of the public therein. The court, in *Moose v. Carson*, 104 N. C. 432, 10 S. E. 689 (1889), seems to have overlooked what was decided in *State v. Long*, 94 N. C. 896 (1886), with respect to the effect of adverse possession of a highway upon the right of the public or the citizen therein prior to this section. *State v. Godwin*, 145 N. C. 461, 59 S. E. 132 (1907).

Where a county entered into the possession of a square for the public use before this section, the provisions of this section will not permit the plaintiff to acquire title thereto by adverse possession under a deed purporting to convey a part thereof. *Gates County v. Hill*, 158 N. C. 584, 73 S. E. 804 (1912).

A right to maintain a building on a navigable stream which obstructs the operation of a draw in a county bridge cannot be acquired by adverse user by virtue of this section. *Lenoir County v. Crabtree*, 158 N. C. 357, 74 S. E. 105 (1912).

Same—Curing Erroneous Charge.—An erroneous charge that the title to an open square, dedicated to and accepted by a town, would be acquired by seven years

adverse possession, contrary to the provisions of this section, is not cured alone by a full and complete charge on the principles of an offer to dedicate and an acceptance of the square by the town. *Atlantic, etc., R. Co. v. Dunn*, 183 N. C. 427, 111 S. E. 724 (1922).

Applies Only to Streets Acquired by Municipality.—The principle of law of this section applies only to such streets as the municipality has acquired and not to land offered to be dedicated by a private citizen for use as streets when such offer of dedication has not been accepted by the municipality before the offer has been unequivocally withdrawn. *Gault v. Lake Waccamaw*, 200 N. C. 593, 158 S. E. 104 (1931).

Sections Construed with This Section.—Construing § 146-91 providing that no statute of limitation shall affect the title or bar the action of one claiming it under an assignment from the State Board of Education, etc., with §§ 1-30, 1-35, and this section, it is held, that the limitations as to color for twenty-one years, and without for thirty years, do not apply to personal

actions after the State has parted with her title to the lands; and the three-year statute to recover damages for trespass in cutting and removing trees from the land applies under the facts in this case. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Possession Prior to Enactment.—When sufficient adverse possession of a street of an unincorporated town by the present owners and those claiming under them had been shown, for thirty-five years prior to the enactment of this section the right of the town to the use of the street was barred by the statute of limitations. *Tadlock v. Mizell*, 195 N. C. 473, 132 S. E. 713 (1928).

Property Conveyed to Trustees for Municipal Purposes.—Where property was conveyed to trustees for the benefit of members of the community for use as a community house or playground, this section does not apply. *Carswell v. Creswell*, 217 N. C. 40, 7 S. E. (2d) 58 (1940).

Cited in *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606 (1945).

ARTICLE 5.

Limitations, Other than Real Property.

§ 1-46. Periods prescribed.—The periods prescribed for the commencement of actions, other than for the recovery of real property, are as set forth in this article. (C. C. P., s. 30; Code, s. 151; Rev., s. 390; C. S., s. 436.)

Statute Affects Remedy Only.—The statute of limitations relates only to remedy, and the defendant is never afforded an opportunity of relying upon it until the plaintiff resorts to his remedy, either by action on the judgment, or motion in the nature of scire facias to revive it. *Berry v. Corpening*, 90 N. C. 395 (1884).

Same—Defenses against Former Statute.—Since the prior law was not an absolute bar to actions, but merely raised a presumption of payment which might be rebutted, the question of changed residence, destitution or insolvency of debtor and other such questions were material in rebutting the presumption raised, but under the present law are immaterial for such purposes since the present statutes totally bar the action. See *Campbell v. Brown*, 86 N. C. 376 (1882).

Actions for Which No Statutes.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890). Nor is there

any statute applicable to the probate of wills. In *re Dupree's Will*, 163 N. C. 256, 79 S. E. 611 (1913).

Application of Statutes to Trust Relations.—Where a partner receives firm money in winding up the affairs of the partnership in pursuance of an agreement that he so receives such funds, he holds them in trust for the other partners and the statutes do not run. *McNair v. Ragland*, 7 N. C. 139 (1819).

Suspension of Statutes.—The statute of limitation does not run when there is no one in esse capable of suing. *Grant v. Hughes*, 94 N. C. 231 (1886).

Effect of Change of Period by Amendment.—A reasonable time for the commencement of an action before the statute changing the period works a bar, *Nichols v. R. R.*, 120 N. C. 495, 26 S. E. 643 (1897), shall be the balance of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years had elapsed before the amending act, then two years more

would be a reasonable time. If three years time would bar the action and three years had elapsed, as in the present case, before the amending act is passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294 (1897).

Effect of Failure to Plead Particular Section. — Defendant's allegations that plaintiff's cause of action on bond coupons had accrued more than ten years prior to the institution of the action and was barred under the provisions of this section, is a sufficient pleading of statute of limitations, although no specific reference is

made to the particular sections of the statute applicable. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610 (1946).

Burden of Proof. — Where defendant sufficiently pleads the statute of limitations the burden is upon plaintiff to show that his action was commenced within the time permitted by the statute, and upon his failure to do so, nonsuit is proper. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610 (1946).

Quoted in *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606 (1945).

Cited in *Copley v. Scarlett*, 214 N. C. 31, 197 S. E. 623 (1938); *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

§ 1-47. Ten years.—Within ten years an action—

1. Upon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition. No such action may be brought more than once, or have the effect to continue the lien of the original judgment.

2. Upon a sealed instrument against the principal thereto.

3. For the foreclosure of a mortgage, or deed in trust for creditors with a power of sale, of real property, where the mortgagor or grantor has been in possession of the property, within ten years after the forfeiture of the mortgage, or after the power of sale became absolute, or within ten years after the last payment on the same.

4. For the redemption of a mortgage, where the mortgagee has been in possession, or for a residuary interest under a deed in trust for creditors, where the trustee or those holding under him has been in possession, within ten years after the right of action accrued.

5. For the allotment of dower upon lands not in the actual possession of the widow following the death of her husband. (C. C. P., ss. 14, 31; Code, s. 152; Rev., s. 391; C. S., s. 437; 1937, c. 368.)

I. In General.

II. Subs. (1). Judgments and Decrees.

III. Subs. (2). Sealed Instruments.

IV. Subs. (3). Mortgage Foreclosure.

V. Subs. (4). Redemption of Mortgage.

I. IN GENERAL.

Editor's Note.—The 1937 amendment added subsection 5 to this section.

For discussion of the effect of the amendment, see 15 N. C. Law Rev. 354 and for comment on section, see 11 N. C. Law Rev. 220; 22 N. C. Law Rev. 146.

Law Prior to Section.—It was said of the statute of presumption immediately preceding this section that, "its obvious policy, as said in *Ingram v. Smith*, 41 N. C. 97 (1849), is to insist peremptorily on diligence in all cases to which it has any application, and it is one which the courts must fairly carry out. So emphatically is it a statute of repose, that no saving is made in it of the rights of infants, *femes covert*, or persons *non compos*." *Hamlin*

v. Mebane, 54 N. C. 18 (1853); *Hodges v. Council*, 86 N. C. 181 (1882); *Headen v. Womack*, 88 N. C. 468 (1883).

The presumption was not conclusive; it might have been rebutted by any pertinent proof, and such proof was presumed by the appellate court where there was no complaint of the finding of fact by the court. *In re Walker*, 107 N. C. 340, 12 S. E. 136 (1890).

Though not strictly a statute of limitations, the section was so denominated in a general sense, and hence it was made a part of the chapter denominated in the Revised Code "Limitations." And although it did not create an absolute bar, it did, in a sense, create a conditional bar. *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512 (1887).

Same—Effect of Present Section.—This section has taken the place of the former statute of presumptions, Revised Code, c. 65, § 18 in respect to judgments. *Brown*

v. Harding, 171 N. C. 686, 89 S. E. 222 (1916).

Retroactive Effect.—This statute did not apply to actions commenced before August, 1868, or where the right of action accrued before that date. Gaither v. Sain, 91 N. C. 304 (1884).

A limitation is inflexible and unyielding; it ceases to operate only in the way and for the cause prescribed by the statute. Brown v. Harding, 171 N. C. 686, 89 S. E. 222 (1916).

Application Limited to Actions or Suits

—Power of Sale.—The statute was intended to apply only to actions or suits, and this is apparent from the very language of the law. In a case where it became necessary to decide whether a sale under a power was a suit or an action within the meaning of a statute it was held that a proceeding to foreclose a mortgage by advertisement is not a suit. Such a proceeding is merely an action of the mortgagee exercising the power of sale given him by the mortgagor. In no sense is it a suit in any court, and all the definitions of that word require it to be a proceeding in some court. Cone v. Hyatt, 132 N. C. 810, 44 S. E. 678 (1903); Miller v. Coxe, 133 N. C. 578, 45 S. E. 940 (1903).

The legislature has prescribed ten years as the limitation to an action upon a judgment, but it has made no provision for a party to avail himself of its protection when there is no action or proceeding in the nature of an action taken against him. Berry v. Corpening, 90 N. C. 395 (1884).

Same—Leave to Issue Execution.—A proceeding for leave to issue execution on a judgment charging lands with owelty in partition is an "action" within the meaning of the statute of limitations. Ex parte Smith, 134 N. C. 495, 47 S. E. 16 (1904).

Sufficiency of Plea of Section.—An answer alleging "that the plaintiff has not brought his action within the time prescribed by law, and the same is barred by the statute of limitations," is a sufficient plea of the statute of limitations. Pemberton v. Simmons, 100 N. C. 316, 6 S. E. 122 (1888).

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of limitations is available to plaintiff as a valid defense to the affirmative claim of offset

pleaded by defendant. Perry v. First Citizens Bank & Trust Co., 223 N. C. 642, 27 S. E. (2d) 636 (1943).

Duty to Consider Unsatisfactory Plea.

—Although the plea of this section was indefinite and unsatisfactory, it was the duty of the court below to have considered and determined it, and a failure to do so was held to be error. Proctor v. Proctor, 105 N. C. 222, 10 S. E. 1036 (1890).

Effect of Part Payment.—A partial payment voluntarily made does not remove the statutory bar. McDonald v. Dickson, 87 N. C. 404 (1882).

Effect of Making or Adding Parties.—

Where this section applies, its provisions are not affected by the fact that additional parties to the action, ordered by the Supreme Court, had not been made before a succeeding term of the superior court, and the judge had thereupon ordered a discontinuance of the action, from which there was no appeal. Geitner v. Jones, 176 N. C. 542, 97 S. E. 494 (1918).

Evidence as to Running.—Evidence as to the running of this statute can have no pertinency where but little more than three years has elapsed. Wilcoxon v. Logan, 91 N. C. 449 (1884).

Applied in Serls v. Gibbs, 205 N. C. 246, 171 S. E. 56 (1933); **Farmville v. Paylor,** 208 N. C. 108, 179 S. E. 459 (1935); **Davis v. Cockman,** 211 N. C. 630, 191 S. E. 322 (1937); **Allsbrook v. Walston,** 212 N. C. 225, 193 S. E. 151 (1937); **Bell v. Chadwick,** 226 N. C. 598, 39 S. E. (2d) 743 (1946); **Layden v. Layden,** 228 N. C. 5, 44 S. E. (2d) 340 (1947); **North Carolina Joint Stock Land Bank v. Bland,** 231 N. C. 26, 56 S. E. (2d) 30 (1949).

Cited in Usry v. Suit, 91 N. C. 406 (1884); **Wilcoxon v. Logan,** 91 N. C. 449 (1884); **Sikes v. Parker,** 95 N. C. 232 (1886); **Williams v. McNair,** 98 N. C. 332, 4 S. E. 131 (1887); **In re Gibbs,** 205 N. C. 512, 171 S. E. 55 (1933); **Furr v. Trull,** 205 N. C. 417, 171 S. E. 641 (1933); **Davis v. Alexander,** 207 N. C. 417, 177 S. E. 417 (1934); **Ritter v. Chandler,** 214 N. C. 703, 200 S. E. 398 (1939); **Ownbey v. Parkway Properties,** 221 N. C. 27, 18 S. E. (2d) 710 (1942); **Raleigh v. Mechanics, etc., Bank,** 223 N. C. 286, 26 S. E. (2d) 573 (1943); **Lee v. Rhodes,** 231 N. C. 602, 58 S. E. (2d) 363 (1950).

II. SUBS. (1). JUDGMENTS AND DECREES.

Prior Law.—This statute of presumptions Revised Code, c. 65, § 18, the former law corresponding to this section, which

declared that judgments, decrees, etc., should be presumed to be satisfied within ten years, was not conclusive. In *re Walker*, 107 N. C. 340, 12 S. E. 136 (1890).

A decree in proceedings for partition had in 1861, adjudging owelty of partition against certain shares of the land divided, was subject to the statute of presumptions, which corresponded to this section, because this section is not retroactive. *Herman v. Watts*, 107 N. C. 646, 12 S. E. 437 (1890).

If there are valid subsisting judgments for the unpaid mortgage debt and the vendee does not deny the liability, the assignee of a joint vendor cannot insist upon the statute of presumption of payment from lapse of time as to the original debt, nor upon a bar by the act of limitations, as to the reduced debt assumed by the assignee of the vendee. *Ely v. Bush, etc., Co.*, 89 N. C. 358 (1883).

There is therefore no analogy which makes the decisions under the former precedents applicable to the present law (since the Code of Civil Procedure in 1868) inasmuch as they relate entirely to rules of evidence and not to the removal of a statutory bar where the action is upon a bond or judgment. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Statute Strictly Construed.—A statute so entirely in derogation of common right as is the statute of limitations, should be strictly construed, and under it a judgment should not be treated as a contract, because it does not come within the necessity of that term. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Retroactive Effect.—A judgment rendered before, though docketed after, the adoption of the Code of Civil Procedure, was subject only to a presumption of satisfaction, and not to the statute of limitations as prescribed in the Code. *Johnston v. Jones*, 87 N. C. 393 (1882).

Section Operates as Bar.—This section fixes the current period of ten years as that which terminates the lien of a judgment, and operates as a bar to a new action upon it. *McDonald v. Dickson*, 85 N. C. 248 (1881).

An action to enforce the lien of a judgment by condemning the land of the judgment debtor to be sold is not an action upon a judgment within the purview of subsection (1), but even if the statute were applicable it would not have the effect of continuing the lien of the judgment beyond the ten-year period prescribed by § 1-234. *Lupton v. Edmundson*, 220 N. C. 188, 16 S. E. (2d) 840 (1941).

Significance of Transcribing Justice's Judgment to Superior Court.—A creditor having a judgment in a justice's court may keep his judgment altogether in that court, and rely alone on such process for its enforcement as a justice of the peace may issue; and if he so do, the bar of § 1-49 will apply to it at the end of seven years, unless before that time he sues and obtains a new judgment as he lawfully may do; but if he elect to have a transcript docketed in the superior court, and it is done, then all right of execution in the justice's court is renounced and in lieu thereof, the creditor has the more efficient and far reaching executions and process of the superior court. *Broyles v. Young*, 81 N. C. 315 (1879).

The transcript of a justice's judgment docketed in the superior court becomes, for the purpose of lien and execution, a superior court judgment and is subsequent to the ten-year limitation notwithstanding § 1-49. *Broyles v. Young*, 81 N. C. 315 (1879).

Land is not relieved under this section of a judgment lien by the mere transfer of the debtor's title. But it has been held that "the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun but not completed before the expiration of ten years." *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642 (1935), citing *Hyman v. Jones*, 205 N. C. 266, 171 S. E. 103 (1933).

Application to Foreign Judgments.—This section applies to foreign judgments. *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212 (1900).

A cause of action on a judgment accrues from the date of its rendition. *Rodman v. Stillman*, 220 N. C. 361, 17 S. E. (2d) 336 (1941).

When Statute Begins to Run—Judgment for Costs.—A judgment for costs is considered part of the first judgment where the costs were first levied against the plaintiff but were later adjudged against the defendant, and there is no bar except from the lapse of ten years under par. (1) of this section. *Owen v. Paxton*, 122 N. C. 770, 30 S. E. 343 (1898).

Same—At Time of Judgment or Confirmation of Sale.—Where an action is instituted to recover the amount due on a note and to foreclose the mortgage securing the same and judgment is rendered on the debt, an order being made for the sale of the land, which sale was later reported and confirmed, the statute of limi-

tations began to run at the date of the money judgment and not from the date of the confirmation of the sale. *McCaskill v. McKinnon*, 121 N. C. 192, 28 S. E. 265 (1897).

Same—Judgment for a Devastavit against Executor.—When an action is brought against an executor or administrator for a devastavit, and a judgment is obtained against him, the cause of action accrues at the time of the qualification, and the law in force at the time governs, but when the action is brought after the death of the executor, the cause of action accrues as against his real and personal representative, when such representative qualifies and gives notice to creditors. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887).

Same—Alimony Payable Annually.—In an action on a judgment for alimony, payable annually, the annual sums are barred within ten years from the time they become due under this section. *Arrington v. Arrington*, 127 N. C. 190, 37 S. E. 212 (1900).

Stopping the Statute.—Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten-year statute of limitations. *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424 (1942).

Effect of Judgment upon Contract or Tort.—A cause of action on contract or tort loses its identity when merged in a judgment; and thereafter a new cause of action arises out of the judgment. *McDonald v. Dickson*, 87 N. C. 404 (1882).

Period of Statute—Effect of Admission of Claim by Administrator.—A claim reduced to judgment is barred by the ten-year statute of limitation unless the claim was admitted by the administrator, or action was brought upon it, in one year after the expiration of the ten years on the appointment of administrator as prescribed by statute. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889).

Same — Specialties Reduced to Judgments.—Specialties, when reduced to judgments, are merged, and the statute barring judgments will then apply. *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889).

Effect of Issuing Executions During Period.—The statute of limitations may be set up as a defense by an administrator to a motion for leave to issue execution after ten years from the date of docketing a judgment against his intestate and this although executions have regularly been issued within each successive period of three years after the judgment was docketed. *Berry v. Corpening*, 90 N. C. 395 (1884).

The words “any state” must be taken to mean the judgment of a court of any state including our own. But it could make no material difference, even if not construed to include this State, since, by § 1-56, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. *McDonald v. Dickson*, 85 N. C. 248 (1881).

Effect of Payment on Judgment.—A payment on a judgment does not arrest the running of the statute of limitations. *McCaskill v. McKinnon*, 121 N. C. 192, 28 S. E. 265 (1897).

A partial payment on a judgment does not arrest the running of the statute of limitations. *Hughes v. Boone*, 114 N. C. 54, 19 S. E. 63 (1894).

Comparison of Effect of Application of § 1-56 with This Section.—It can make no difference whether subsection 1 of this section or § 1-56 applies. The result will be the same in either case. *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16 (1904).

Application to Issuance of Execution.—The issuing of an execution on a decree charging owelty in partition is barred within ten years. *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16 (1904).

The statute of limitations is a proper plea and a complete bar to a motion for leave to issue execution on a judgment, when such motion is made more than ten years after the rendition of such judgment. *McDonald v. Dickson*, 85 N. C. 248 (1881).

III. SUBS. (2). SEALED INSTRUMENTS.

Section Operates upon Remedy.—This section limits the time within which actions may be brought and thus operates upon the remedy and not the right. The bar of the statute on a sealed promissory note is of that character, and while it takes away the forum for the enforcement of the note, it does not destroy the debt. *Demai v. Tart*, 221 N. C. 106, 19 S. E. (2d) 130 (1942).

When Statute Begins to Run—Breach of Warranty.—In an action for breach

of a covenant of warranty the statute of limitation begins to run when there is an ouster of the grantee. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

Same—Breach of Covenant of Seizin.—In an action for damages for breach of covenant of seizin the statute of limitations begins to run upon delivery of the deed. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

Same—Coupons of Bonds.—The statute of limitations begins to run against coupons of bonds at the maturity, not of the bonds, but of the coupons. *Threadgill v. Commissioners*, 116 N. C. 616, 21 S. E. 425 (1895).

Where bond coupons are negotiable in form and payable to the bearer, and have been detached from the bonds and the bonds sold, the statute of limitations begins to run against each of them from their respective dates of maturity, and in such instance a contention that the coupons were incident to the principal obligation of the bond and were valid during the life of the bond is untenable. *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610 (1946), distinguishing *Knight v. Braswell*, 70 N. C. 709 (1874).

Same—Guaranty under Seal.—An action upon a guaranty under seal is not barred until ten years after the cause of action accrues. *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175 (1890).

Application to Sureties.—This subsection is not applicable to actions against sureties. The use of the word "principal" and the omission of the word "sureties" clearly indicates this to be the intention of the legislature. Section 1-52, subs. (1) is applicable to sureties and the action against them is limited to three years. *Welfare v. Thompson*, 83 N. C. 279 (1880); *Redmond v. Pippen*, 113 N. C. 90, 18 S. E. 50 (1893); *Barnes v. Crawford*, 201 N. C. 434, 160 S. E. 464 (1931); *North Carolina Bank, etc., Co. v. Williams*, 208 N. C. 243, 180 S. E. 81 (1935); *North Carolina Bank, etc., Co. v. Williams*, 209 N. C. 806, 185 S. E. 18 (1936).

Guarantor as Principal under Section.—Neither the spirit nor the letter of this section makes a guarantor principal to the original obligation. *Coleman v. Fuller*, 105 N. C. 328, 11 S. E. 175 (1890) (dis. op.).

Application to Bills, Notes, etc.—The prior law, as does this section, embraced "single bills," as well as promissory notes and other demands therein designated. *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512 (1887).

An action on a note under seal against the endorser on the note is ordinarily barred after three years from maturity of the note, by § 1-52, subs. 1, even though the endorsement is itself also under seal, an endorser not being a principal to the note so as to come within the provisions of this section, prescribing a ten-year period "upon a sealed instrument against the principal thereto." *Howard v. White*, 215 N. C. 130, 1 S. E. (2d) 356 (1939).

Where the note contained the word "seal" opposite the signature it was held to be conclusive as to the nature of the instrument. Therefore this section controls as to the time within which an action might be brought. *Federal Reserve Bank v. Kalin*, 81 F. (2d) 1003 (1936).

Where plaintiff offered in evidence a note, apparently executed by defendant and another as joint obligors, with the word "seal" in brackets opposite the name of each, nothing else appearing, this would repel the three-year statute of limitations, as sealed instruments against principals are not barred until lapse of ten years. *Lee v. Chamblee*, 223 N. C. 146, 25 S. E. (2d) 433 (1943).

Where action was instituted on note under seal on 10 February, 1943 and last payment had been made upon the note on 1 October, 1933, the action was not barred by this section as the statute commenced again to run from the day when the last payment was made. *Sayer v. Henderson*, 225 N. C. 642, 35 S. E. (2d) 875 (1945), citing *Green v. Greensboro Female College*, 83 N. C. 449, 35 Am. Rep. 579 (1880).

Application to Bonds—Former Law.—The corresponding section of the former law was construed to embrace single bonds, though they were not named in terms. *Rogers v. Clements*, 98 N. C. 180, 3 S. E. 512 (1887).

The presumption of payment of a bond arises after ten years from the time the right of action accrues, and the provisions of § 1-26 do not apply. *Hall v. Gibbs*, 87 N. C. 4 (1882).

Same—Section Not Retroactive.—A bond for the payment of money executed prior to this section, by the principal and his sureties is exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N. C. 709 (1874).

Conditions Repelling Statute—Set-off.—A set-off in favor of the obligor is not a part payment as to an endorser and does not repel the statute. *Woodhouse v. Simmons*, 73 N. C. 30 (1875).

Power of Sale in Deed of Trust.—See generally, *Merrimon v. Postal Tel.-Cable Co.*, 207 N. C. 101, 176 S. E. 246 (1934).

Whether Note under Seal as a Question of Law or Fact.—While ordinarily the bar of the statute of limitations is a mixed question of law and fact, where, in an action on a note, the plea of the statute is based upon defendant's contention that the note was not under seal, but defendant offers no evidence in support of his contention that he did not adopt the printed word "seal" appearing on the note after his name as maker, the question of the statute becomes a matter of law, and the court properly refuses to submit an issue as to whether the action was barred. *Currin v. Currin*, 219 N. C. 815, 15 S. E. (2d) 279 (1941).

IV. SUBS. (3). MORTGAGE FORECLOSURE.

The prior law corresponding to this section created a presumption that after ten years the mortgage was presumed to have been satisfied which might have been rebutted and did not operate to absolutely bar the right. *Pemberton v. Simmons*, 100 N. C. 316, 6 S. E. 122 (1888).

Only Limitation upon Right to Foreclose.—This section is the only limitation upon the mortgagee's right of action for foreclosure or sale. *Parker v. Banks*, 79 N. C. 480 (1878).

The institution of suit to foreclose by the mortgagee in possession tolls the operation of this section and the right of the mortgagor to demand an accounting for the rents and profits is not barred during the pendency of the foreclosure suit. *Anderson v. Moore*, 233 N. C. 299, 63 S. E. (2d) 641 (1951).

Prerequisites to Bar.—In order to bar an action for relief under this section two things must concur, namely, the lapse of ten years after the forfeiture or after the power of sale became absolute or after the last payment, and the possession of the mortgagor during that period. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904); *Ownbey v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900 (1942).

Necessity for Possession.—The mere lapse of time, unaccompanied by any possession, does not obstruct the right to foreclose a mortgage. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889), decided under prior statute.

The statutory presumption of abandonment of an equitable claim to land, arising within ten years after the right of action accrues, is fatal to the plaintiffs upon the facts of this case. *Headen v. Wo-*

mack, 88 N. C. 468 (1883).

Same—Remainderman before Lapse of Life Estate.—The actual possession of the life tenant does not inure to the remainderman. Thus, during the continuance of the life estate the latter cannot avail himself of that actual possession as against one who holds a mortgage on his interest for the purpose of barring his right under the mortgage. *Malloy v. Bruden*, 86 N. C. 251 (1882); *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Character of Possession Necessary.—It is impossible to suppose that the legislature intended a constructive possession, for the "mortgagor or grantor" could never have such possession as against a mortgagee. The latter has the right of possession by construction of law, as he has the legal title, and, if a constructive possession was intended, there was no use in requiring possession at all, as, if neither party was in actual possession, the constructive possession would always be in the mortgagee. *Dobbs v. Gullidge*, 20 N. C. 197 (1838); *Williams v. Wallace*, 78 N. C. 354 (1878); *London v. Bear*, 84 N. C. 266 (1881); *Deming v. Gainey*, 95 N. C. 528 (1886); *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889); *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904); *Ownbey v. Parkway Properties*, 222 N. C. 54, 21 S. E. (2d) 900 (1942).

Same—Section Applicable to Exclusion of § 1-56.—Where there is no possession by either party, there can be no running of the statute. If it was intended that § 1-56 should apply where there is no possession by either party, it was utterly useless to insert in subsections (3) and (4) the provision in regard to possession, as the statute under such a construction of § 1-56, would run whether there was any possession or not, and the period of limitation is the same in both sections. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Since this subsection is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before § 1-56 has any application. Such a construction would be a

complete reversal of the will of the legislature as plainly expressed. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

There are several cases decided under § 1-56 in which the principle of § 1-47, sub. 3 has been adopted by analogy, and in which it was held that a party who remains in possession of land is not barred of any equity therein by lapse of time, and that the statute runs only where the other party has had possession. *Smith v. McKee*, 87 N. C. 389 (1882); *Mask v. Tiller*, 89 N. C. 423 (1883); *Thornburg v. Mastin*, 93 N. C. 258 (1885); *Norton v. McDevit*, 122 N. C. 755, 756, 30 S. E. 24 (1898). *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385, 95 Am. St. Rep. 660 (1903) was explained in *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

When Holding Becomes Adverse.—When the mortgagor of property is left in possession, he or his vendee holds it for the mortgagee, and his possession does not become adverse so as to set the statute in motion until condition broken. *Woody v. Jones*, 113 N. C. 253, 18 S. E. 205 (1893).

Absence from State as Suspending Section.—An action to foreclose a mortgage comes within the purview of § 1-21, and the absence of the mortgagor from the State suspends the running of the statute. *Love v. West*, 169 N. C. 13, 84 S. E. 1048 (1915).

Where this subsection 3 is pleaded, the absence of the mortgagor from the State for a year or longer as prescribed in § 1-21 will not be counted, nor will any presumption of payment of the debt be raised within the period allowed for the commencement of the action. *Love v. West*, 169 N. C. 13, 84 S. E. 1048 (1915).

Effect upon Debt Secured.—The provisions of this paragraph only bar an action to foreclose the mortgage, and do not bar an action to recover the debt secured by the mortgage. *Fraser v. Bean*, 96 N. C. 327, 2 S. E. 159 (1887).

Effect of Bar of Debt upon Foreclosure.—The fact that a note is barred by the three-year statute, § 1-52, does not prevent the mortgagee from foreclosing his mortgage securing it, this section being applicable. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

Although an action upon the debt secured by a mortgage may be barred by the lapse of time, the remedy appertaining to the security may be enforced. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87 (1889).

Where a note has not been barred, the foreclosure of a deed in trust, securing it, may be ordered. *Geitner v. Jones*, 176 N. C. 542, 97 S. E. 494 (1918).

A mortgage is an incident of the note it secures, and the statute of limitations will not run against its foreclosure when it has not run against the note. *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383 (1926).

Effect of Payment of Interest.—This section will not bar foreclosure on a deed of trust when, although the debt was due more than 10 years ago, interest has been paid on the debt within 10 years. *Dixie Gro. Co. v. Hoyle*, 204 N. C. 109, 167 S. E. 469 (1933).

Section Not Applicable to Power of Sale.—The execution of a power of sale in a mortgage is not barred by the statute of limitations referring to actions to foreclose mortgages. *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940 (1903).

This section applies to actions for foreclosure of a mortgage or deed of trust and not to foreclosure under a power of sale and to take benefit under such a statute, it must be pleaded. *Spain v. Hines*, 214 N. C. 432, 200 S. E. 25 (1938). See also, 17 N. C. Law Rev. 448.

It is conceded that if it were necessary for the mortgagee to bring an action to invoke the equitable aid of the court to foreclose his mortgage, he would be barred, because in that event he would abandon his power of sale and ask for the intervention of the court, which would be compelled to enforce the statutory bar. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

The theory of the statute is that there has been an abandonment of the right, which will not be presumed unless the party resisting the enforcement of the right has had possession. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Effect of Barring Foreclosure upon Power of Sale.—“The court said in *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385 (1903), ‘It is well settled that an action upon the debt may be barred without affecting the right to maintain an action to foreclose the mortgage given to secure it. *Capehart v. Dettrick*, 91 N. C. 344 (1884). This because the bar of the statute affects only the remedy and not the right,’ and upon this point the court was unanimous.” *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

It was further held in *Menzel v. Hinton*, 132 N. C. 660, 44 S. E. 385 (1903), that

the execution of a power of sale is not within the language of this subsection, the court saying: "It is not necessary for the mortgagee to institute an action for the foreclosure of the mortgage or the execution of the power of sale; hence no time is fixed by the statute within which he must execute the power." *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940 (1903).

But the General Assembly has changed the law in this particular by providing that the power of sale "shall become inoperative, and no person shall execute any such power when an action to foreclose such mortgage or deed of trust for the benefit of creditors would be barred by the statute of limitations," § 45-26 (now § 45-21.12), and this subsection, bars actions to foreclose a mortgage or deed of trust unless commenced within ten years, etc. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

Menzel v. Hinton was followed in *Cone v. Hyatt*, 132 N. C. 810, 44 S. E. 678 (1903), and § 45-26 (now § 45-21.12), which bars a power of sale when foreclosure is barred, was passed to overcome the decisions. *Humphrey v. Stephens*, 191 N. C. 101, 131 S. E. 383 (1926).

The Exercise of a Power of Sale under Mortgage Is Not a Suit.—See *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940 (1903).

Applicability to Consent Judgment Allowing the Equity.—A consent judgment providing that the defendant has an equity to redeem the land upon the payment of a certain sum, on or before a certain day, and if this payment is made on or before that day the plaintiff will convey said land to the defendant, but in case of failure to pay within the time limited, the defendant shall stand absolutely debarred and foreclosed of and from any and all equity or other estate, established the relation of mortgagor and mortgagee, and notwithstanding the provision of strict foreclosure that relation continued to exist after the day of forfeiture and under this subsection ten years' possession of the defendant, after default, bars the plaintiff. *Bunn v. Braswell*, 139 N. C. 135, 51 S. E. 92 (1905).

Necessity of Pleading Section—Waving Objection.—When a party to an action involving the title to lands in dispute contends that a certain mortgage necessary in the paper title of the adverse party, is barred by this subdivision an objection that the same was not specially pleaded is waived when, after the conclusion of the evidence and argument, he obtains permission from the court to open

the case and offer evidence tending to show that the mortgage had been kept in date of payment, thus rendering the issue appropriate and necessary. *Ferrell v. Hinton*, 161 N. C. 348, 77 S. E. 224 (1913).

Section Must Be Specifically Pleaded.—In an action to foreclose a mortgage the ten-year statute of limitations must be specially pleaded. *Stancill v. Spain*, 133 N. C. 76, 45 S. E. 466 (1903).

Power of Grantee to Plead.—The grantees of a mortgagor are entitled to plead, in a foreclosure action, the statute of limitations. *Stancill v. Spain*, 133 N. C. 76, 45 S. E. 466 (1903).

Section Applicable to Mortgage of Surety.—Where a surety executes a mortgage on his own land, an action to foreclose the same is not barred until the expiration of ten years. *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940 (1903).

Applicability to Vendor and Vendee.—While the relation of vendor and vendee is in many respects similar to that existing between mortgagor and mortgagee, this subsection does not embrace actions arising out of executory contracts for sales of land. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87 (1889).

Cancellation of Barred First Mortgage by Second Mortgagee.—A second mortgagee cannot have the first mortgage canceled because it is barred by the statute of limitations. *Miller v. Cox*, 133 N. C. 578, 45 S. E. 940 (1903).

Effect of Part Payment.—Payment on a bond secured by mortgage before it goes out of date, and within ten years before suit brought, will prevent the bar of the statute of limitations, and a purchaser of the land at a mortgage sale will not be barred. *Williams v. Kerr*, 113 N. C. 306, 13 S. E. 501 (1893).

Where partial payment is made on a note secured by deed of trust, action to foreclose the instrument is not barred until ten years from date of such payment. *Smith v. Davis*, 228 N. C. 172, 45 S. E. (2d) 51, 174 A. L. R. 643 (1947).

Part payment operating to start the running of the statute of limitations anew against the right of action to foreclose a mortgage or deed of trust, is any payment on the debt secured by the instrument, and the action to foreclose is not barred within ten years from such payment notwithstanding that the part payment is applied to only one of the notes secured, resulting in the bar of the statute as to an action on the other note. *Demai v. Tart*, 221 N. C. 106, 19 S. E. (2d) 130 (1942).

Sale under Barred Mortgage—Remedy of Mortgagor.—A sale under a mortgage barred by the statute would carry to the purchaser no title. The plaintiff mortgagor being in possession has a full defense to an action for ejectment when brought by the purchaser. *Capehart v. Biggs & Co.*, 77 N. C. 261 (1877); *Fox v. Kline*, 85 N. C. 173 (1881); *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78 (1893).

Where a mortgagor in possession has a full defense to an action for ejectment when brought by a purchaser at a sale under a mortgage barred by the statute of limitations, the court will not interfere by injunction to prevent a sale threatened by the mortgagee. It would be otherwise if there were a contest as to the amount due under the mortgage. *Hutaff v. Adrian*, 112 N. C. 259, 17 S. E. 78 (1893).

Sale While Suit to Foreclose Pending.—Suit to foreclose a duly registered deed of trust was instituted prior to the bar of this section against the trustee, the cestuis and the assigns of the cestuis. While the suit was pending, the assigns of the cestuis sold the property, and upon discovering the transfer, plaintiff had the purchasers made parties. At the time they were made parties the ten-year period prescribed by statute had expired. It was held that the purchasers during the pendency of the foreclosure suit were chargeable with notice thereof and acquired only that interest which their grantors then had, and could not assert the bar of the statute. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942).

Foreclosure Held Only Remedy in Absence of Signed Note.—Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, in the event of default in payment, foreclosure of the deed of trust is the only action maintainable against her. This section, therefore, prescribes the time within which an action may be brought. *Carter v. Bost*, 209 N. C. 830, 184 S. E. 817 (1936).

Applied in *Woody v. Jones*, 113 N. C. 253, 18 S. E. 205 (1893); *McCollum v. Smith*, 233 N. C. 10, 62 S. E. (2d) 483 (1950).

V. SUBS. (4). REDEMPTION OF MORTGAGE.

Applicability to Trust Relation.—The personal representative of a trustee, constituted by a deed in trust, has no right to plead this statute of limitation against

his cestui que trust calling for a settlement of the trust. *Johnston v. Overman*, 55 N. C. 182 (1855).

When Statute Defense to Right to Redeem.—Where the mortgagee is permitted to remain in actual possession of mortgaged land, as mortgagee, for a period of ten years and the mortgage debt has not been paid and no action to foreclose or redeem has been instituted in the meantime, title to the premises will be deemed to be in him, and the ten-year statute of limitations if properly pleaded and relied upon, will be a complete defense to an action to redeem. *Anderson v. Moore*, 233 N. C. 299, 63 S. E. (2d) 641 (1951).

When Statute Begins Running.—Where, in accordance with the agreement expressed in the instrument, the mortgagee enters at once into possession of the lands, the mortgagor's right for an accounting arises when the bond the instrument secures has matured and remains unpaid; and his right of action and that of those claiming under him accrues then, and the mortgagor's right of action is barred by a continued peaceful possession by the mortgagee for ten years therefrom. Section 1-42 does not apply. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

Bar of Right to Redeem Bars Right to Accounting.—When the right to redeem is barred by this section the right to enforce an accounting is likewise barred. *Anderson v. Moore*, 233 N. C. 299, 63 S. E. (2d) 641 (1951).

Necessity for Possession in Mortgagee.—The mere lapse of time, unaccompanied by possession, does not obstruct the right to redeem. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889). Decided under prior statute.

The statute of limitation does not run against a mortgagor in possession of lands by reason of the legal title being in the mortgagee, not in possession. *Caulley v. Sutton*, 150 N. C. 327, 64 S. E. 3 (1909).

This section applies only where the mortgagee or trustee is in possession. The opinion of the court in this case rests upon the ground that it does not apply where the mortgagee or trustee has not been in possession, hence such case necessarily is one not therein "provided for" and falls under § 1-56. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904) (dis. op.). It was held in the main opinion that § 1-56 was not applicable.

Same—Holding under Tenant.—Where

a mortgagee takes adverse possession of, and rents out the mortgaged land, the payments of rent to him by his tenants on the land does not affect the running of the statute of limitations against the mortgagor's right to sue for redemption. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298 (1889).

Nature of Possession.—It is not required that the possession of the mortgagee be adverse in order to bar the mortgagor's action in ten years, under the provisions of this section. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

The prior statute said nothing about an actual possession being essential to the prescribed effect of the lapse of time. Where there was no actual possession the constructive possession followed the legal title, and where such possession was had for more than ten years after the right to redeem accrued, the statute barred the right of redemption. *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889).

But the possession required by this statute must be actual and not merely constructive. *Weathersbee v. Goodwin*, 175 N. C. 234, 95 S. E. 491 (1918). *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210 (1923), for the action to enforce the equity of redemption is barred after the lapse of ten years, from the date on which his cause of action accrued, where the mortgagee has been in the actual possession of the land. *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926). See *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889), and the dissenting opinion.

Possession presumed by virtue of § 1-42 is not sufficient to meet the requirements of this section, par. 4, for although more than ten years have passed since the cause of action accrued, an action for redemption, under this subsection is not barred, unless the mortgagee has during said time been in the actual possession of the land conveyed by the mortgage. *Sim-*

mons v. Ballard, 102 N. C. 105, 9 S. E. 495 (1889); *Cauley v. Sutton*, 150 N. C. 327, 64 S. E. 3 (1909); *McNair v. Boyd*, 163 N. C. 478, 79 S. E. 966 (1913); *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

Effect of Intervening Disability.—

Where the mortgagee sells the mortgaged land, buys it himself, and enters into adverse possession in the lifetime of the mortgagor, the action is barred as against the infant heirs under this section. *Frederick v. Williams*, 103 N. C. 189, 9 S. E. 298 (1889).

Nor did the prior statute contain a saving clause in favor of persons under disabilities. *Houck v. Adams*, 98 N. C. 519, 4 S. E. 502 (1887).

Applicability Where Action Not for Redemption.—The question as to whether the bar of this statute applies to recover lands held under a mortgage, the action not being one to redeem, was raised but not decided. *Weathersbee v. Goodwin*, 175 N. C. 234, 95 S. E. 491 (1918).

Principle Illustrated.—When a mortgagee has been in possession more than thirty years since the execution of the mortgage, the right of redemption is barred. *Gray v. Williams*, 130 N. C. 53, 40 S. E. 843 (1902).

Where the mortgagee has actual possession, either when the cause of action for redemption accrues or where he thereafter goes into and remains continuously in such possession for more than ten years, before an action to redeem is commenced, the statute of limitations, where pleaded and relied upon in the answer, is a complete defense. *Bernhardt v. Hagamon*, 144 N. C. 526, 57 S. E. 222 (1907); *Crews v. Crews*, 192 N. C. 679, 135 S. E. 784 (1926).

Edwards v. Tipton, 85 N. C. 479, (1881), is a case illustrating the application of the prior statute.

Applied in *Hughes v. Oliver*, 228 N. C. 680, 47 S. E. (2d) 6 (1948).

§ 1-48: Transferred to § 1-54, paragraph 6, by Session Laws 1951, c. 837, s. 2.

§ 1-49. Seven years.—Within seven years an action—

1. On a judgment rendered by a justice of the peace, from its date.

2. By a creditor of a deceased person against his personal or real representative, within seven years next after the qualification of the executor or administrator and his making the advertisement required by law for creditors of the deceased to present their claims, where no personal service of such notice in writing is made upon the creditor. A creditor thus barred of a recovery against the

representative of any principal debtor is also barred of a recovery against any surety to the debt. (C. C. P., s. 32; Code, s. 153; Rev., s. 392; C. S., s. 438.)

I. Subsection One.

II. Subsection Two.

Cross References.

As to judgment in a court of a justice of the peace, see §§ 7-166 et seq. As to requirement of advertisement for claims against estate by executor, administrator, etc., see § 28-47. As to personal notice to creditor by executor, administrator, etc., see § 28-49.

I. SUBSECTION ONE.

This section is not retroactive. *Morris v. Syme*, 88 N. C. 453 (1883).

When Statute Begins to Run.—Where a judgment was rendered by a justice of the peace and upon a rehearing granted by him a similar judgment was rendered, the statute of limitations began to run from the date of the later, the first judgment having been vacated. *Salmon v. McLean*, 116 N. C. 209, 21 S. E. 178 (1895).

Judgment Docketed in Superior Court.—A judgment of a justice of the peace, duly docketed in the superior court, becomes a judgment of the superior court in every respect, and may be enforced by execution at any time within ten years from the date of such docketing under § 1-47. *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535 (1890); *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 1001 (1891).

Where the judgment debtor made a motion, within ten years from docketing judgment, for leave to issue execution thereon, which was denied, and thereupon within one year after such denial, but more than ten years from the date of docketing, he brought an action on the judgment, it was held, that the action was barred by the statute of limitations, § 1-25 not being applicable to the facts. *McIlhenny v. Wilmington Sav., etc., Co.*, 108 N. C. 311, 12 S. E. 1001 (1891).

Same—Where Action on Judgment.—In an action upon justice's judgments which have been docketed in the superior court and not merely a motion for executions, the seven-year statute applied and barred a recovery of the claim. *Daniel v. Laughlin*, 87 N. C. 433 (1882); *Oldham v. Rieger*, 148 N. C. 548, 62 S. E. 612 (1908).

An action in the nature of a creditor's bill, brought in the superior court against an executor, for the purpose of an accounting and the payment of a judgment rendered against the testator obtained in a justice's court, is an action upon a judg-

ment of a justice of the peace. *Oldham v. Rieger*, 148 N. C. 548, 62 S. E. 612 (1908).

Application to Surety upon Stay of Execution.—Where one by signing a stay of execution upon a justice's judgment as surety becomes thereby a party to the judgment, the statutory bar of seven years applies to an action brought against the surety upon the judgment. *Barringer v. Allison*, 78 N. C. 79 (1878).

II. SUBSECTION TWO.

Prior Law.—Under the provisions of the Act of 1715, if the debt was due at the death of the debtor, an action must have been brought within seven years from the death, otherwise both the heir and the executor would have been discharged, and if the action arose after the death, the action must have been brought within seven years after the cause of action arose, or the act would have been a bar, provided the personal representative has paid over the assets. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887).

Revised Code c. 65, § 11, provided that creditors should make their claim within seven years after the death of their debtor, or be forever barred; and according to every interpretation which has been put upon its terms, it worked a complete bar to every demand, due at the death of the debtor, upon which suit was thereafter delayed for seven years, provided it appeared that in the meantime the estate had been fully administered, so that nothing remained in the hands of the administrator, with which to satisfy the claim. *Godley v. Taylor*, 14 N. C. 178 (1831); *Cooper v. Cherry*, 53 N. C. 323 (1861); *McKeithan v. McGill*, 83 N. C. 517 (1880); *Morris v. Syme*, 88 N. C. 453 (1883).

Purpose and Effect of Statute.—Our present limitations in favor of estates of deceased persons are unconnected with assets and are intended to stimulate the vigilance of creditors and give repose to the estates of deceased debtors. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

The statute was intended to be restricted to cases where the creditor's action lies against the personal representative as such, e. g., the right to enforce specific performance or some lien or trust not covered by other provisions of the Code. *Smith v. Brown*, 101 N. C. 347, 7 S. E. 890 (1888). This is the only way to avoid the absurdity of barring a cause of action before it arises. When the creditor, seeking merely to col-

lect his debt, is not barred as against the personal representative, he cannot be barred as against the land which that representative is to subject. The liability is that of the land, and not of the heir as such. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

This section applies to an action against a personal, and where necessary, the real representatives to compel the performance of some right of which the debt itself is the foundation. *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342 (1943).

Statute as Absolute Bar.—After the time prescribed in this section, the statute is an absolute bar to creditors. *Lawrence v. Norfleet*, 90 N. C. 533 (1884); *Worthy v. McIntosh*, 90 N. C. 536 (1884); *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889) (dis. op.).

Evidence of Laches. — In *Strayhorn v. Aycock*, 215 N. C. 43, 200 S. E. 912 (1939), plaintiff claimed proceeds of an insurance policy payable to estate of testator and contended that the policy was taken out by him to secure him for funds advanced testator. This action was not instituted until some fourteen years after testator's death. It was held that the rights of creditors having intervened, the record disclosed conduct on the part of the plaintiff barring the action for laches.

When Construed with § 1-52. — While this section standing alone would extend the time "by any creditor of a deceased person against his personal or real representative within seven years," etc., we must take it in connection with § 1-52, which restricts "within three years an action upon a contract, obligation or liability arising out of a contract express or implied, except those mentioned in the preceding sections" (which especially referred to contracts under seal, § 1-47, par. 2, *Joyner v. Massey*, 97 N. C. 148, 1 S. E. 702 (1887)), and with § 1-22. *Redmond v. Phippen*, 113 N. C. 90, 18 S. E. 50 (1893).

Section Confined to Creditors — Construed with § 1-56.—The language of the statute is confined to actions by a creditor, whereas the duty to subject the land rests primarily on the personal representative. It would be anomalous to bar the creditor in seven years under this section and the personal representative in ten years under § 1-56. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

Same — Application to Action for Possession.—This section does not apply to an action, brought to obtain possession of land bought for plaintiff's mother with plaintiff's money but conveyed to the for-

mer, the action being brought against the husband of the grantee after her death. *Norton v. McDevit*, 122 N. C. 755, 30 S. E. 24 (1898).

Same—Application to Suit between Administrators.—Where a suit is brought by one administrator against another, it must be commenced within seven years next after the right of action vests in the plaintiff under his appointment. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

Prerequisite to Running. — The mere lapse of time—seven years—does not create the bar; it must be coupled with the advertisement, or personal notice, and when these have been made, the statute will begin to run from the date of the qualification of the executor or administrator. *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77 (1889).

When Statute Begins to Run.—It was not intended by this statute that the seven years should begin to run from the time of "making the advertisement." If that was the intention of the legislature, they would not in the same connection have employed the words "next after the qualification of the executor or administrator," as that is an event which must precede the advertisement, and which under the provisions of the law may do so by the space of twenty days. To give the act that construction there would be two events and leave it doubtful from which the time is to be computed. *Cox v. Cox*, 84 N. C. 138 (1881).

Suits against an administrator must be brought by creditors of the decedent within seven years next after the qualification of the administrator. The Code, sec. 153. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

This statute is construed in *Cox v. Cox*, 84 N. C. 138 (1881), and it is held that while the advertisement is an indispensable prerequisite to the operation, it is incidental, and the time must be computed from the qualification of the representative. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

Effect of Failure to Present Claim. — Though the failure to present the claims is declared to be an absolute bar (except against those laboring under disabilities), without any qualification as to the advertisement, this statute does not protect an administrator unless he has paid over the assets, and is absolute and positive in denying the remedy as advertised in conformity to the act. *Cooper v. Cherry*, 53 N. C. 323 (1861); *Cox v. Cox*, 84 N. C. 138 (1881).

Significance of Making Advertisement.—

The words "and making the advertisement required by law," etc., were used simply to qualify the provisions of the act, and the act should be construed as if it read "within seven years next after the qualification of the executor or administrator, provided he shall have made the advertisement required by law for creditors of the deceased to present their claims," etc. *Cox v. Cox*, 84 N. C. 138 (1881).

See the dissenting opinion in *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

While the advertisement for creditors to present their claims is an indispensable prerequisite to the operation of this section, yet, as to the time from which the statute begins to run, it is incidental. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

Same — Prerequisites to Pleading by Representatives.—The executor or administrator must show that seven years have transpired after his qualification before the commencement of the action, and that he had advertised as required by law. Without proof of the advertisement, the plea of the statute of limitations cannot avail him. *Cox v. Cox*, 84 N. C. 138 (1881).

An executor or administrator who pleads the statute of limitations under this subsection must show that the seven years have expired next after his qualification before suit brought, and that he has advertised according to law. Without proof of the advertisement, the plea of the statute will not avail him. *Cox v. Cox*, 84 N. C. 138 (1881).

Same—Necessity for Affirmative Plea.—To enable the personal representative of a deceased person to avail himself of the limitations provided in this subsection, he must allege in his plea, and prove upon the trial, that he made the advertisement, or gave the personal notice to the creditors, as prescribed in the statute. *Love v. Ingram*, 104 N. C. 600, 10 S. E. 77 (1889).

Conditions Preventing the Running.—Nothing will defeat the operation of this subsection, except the disabilities mentioned in the Code, or such fraud or other matter of equitable nature, as would make it against conscience to rely on the statute. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887).

The death of the surety and the lapse of a time longer than that prescribed in the statute before the qualification of a personal representative did not suspend the operation of the statute, if the wards could, during that time, have proceeded against the guardian. *Williams v. McNair*, 98 N. C. 332, 4 S. E. 131 (1887).

Pendency of Suit as Suspension.—If an action is brought by a creditor against the personal representative of his deceased debtor within seven years, etc., but by delays in the courts judgment is not obtained until after seven years, the real representative is not protected by the statute of limitations when it is sought to subject the decedent's lands to the payment of such debt. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

So much of the ruling in *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887), as holds that the realty is protected from liability for the debts of the deceased if the statutory period of seven years has expired, even though the creditor had begun proceedings within the seven years against the personal representative to enforce his claim, but by delays in the court had failed to obtain judgment till after that period is overruled. This decision has been much questioned and has been repeatedly shaken, among other cases, see *Woodlief v. Bragg*, 108 N. C. 571, 13 S. E. 211 (1891), and *Smith v. Brown*, 101 N. C. 347, bottom of p. 352, 7 S. E. 890 (1888). It may be noted that its supporting case, *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887), which protected the heir at law by the lapse of seven years from the qualification of the personal representatives, even as to causes of action accruing subsequently to the death of the decedent, was overruled in *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892), thereby establishing the dissenting opinion of Merrimon, J., in *Andres v. Powell* as the correct statement of the law. *Lee v. McKoy*, supra, therefore, overruled the decision in *Syme v. Badger*, which, after the long and repeated consideration given it, seems to have been founded upon a mistaken line of reasoning. See *Smith v. Brown*, pp. 352, 353. Since the obtaining of a judgment against the personal representatives prevents the bar of the statute as to the real representatives, there can be no reason why the latter are not equally prohibited from pleading the statute when the action was begun against the personal representatives within seven years, but by delays in the courts judgment was not had against them until after the lapse of seven years.

The ruling in *Syme v. Badger* would bar a cause of action before the right to sue on it had accrued. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

Same—As against Heirs Where Not Parties.—Where proceedings against the administratrix were instituted within the

seven years after her qualification and making advertisement though the heirs at law were not made parties to the proceedings till after the lapse of seven years, the proceedings, not being barred as to the personal representative, cannot be barred as to the heirs at law by this section. *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

Time of Accrual as Affecting Application.—This subsection contemplates those claims upon which the right of action had accrued at the time of qualification; as to those upon which the right of action subsequently accrues, the statute begins to run from the date of such accrual. *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887), and *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887) distinguished. *Miller v. Shoaf*, 110 N. C. 319, 14 S. E. 800 (1892).

Necessity for Full Administration.—Creditors of a deceased person, whose claims were due at the death of the debtor, are barred after seven years next after letters granted; provided the estate has been fully administered. *Morris v. Syme*, 88 N. C. 453 (1883). Governed by R. C. ch. 65, section 11.

Effect of No Assets in Hands of Representatives.—This statute is an absolute bar unless suit is brought within the time

specified, whether there be assets or not in the hands of the representative. *Lawrence v. Norfleet*, 90 N. C. 533 (1884).

What Must Be Pleaded and Proved by Administrator.—Where an administrator had assets and sets up the statute of limitations against a debt of his intestate he must aver and prove that he has properly administered the same, in order that his plea may avail him. If it is ascertained he has no assets, the statute is a complete bar. *Little v. Duncan*, 89 N. C. 416 (1883).

The statute was not a bar, at all events; if there were assets in the hands of the administrator, the plea of this section would not be good and avail him, unless he should, in that case, aver and prove that he had paid such assets to the persons entitled to the same. *Little v. Duncan*, 89 N. C. 416 (1883).

Heirs as Parties.—In order to save circumlocution the heirs at law may be made parties to the proceedings against the personal representative. *Lilly v. Wooley*, 94 N. C. 412 (1886), which was cited with approval in *Syme v. Badger*, 96 N. C. 197, 2 S. E. 61 (1887), and which has been approved since in *Brittain v. Dickson*, 104 N. C. 547, 10 S. E. 701 (1889); *Lee v. McKoy*, 118 N. C. 518, 24 S. E. 210 (1896).

§ 1-50. Six years.—Within six years an action—

1. Upon the official bond of a public officer.
2. Against an executor, administrator, collector, or guardian on his official bond, within six years after the auditing of his final account by the proper officer, and the filing of the audited account as required by law.
3. For injury to any incorporeal hereditament.
4. Against a corporation, or the holder of a certificate or duplicate certificate of stock in the corporation, on account of any dividend, either a cash or stock dividend, paid or allotted by the corporation to the holder of the certificate or duplicate certificate of stock in the corporation. (C. C. P., s. 33; Code, s. 154; Rev., s. 393; C. S., s. 439; 1931, c. 169.)

I. In General.

II. Subsection One—Public Officers.

III. Subsection Two—Executor, Guardian, etc.

Cross References.

As to official bonds generally, see §§ 128-8 et seq. As to right of action on bond of executor, administrator, or collector, see § 28-42. As to action on bond of guardian, see § 33-14. See also § 55-116.

I. IN GENERAL.

Editor's Note.—The 1931 amendment added subsection 4 to this section.

Prior Law.—Formerly there was no statute limiting the time in which actions must be brought on bonds, except a provision

in favor of the surety. *Humble v. Mebane*, 89 N. C. 410 (1883).

The present statute takes the place of § 5, c. 65 of the Revised Code. It is manifestly intended to serve the same purpose, and must receive the same construction as to the time when the statute begins to operate. *Commissioners of Moore County v. MacRae*, 89 N. C. 95 (1883).

Manner of Pleading Section.—This section must be affirmatively pleaded. *Humble v. Mebane*, 89 N. C. 410 (1883).

II. SUBSECTION ONE—PUBLIC OFFICERS.

Application to Bond of Defaulted Clerk.

—This section is applicable to an action

against the surety on the bond of a defaulted clerk of the superior court. *State v. Martin*, 186 N. C. 127, 118 S. E. 914 (1923).

Application to Action for Tort against Clerk.—In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required, this section does not apply. *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101 (1895).

Application to Registers of Deeds.—The statutory limit for bringing actions on the official bond of the register of deeds seems to be six years, under this section. Thus the statute commences to run from the time of the failure to register. *State v. Grizzard*, 117 N. C. 105, 23 S. E. 93 (1895). See also, *Bank of Spruce Pine v. McKinney*, 209 N. C. 668, 184 S. E. 506 (1936).

When Statute Begins to Run.—An action upon an official bond may be brought within six years after a breach thereof; the statute does not begin to run from the date, but only from the breach of the bond. *Commissioners v. MacRae*, 89 N. C. 95 (1883).

Ordinarily the statute begins to run from the time of the breach of the bond. Upon the termination of a sinking fund commissioner's term the law required him to account for funds in his hands and his failure to do so constituted a breach of his official bond giving rise to a cause of action thereon immediately. *Washington v. Bonner*, 203 N. C. 250, 165 S. E. 683 (1932).

Ordinarily, the statute of limitations on the bond of a clerk of the superior court begins to run upon default and not upon discovery, and when funds are paid into the clerk's office to the use of a person who is *sui juris* and knows that the funds are subject to his demand, and the clerk invests such funds in good faith, the provisions of § 1-52, par. 9, have no application in an action against successive sureties on the clerk's bonds to recover the loss sustained through such investment. *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324 (1939).

Where the official bond of a public officer by valid contractual limitation covers only the first year of the official's six-year term of office, the statute of limitations begins to run in favor of the surety on the bond from the expiration of the first year of the official's term of office and not the expiration of the official's statutory six-year term of office in view of this section. *Washington v. Trust Co.*, 205 N. C. 382, 171 S. E. 438 (1933).

Protection Extends to Surety.—This statute protects both principal and surety upon the bond. *Vaughan v. Hines*, 87 N. C. 445 (1882).

III. SUBSECTION TWO—EXECUTORS, GUARDIANS, ETC.

Purpose of Section.—This section is intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and after reasonable time, to give quiet and repose to the estate of dead men. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

Application and Relation of Various Sections.—This section, par. 2, expressly applies to actions on the "official bond," § 1-52, par. 6, to sureties only, and § 1-56 so far as executors, administrators and guardians are concerned, is applicable only when there has been a settlement, either by acts of the parties or a decree of court. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for fifteen years after the executor filed his final account, the action was barred by either this section or § 1-56. *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74 (1891).

The statutes of limitation applicable to actions against administrators make a distinction between their fiduciary liabilities and their liabilities upon the administration bond. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889) (dis. op.).

Application to Action for Account.—Where the action is not brought upon the official bond as administrator of the testator of the defendant, but it is brought to compel an account and settlement of the estate of the intestate of the plaintiff in his hands in his lifetime, the defendant is a trustee of an express trust, and the statute of limitations does not apply. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Application to Action for Share.—The statute does not run in favor of administrators against the suit of the next of kin for their distributive shares. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889); unless the action is on the bond to recover the amount of such share. *Vaughan v. Hines*, 87 N. C. 445 (1882).

When Applicable to Action for Balance Due.—No statute of limitations is a bar to an action to recover a balance admitted by a personal representative to be due legatees or distributees on his final account, unless he can show that he has disposed

of such balance in some way authorized by law, or unless three years have elapsed since a demand and refusal to pay such admitted balance. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Persons against Whom Section Absolute Bar.—An action must be brought against an executor or administrator by a creditor, legatee or next of kin of the decedent, within six years after the filing of the final account, or it will be barred by the statute. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

The creditors must bring their action within the six year period of limitation. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

It would be a curious legal anomaly if, within six years, the next of kin should bring their action against the executor or administrator (and they must bring it within six years or be barred) and recover, and then more than six years after the auditing of the account a creditor of the deceased should bring action and be allowed to recover, either out of the executor or administrator, or out of the next of kin or heir. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

An action on the bond must be prosecuted within the six years after the filing of the specified account as well by the next of kin as by creditors, in order to escape the statutory obstruction. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

After the time prescribed in this section and § 1-52, par. 6, the statute is an absolute bar to the next of kin. *Spruill v. Sanderson*, 79 N. C. 466 (1878); *Vaughan v. Hines*, 87 N. C. 445 (1882); *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889) (dis. op.).

This applies to an action upon a bond to recover distributive shares. *Vaughan v. Hines*, 87 N. C. 445 (1882).

Extent of Surety's Protection.—This statute protects the surety as well as the principal. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887); *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891).

In addition to the protection of this section, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond under § 1-52, par. 6. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Where the cause of action against an executor, administrator or guardian is for a breach of the bond, it is barred as to the sureties after three years from the breach complained of under § 1-52, par. 6;

Kennedy v. Cromwell, 108 N. C. 1, 13 S. E. 135 (1891).

Failure of Guardian to Pay Balance Due Ward.—An action against a guardian for failure to pay the ward the balance of the estate due the ward after the ward has attained his majority is not barred by the six-year statute of limitations where the guardian has not filed a final account as required under this section, the statute not applying to such action. *State v. Fountain*, 205 N. C. 217, 171 S. E. 85 (1933).

Significance of Final Account and Audit.

—The final account is the initial point at which the statute begins to run, to actions upon the bond for a breach of its obligations, but leaves the representative, in his fiduciary capacity, exposed to the demand of the fiduciary or creditor, the latter losing his remedy under the condition set out in the preceding section. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Until a final account is filed and audited there can be no bar; nor is there any as to a balance admitted to be due by such final account, unless the executor or administrator can show that he has disposed of it in some way authorized by law, or unless there has been a demand and a refusal to pay such admitted balance, in which case the action is barred in three years after such demand and refusal. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

After the final account the statute runs against the next of kin, and an action against the administrator upon his official bond is barred after six years from the auditing of his final account. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

The bar is unavailable under this section, unless there has been an account audited for the guardian, or unless there has been a lapse of three years from the breach of the bond in favor of the surety. *Humble v. Mebane*, 89 N. C. 410 (1883).

Same—Effect of Failure to Make Final Settlement.—See *Self v. Shugart*, cited below.

A guardian qualified in July, 1872; his ward came of age in September following; the guardian died without having settled his trust or making any of the returns required; in 1887 the ward made a demand upon, and brought suit against the sureties on the bond; held, that his action was barred. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468 (1888).

Significance of Demand Irrespective of Final Account.—Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both

the principal and sureties on said bond in three years under § 1-52, par. 6. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891).

When such final account is filed, and there is no demand and refusal; Quaere, whether the action as to the executor, administrator or guardian himself is barred in six years or ten years. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891).

Same—As Applied to Suit by Minor.—An action by the ward against the sureties on the bond of the guardian is barred after three years from the time the ward becomes twenty-one years old if the guardian makes no final settlement; and within six years if the guardian makes a final settlement. *Self v. Shugart*, 135 N. C. 185, 47 S. E. 484 (1904).

Where there is no final account filed,

§ 1-51. Five years.—Within five years—

1. No suit, action or proceeding shall be brought or maintained against a railroad company owning or operating a railroad for damages or compensation for right of way or use and occupancy of any lands by the company for use of its railroad unless the action or proceeding is commenced within five years after the lands have been entered upon for the purpose of constructing the road, or within two years after it is in operation.

2. No suit, action or proceeding shall be brought or maintained against a railroad company for damages caused by the construction of the road, or the repairs thereto, unless such suit, action or proceeding is commenced within five years after the cause of action accrues, and the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass on his property. (1893, c. 152; 1895, c. 224; 1897, c. 339; Rev., s. 394; C. S., s. 440.)

Local Modification.—*Burke, McDowell*: Pub. Loc., 1923, c. 535; *Caldwell*: Pub. Loc., 1927, c. 119; *Haywood, Mitchell, Yancey*: Pub. Loc., 1923, c. 433.

I. In General.

II. Subsection One—Right of Way.

III. Subsection Two—Damages for Construction and Repair.

I. IN GENERAL.

This section makes uniform the periods of limitation against railroad companies for damages or compensation for lands taken for rights of way or use and occupancy. *Carolina, etc., Ry. Co. v. Piedmont Wagon, etc., Co.*, 229 N. C. 695, 51 S. E. (2d) 301 (1949), discussed in 27 N. C. Law Rev. 579.

Law Prior to Section.—Before this section a railroad could acquire the prescriptive right to pond water on adjacent lands only by subjecting itself to an action for the injury continuously for twenty years. *Nichols v. Norfolk, etc., R. R. Co.*, 120 N. C. 495, 26 S. E. 643 (1897); *Harrell v. Norfolk, etc., R. R. Co.*, 122 N. C. 822, 29 S.

semble, that the statute begins to run from the arrival of the ward of age, but whether in such cases three years or ten years bar, quaere. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891).

When Action Brought.—The action must be brought within six years after the auditing and filing of the account. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Suspension of Statute.—Where there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73 (1891).

E. 56 (1898).

The former law permitting the plaintiff to bring at his option, an action for permanent damages, in which case the entire damages, "past, present and prospective," could be sued for in one action to which twenty years was the limitation, or, at plaintiff's election, from time to time, actions could be brought for the continuing damages, in which actions the recovery was limited to damages accruing within three years. *Ridley v. Seaboard, etc., R. R. Co.*, 118 N. C. 996, 24 S. E. 730 (1896); *Parker v. Norfolk, etc., R. R.*, 119 N. C. 677, 25 S. E. 722 (1896); *Beach v. Wilmington, etc., R. Co.*, 120 N. C. 498, 26 S. E. 703 (1897) (dis. op.); *Ridley v. Seaboard, etc., R. R. Co.*, 124 N. C. 34, 32 S. E. 325 (1899).

Prior to this section, three years was the statutory limitation to actions for recovery of damages to crops. *Ridley v. Seaboard, etc., R. Co.*, 124 N. C. 34, 32 S. E. 325 (1899).

Constitutionality.—This section is not a

violation of the Fourteenth Amendment of the Constitution of the United States, prohibiting any state from denying to any person the equal protection of the laws. *Narron v. Wilmington, etc.*, R. R. Co., 122 N. C. 856, 29 S. E. 356 (1898).

Power of Legislature to Change Period.—The legislature may reduce or extend the time within which an action may be brought, subject to the restriction that when the limitation is shortened, "a reasonable time must be given for the commencement of an action before the statute works a bar." *Nichols v. Norfolk, etc.*, R. R. Co., 120 N. C. 495, 26 S. E. 643 (1897).

Retroactive Effect.—This section does not apply to a suit begun before its passage. *Nichols v. Norfolk, etc.*, R. R. Co., 120 N. C. 495, 26 S. E. 643 (1897); *Harrell v. Norfolk, etc.*, R. R. Co., 122 N. C. 822, 29 S. E. 56 (1898).

Section Restricted to Railroad Companies.—The period of the acquisition by user for five years, allowed to railroad companies by this section, does not extend to telegraph companies. *Teeter v. Postal Tel. Cable Co.*, 172 N. C. 784, 90 S. E. 941 (1916).

This section in express terms applies only to actions against railroad companies, and the courts have no authority to extend its provisions to actions of a different character. *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 138 (1906).

The language in *Mullen v. Canal Co.*, 130 N. C. 496, 41 S. E. 1027 (1902), which is said to have extended this section to include canal companies, is as follows: "While c. 224, Laws 1895, applies only to railroads, yet as the court has extended the rule of permanent damages to water companies and telegraphs, under the principle laid down in *Ridley v. R. R.*, 118 N. C. 996, 24 S. E. 730, 32 L. R. A. 708 (1896), we see no reason why it should not apply equally to canals." It will thus be observed that the court here only declared that it would extend the rule of permanent damages to actions against the defendant company according to the principle announced and exploited in *Ridley v. R. R.*, and as contemplated by the statute in reference to railroads, but did not, and did not intend to extend the application of the statute or the period of limitation therein established to cases not contained in its provisions. *Cherry v. Canal Co.*, 140 N. C. 422, 53 S. E. 138 (1906).

In case of railroads, the period within which actions for continuing trespasses may be brought has been reduced to five years, but there being no such statute in respect of telegraph companies, the com-

mon-law period of twenty years is required. *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. (2d) 337 (1942), citing *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474 (1900).

When Statute Begins to Run.—The statute begins to run from the date of the first substantial injury. *Ridley v. Seaboard, etc.*, R. R., 118 N. C. 996, 24 S. E. 730 (1896); *Beach v. R. R.*, 120 N. C. 498, 26 S. E. 703 (1897); *Stack v. Seaboard, etc.*, R. R., 139 N. C. 366, 51 S. E. 1024 (1905); *Staton v. Atlantic, etc.*, R. R., 147 N. C. 428, 61 S. E. 455 (1908); *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 69 S. E. 8 (1910).

The right of action of a remainderman against railroad to recover lands accrues upon the death of the life tenant. *Young v. Atl. Coast Line R. R.*, 189 N. C. 238, 126 S. E. 600 (1925).

Quoted in *Blevins v. Northwest Carolina Utilities*, 209 N. C. 683, 184 S. E. 517 (1936).

II. SUBSECTION ONE—RIGHT OF WAY.

Section a Statute of Limitation—Affirmatively Plead.—This section in regard to bringing an action against a railroad for damages for a right of way taken by it without condemning the same or acquiring the easement by purchase, is a statute of limitation, and must be specially pleaded by the railroad company, if relied on; and it is not required of the owner to affirmatively show that he has commenced his action within the time specified, as it is not a condition annexed to his cause of action. *Abernathy v. South & Western R. Co.*, 159 N. C. 340, 74 S. E. 890 (1912).

Amount of Damages Recoverable.—The amount recovered is not the estimated sum of all future damages expected to result from a continuing trespass, for such damages, running indefinitely, perhaps forever, would be utterly incapable of calculation; and, moreover, it would be giving the defendant a right to commit a wrong. The sum recoverable is the damage done to the estate of the plaintiff by the appropriation to the easement of so much of his land, or such use thereof as may be necessary to the easement. *Beach v. Wilmington & Weldon R. R. Co.*, 120 N. C. 498, 26 S. E. 703 (1897).

Allowance of Interest.—It is within the power of the lower court, to allow interest on the amount found since the actual taking by the railroad company of the owner's land for its right of way, as a part of the damages. *Abernathy v. South & West-*

ern R. Co., 159 N. C. 340, 74 S. E. 890 (1912).

This section has no application to an action in ejectment by the owner of the fee to recover that part of the right of way no longer used by the railroad company or its lessee for railroad purposes. *Sparrow v. Dixie Leaf Tobacco Co.*, 232 N. C. 589, 61 S. E. (2d) 700 (1950).

III. SUBSECTION TWO—DAMAGES FOR CONSTRUCTION AND REPAIR.

Editor's Note. — The act of 1893 was merely a statute of limitation. The act of 1895, professedly an amendment to the act of 1893, provides that all actions for damages caused by the construction or repair of any railroad, shall be commenced within five years after the cause of action occurs; and that "the jury shall assess the entire amount of damages which the party aggrieved is entitled to recover by reason of the trespass upon his property." *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

The provision in the act of 1895 incidently provided for a statutory easement, rather by implication than direct terms, in effect is but little more than a legislative affirmation of the rule already enunciated in other jurisdictions and adopted in *Ridley v. Seaboard, etc., R. R.*, 118 N. C. 996, 24 S. E. 730 (1896), which was decided a year after the act was passed. *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

Recovery for Easement and Damages. —Where the railroad is damaging plaintiff, but not permanently, and does not wish to acquire the easement under this section, it may pay for the damage done and then abate the cause of the injury without being forced to purchase the easement under this section. *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

Same—Ditches and Embankments as Permanent Structures. — A ditch is not necessarily a permanent structure. Suppose that a section master should carelessly dig a ditch that flooded a large brick building in such a manner that its continuance would probably eventually undermine its walls and cause its destruction. Could not the railroad fulfill its obligations by abating the nuisance and fully repairing the present damage, or would it be compelled to pay the full value of the building? Surely the statute never contemplated such injustice as the latter alternative. And yet, if it takes the easement, it must pay for it, and in any event must

pay for the injury already done. *Lassiter v. Norfolk, etc., R. R.*, 126 N. C. 509, 36 S. E. 48 (1900).

Ditches may be made permanent, as far as the plaintiff is concerned, by the refusal of the defendant to change them; and in that event, if the court refuses to compel the abatement, it must award permanent damages. Such permanent damages represent the damage done to the estate of the plaintiff by the appropriation of the easement of so much of his land, or such use thereof, as may be necessary to the easement. As this, being the value of a right, is essentially distinct from damages for the perpetration of a wrong, they are cumulative and may both be recovered in the same action, as clearly intended by the statute. *Lassiter v. Norfolk, etc., R. R.*, 126 N. C. 509, 36 S. E. 48 (1900).

An action against a railroad company for damages caused to plaintiff's lands by an embankment built by the defendant's grantor, a railroad company, which at the time of its erection produced the same physical conditions, necessarily causing the same or substantial injury and interference on plaintiff's lands that have existed since, is barred by the statute of limitations after five years. *Campbell v. Raleigh, etc., R. R. Co.*, 159 N. C. 586, 75 S. E. 1105 (1912).

Same—Recurrent Injuries—When Action Barred by § 1-52. —In an action for damages against a railroad company arising from alleged negligence with respect to its roadbed, it is held, that for injuries arising from the original and permanent construction of the road, properly maintained, this section applies; but those arising from the negligent failure of the defendant to properly maintain the road, such as keeping open culverts and the like, actions may be brought from time to time for the three years preceding the institution of the action, as in ordinary cases of recurrent injury. *Perry v. Norfolk Southern R. Co.*, 171 N. C. 38, 87 S. E. 948 (1916).

Same—Inclusiveness of Section Respecting Damages. — The damages to land caused by the building of a railroad and structures within contemplation of this section are the entire damages, past, present, and prospective, including not only the depreciation of the land incident to the trespass, but also the injury to growth of crops during the period covered by the enquiry to the time of trial, which may be assessed by the jury on separate issues as to each. *Barclift v. Norfolk Southern R. Co.*, 175 N. C. 114, 95 S. E. 39 (1918).

The evident meaning of this act is that hereafter, in all actions against railroads for injuries from construction or repair of the road, the permanent damages must be assessed. *Nichols v. Norfolk, etc., R. R. Co.*, 120 N. C. 495, 26 S. E. 643 (1897), citing *Strickland v. Draughan*, 91 N. C. 103 (1884).

Since this section all damages accruing from the construction of a railroad must be sued for within five years and the entire amount of damages must be recovered in one action. This is a very just enactment and protects such corporations from the oppression of being sued again and again ad infinitum on the ground of continuing damages. *Beach v. Wilmington & Weldon R. R. Co.*, 120 N. C. 498, 26 S. E. 703 (1897) (dis. op.)

In actions brought in cases for damages to crops and personal injuries, since the passage of this section, only permanent damages, i. e., damages once for all, can be recovered; and such actions are barred by the lapse of five years. *Ridley v. Seaboard, etc., R. R. Co.*, 124 N. C. 34, 32 S. E. 325 (1899).

It is true the act uses the words "shall assess," but they are expressly applied to the damages to which the plaintiff is entitled. This act does not profess to restrict the right of the plaintiff to compensation for the injury suffered. If the plaintiff is otherwise entitled to yearly damages, he can recover them in addition to the just compensation to which he is entitled for the value of the easement if it is conveyed to the defendant. It is true that, if entitled thereto, he must recover them in the same action, but not necessarily in the same issue. In fact it is better to submit them in different issues, as they are distinct in principle. The one is compensation for a wrong; while the other is the conveyance of a right, as the allowance of permanent damages under this act is in effect the condemnation of land to the use of a statutory easement. *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

Same — Damages Arising after Construction. — This section does not necessarily begin to run from the time the road or structures were originally erected if thereafter changes have been made therein which caused appreciable and substantial damages to adjoining lands. *Barclift v. Norfolk Southern R. Co.*, 175 N. C. 114, 95 S. E. 39 (1918).

The statute of limitations begins to run in cases where the injury is continual and gradual, not necessarily from the construction of the road, but from the time

when the first injury was sustained. This means, of course, the first substantial injury, as it would be a hardship to require a plaintiff to bring an action when his recovery would necessarily be merely nominal, and yet would be a bar to any future action. *Beach v. Wilmington & Weldon R. R. Co.*, 120 N. C. 498, 26 S. E. 703 (1897).

This section does not apply to damages for the diversion of water from a lateral ditch along the roadbed of a railroad company, caused by an insufficient culvert to carry it under the roadbed, until the culvert became insufficient. *Savage v. Norfolk Southern R. Co.*, 168 N. C. 241, 84 S. E. 292 (1915).

By this section actions for damages occasioned by the construction of railroads are to be commenced within five years after cause of action occurs, and the jury shall assess the entire amount of damages suffered by the party aggrieved. The statute does not begin to run until the damage is done. *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

Same—Assessment of Permanent Damages Compulsory.—In the case of *Beasley v. Aberdeen, etc., Co.*, 147 N. C. 362, 61 S. E. 453 (1908), it was held that the assessment of "permanent damages" in a case against a railroad for injuries to land in construction or repair of its roadbed, is made compulsory by this subsection. *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 69 S. E. 8 (1910).

The word "permanent," as applied to injuries and damages, is apt to mislead, as it is used not only in cases where the damage is all done at once, as, for instance, in the tearing down of a house, but also to those cases where the damage is continuing and prospective. In these latter cases the damage is called "permanent," because it proceeds from a permanent cause and will probably continue indefinitely as the natural effect of the same cause. Such is the case where the cause is apparently permanent and the damage necessarily continuing or recurrent. The interest and inconvenience of the public will not permit the abatement of the nuisance, and the law does not contemplate an indefinite succession of suits. *Beach v. Wilmington, etc., R. R. Co.*, 120 N. C. 498, 26 S. E. 703 (1897).

The confusion liable to arise from the word "permanent" as applied to damages is pointed out in *Beach v. R. R.*, 120 N. C. 498, 26 S. E. 703 (1897), where the nature of such an easement is discussed. Whether the damage is permanent or not, must appear from the pleadings. If the

damage is in itself irreparable, or if it will probably recur from a given state of things which the defendant refuses to change, and which the court from motives of public policy will not make him change, permanent damages are allowed as the only way of doing justice to the plaintiff, and at the same time preventing interminable litigation. As far as the plaintiff is concerned, permanent and recurring damages are the same to him, if they equally result in the destruction of his property. The latter are in some respects worse than the former, as they merely prolong his agony, and may cause even greater loss. For instance, if a farmer knows that the railroad has acquired a right to flood his land, he will not plant it; whereas if he relies upon their subsequent forbearance from unlawful injury, he may suffer not only the damage to his land, but also the loss of his labor, seed and fertilizer. In other words, the loss of the crop means the loss of everything that has been put into the crop. *Lassiter v. Norfolk, etc., R. R. Co.*, 126 N. C. 509, 36 S. E. 48 (1900).

Recovery by Present Owner.—The present owner of land may recover of a railroad company, under the provisions of

this section, the entire damages to his land caused by permanent structures or proper permanent repairs of defendant, for a period of five years from the time when the structures or repairs caused substantial injury to the claimant's land, unless a former owner, entitled thereto, had instituted action therefor before his sale and conveyance of the land thus permanently injured by the trespass. *Louisville, etc., R. Co. v. Nichols*, 187 N. C. 153, 120 S. E. 819 (1924).

Effect of Amendment of Pleadings as to Bar.—An amendment to the complaint in an action against a railroad company to recover damages to a crop caused by diversion of the natural flow of water, so as to allege permanent damages to the land does not add a new cause of action, but relates only to the measure of damages arising from the injury; and this section will not bar the plaintiff by reason of the amendment alone. *Pickett v. Atlantic Coast Line R. R. Co.*, 153 N. C. 148, 69 S. E. 8 (1910).

Applied in *Owenby v. Louisville, etc., R. R. Co.*, 165 N. C. 641, 81 S. E. 997 (1914).

§ 1-52. Three years.—Within three years an action—

1. Upon a contract, obligation or liability arising out of a contract, express or implied, except those mentioned in the preceding sections.
2. Upon a liability created by statute, other than a penalty or forfeiture, unless some other time is mentioned in the statute creating it.
3. For trespass upon real property. When the trespass is a continuing one, the action shall be commenced within three years from the original trespass, and not thereafter.
4. For taking, detaining, converting or injuring any goods or chattels, including action for their specific recovery.
5. For criminal conversation, or for any other injury to the person or rights of another, not arising on contract and not hereafter enumerated.
6. Against the sureties of any executor, administrator, collector or guardian on the official bond of their principal; within three years after the breach thereof complained of.
7. Against bail; within three years after judgment against the principal; but bail may discharge himself by a surrender of the principal, at any time before final judgment against the bail.
8. For fees due to a clerk, sheriff or other officer, by the judgment of a court; within three years from the rendition of the judgment, or the issuing of the last execution thereon.
9. For relief on the ground of fraud or mistake; the cause of action shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake.
10. For the recovery of real property sold for the nonpayment of taxes, within three years after the execution of the sheriff's deed.
11. For the recovery of any amount under and by virtue of the provisions of the Fair Labor Standards Act of one thousand nine hundred and thirty-eight

and amendments thereto, said act being an act of Congress. (C. C. P., s. 34; Code, s. 155; 1889, cc. 218, 269; 1895, c. 165; 1899, c. 15, s. 71; 1901, c. 558, s. 23; Rev., s. 395; 1913, c. 147, s. 4; C. S., s. 441; 1945, c. 785.)

I. In General.

II. Subsection One—Contracts.

III. Subsection Two—Liability Created by Statute.

IV. Subsection Three—Trespass upon Realty.

V. Subsection Four—Goods or Chattels.

VI. Subsection Six—Sureties of Executors, etc.

VII. Subsection Seven—Bail.

VIII. Subsection Eight—Clerk Fees.

IX. Subsection Nine—Fraud or Mistake.

X. Subsection Ten — Realty Sold for Taxes.

I. IN GENERAL.

Editor's Note. — The 1945 amendment added subsection 11.

Section Not Retroactive.—A bond for the payment of money executed prior to this section, by the principal and his sureties, is exempted from the operation of the statute of limitations as contained in this section. *Knight v. Braswell*, 70 N. C. 709 (1874).

Burden of Proving Section.—When the statute of limitations is pleaded the burden devolves upon the plaintiff to show that the cause of action accrued within the time limited. *Parker v. Harden*, 121 N. C. 57, 38 S. E. 30 (1897). See also, *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818 (1939).

Effect of Equity upon Claim.—The enforcement of an equity will never be denied, on the ground of lapse of time, where the party seeking it has been in continuous possession of the estate to which the equity is an incident. *Mask v. Tiller*, 89 N. C. 423 (1883).

Effect of Disability.—This statute does not begin running against a person under disability, such as infancy, until the disability is removed; hence it does not begin running until then notwithstanding that the cause may have otherwise accrued prior to that time. *Settle v. Settle*, 141 N. C. 553, 54 S. E. 445 (1906).

Insane Persons Presumed to Have Plead Section.—See § 1-16.

Section Supplemented by § 1-22.—This statute cannot avail as a defense where within six months after the death of the intestate, the plaintiff had qualified as her administrator and had commenced a special proceeding, in the county where the lands of the intestate were situated, to subject them to the payment of debts. *Harris v. Davenport*, 132 N. C. 697, 44 S. E. 406 (1903).

Part Payment by Joint Debtor.—A part payment by one joint debtor before the applicable statute of limitations has run against the demand will start the statute anew as well against the co-obligor as against him who made the payment. *Saieed v. Abeyounis*, 217 N. C. 644, 9 S. E. (2d) 399 (1940).

Subsection Five—Injury to Person or Rights of Another. — Where plaintiff's cause of action based upon the alleged wrongful and unlawful act of defendant in swearing out a warrant against plaintiff charging plaintiff with larceny, accrued within three years prior to the issuance of summons in this suit, it was not barred by this section. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873 (1939).

Where plaintiff has taken a voluntary nonsuit and brings the identical action again, if the former action has not been barred by this section, the second action is in time if brought within one year from the time of the voluntary nonsuit. *Van Kempen v. Latham*, 201 N. C. 505, 160 S. E. 759 (1931).

When Proper to Decide Application in Appellate Court.—Upon the appeal it is unnecessary to decide whether this section or § 1-56 applies where there is an insufficient finding of fact to sustain a plea of either, and for this reason a new trial must be had. *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 827 (1923).

Application to Action to Recover Share of Estate.—An action by an administrator to recover his intestate's share of an estate, is governed by § 1-56, which provides that actions not otherwise provided for shall be brought within ten years, and not this section. *Hunt v. Wheeler*, 116 N. C. 422, 21 S. E. 915 (1895).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of this section and not by § 1-56. *Reynolds v. Whitin Mach. Works*, 167 F. (2d) 78 (1948).

Where the three-year statute of limitations is pleaded in an action to recover for silicosis contracted by plaintiff as the result of alleged negligence of defendant in failing to use reasonable care to provide a reasonably safe place to work, an instruction which fails to limit recovery to those injuries proximately resulting from negligent acts of defendant committed within three years next before the institution of the action, must be held for error. *Bane v.*

Palmer Stone Works, 232 N. C. 267, 59 S. E. (2d) 812 (1950).

Section Not Applicable.—Where the plaintiff did not sign the note and was not bound thereby, having executed only a deed of trust on her land as additional security for the debt, this section has no application. *Carter v. Bost*, 209 N. C. 830, 184 S. E. 817 (1936). See § 1-47, analysis line IV.

This section is not applicable to an action specifically brought under provisions of § 105-414. *Miller v. McConnell*, 226 N. C. 28, 36 S. E. (2d) 722 (1946).

Bar Applies to Remedy.—The bar is applied under this section, not to the mode in which relief is sought, but to the relief itself. *Spruill v. Sanderson*, 79 N. C. 466 (1878).

Applied in *Johnson v. Pilot Life Ins. Co.*, 215 N. C. 120, 1 S. E. (2d) 381 (1939); *Craver v. Spaugb*, 227 N. C. 129, 41 S. E. (2d) 82 (1947); *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

Cited in *Muse v. London Assur. Corp.*, 108 N. C. 240, 13 S. E. 94 (1891); *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723 (1891); *Rhodes v. Tanner*, 197 N. C. 458, 149 S. E. 552 (1929); *Griffith Profit Co. v. English*, 198 N. C. 66, 150 S. E. 619 (1929); *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937); *Ritter v. Chandler*, 214 N. C. 703, 200 S. E. 398 (1939); *Powers v. Planters Nat. Bank, etc., Co.*, 219 N. C. 254, 13 S. E. (2d) 431 (1941); *Currin v. Currin*, 219 N. C. 815, 15 S. E. (2d) 279 (1941); *Lee v. Johnson*, 222 N. C. 161, 22 S. E. (2d) 230 (1942); *Lister v. Lister*, 222 N. C. 555, 24 S. E. (2d) 342 (1943); *State Highway, etc., Comm. v. Diamond Steamship Transp. Corp.*, 226 N. C. 371, 38 S. E. (2d) 214 (1946); *Powell v. Malone*, 22 F. Supp. 300 (1938).

II. SUBSECTION ONE—CONTRACTS.

Application to Agreement to Arbitrate.—An agreement to submit a controversy to arbitration is a contract between the parties, and an action thereon, when it is not under seal, in respect to the running of the statute of limitations, is governed by the three-year statute. *Sprinkle v. Sprinkle*, 159 N. C. 81, 74 S. E. 739 (1912).

Action for Money Had and Received.—An action by a county board of school directors for fines and penalties collected by a city is in the nature of one for money had and received, with none of the incidents of a fiduciary or trust relation, and this subsection applies. *School Directors v. Asheville*, 128 N. C. 249, 38 S. E. 874 (1901).

Contract to Pay Money.—Where land was conveyed to J. with condition that he pay certain sums to his brothers, and he accepted the land and took possession under the devise, he immediately became liable, and the right of action was barred in three years under this section. *Rice v. Rice*, 115 N. C. 43, 20 S. E. 185 (1894).

Action on New Promise.—Where plaintiff, the payee and holder of a note, alleged that the debtor advised him not to enter claim in bankruptcy, and made a promise after the filing of the petition but before the order of discharge was entered to pay the note, plaintiff's cause of action is on the new promise and not the original note, and the new promise being made more than three years prior to the institution of the action, plaintiff's cause is barred by the statute of limitations. *Westall v. Jackson*, 218 N. C. 209, 10 S. E. (2d) 674 (1940).

Action for Dividends Accrued on Cumulative Preferred Stock.—The right of a stockholder to have dividends accrued on her cumulative preferred stock at the time of the reorganization of the corporation declared and paid in accordance with the stipulation of the certificate before dividends are set aside or paid on any other stock is based on contract, and the request for an injunctive relief is merely ancillary thereto, and plaintiff's cause of action arises when dividends are paid on the new stock before accrued dividends on her stock are paid, and her action instituted within three years thereafter is not barred. *Clark v. Henrietta Mills*, 219 N. C. 1, 12 S. E. (2d) 682 (1941).

Guarantee of Prior Indorsement.—The statute of limitations within which to institute an action upon a guarantee of prior indorsement, is three years after the payment of the check. *United States v. National City Bank*, 28 F. Supp. 144 (1939).

Action for Damages against Carrier.—Where the demand in writing for damages of a carrier was made within thirty days, and action was brought within three years it was not barred by this section. *U. S. Watch Case Co. v. Southern Exp. Co.*, 120 N. C. 351, 27 S. E. 74 (1897).

Application to Sealed Instruments—In General.—Civil action, to recover on six promissory notes under seal executed December 3, 1929, and maturing one each year for five successive years, which was begun on August 30, 1940, was not barred by the limitation in this section or ten-year statute of limitation in § 1-47. *Bell v. Chadwick*, 226 N. C. 598, 39 S. E. (2d) 743 (1946).

Same—Sureties.—This section applies to actions upon all sealed instruments, not

referred to in preceding sections. One of these not mentioned in the preceding sections is an action on a sealed note against the sureties thereto. Although such an action against the principal is not barred until ten years by § 1-47, subs. (2), that provision does not refer to sureties. This has been the settled law since *Welfare v. Thompson*, 83 N. C. 276 (1880), was decided. *Redmond v. Pippen*, 113 N. C. 90, 18 S. E. 50 (1893); *Flippen v. Lindsey*, 221 N. C. 30, 18 S. E. (2d) 824 (1942).

The three-year statute of limitations is applicable to sureties on sealed instruments as well as on instruments not under seal. *Lee v. Chamblee*, 223 N. C. 146, 25 S. E. (2d) 433 (1943).

An action against the sureties on the bond of a clerk for defalcations in the office of the State Treasurer is barred after three years. *Jackson v. Martin*, 136 N. C. 196, 48 S. E. 672 (1904).

This section applies to sureties on a note under seal, and as to the sureties the right of action on the note is barred after the lapse of three years. *Barnes v. Crawford*, 201 N. C. 434, 160 S. E. 464 (1931).

An action on a note under seal against a surety thereon is barred after the lapse of three years from the maturity of the note, or after three years from the expiration of an extension of time for payment binding on the surety under this section. *Davis v. Alexander*, 207 N. C. 417, 177 S. E. 417 (1934).

An action on a note under seal against an endorser on the note is ordinarily barred after three years from the maturity of the note, even though the endorsement is under seal. *Hertford Bkg. Co. v. Stokes*, 224 N. C. 83, 29 S. E. (2d) 24 (1944).

Statute Bars Remedy of Claim and Delivery.—Where there had been no new promise or payment on the purchase price for over three years prior to the institution of the action, the three-year statute of limitations, under this section, barred the ancillary remedy of claim and delivery. *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290 (1934).

Parol Evidence Admissible to Show in What Capacity Parties Signed Note.—In an action by the payee of a negotiable note under seal, appearing upon its face to have been signed by several makers, it may be shown upon the trial by parol evidence that with the knowledge of the payee before his acceptance only one of them signed as the original obligor, and that the others signed as sureties only, entitling the sureties to their release upon their defense of the statute of limitations under

this section. *Furr v. Trull*, 205 N. C. 417, 171 S. E. 641 (1933).

Effect of Payment after Statute Has Run.—Where a chattel mortgage on crops secures the payment of the maker's note and the mortgagee endorses the note, and mortgages to another, the bar of the three-year statute of limitations which has otherwise run will not be repelled by payments on the note from the sale of the crop, as against the endorser, or without evidence of his intent to make the payment and thus impliedly at least acknowledge the debt; and his having attended the mortgage sale of the crop and become a purchaser, is not sufficient. *Nance v. Hulin*, 192 N. C. 665, 135 S. E. 774 (1926).

Indemnity or Fidelity Bond.—Where the liability of the insurer is expressly limited in an indemnity or fidelity bond to losses occasioned and discovered during a specified time, this section will not extend the period of indemnity for this is a statute of limitations and can have no effect upon the valid contractual relations existing between the indemnitor and indemnitee. *Hood v. Rhodes*, 204 N. C. 158, 167 S. E. 558 (1933).

Breach of Express Trust.—Since occurrences which constitute a breach of an express trust amount in effect, and usually in fact, to a breach of contract, a cause of action for such breach is barred at the expiration of three years from such breach, under this section. *Teachy v. Gurley*, 214 N. C. 288, 199 S. E. 83 (1938).

Claims for Services.—In absence of special contract to compensate plaintiff for his services to defendant's intestate by will effective at defendant's death, the statute of limitations bars all claims for services except those rendered within three years. *Grady v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760 (1944).

Recovery cannot be had upon assumpsit or quantum meruit for personal services rendered in reliance upon the oral contract to devise when the action is instituted more than three years after the death of the promisor, and the statute of limitations is pleaded in bar. *Dunn v. Brewer*, 228 N. C. 43, 44 S. E. (2d) 353 (1947).

A guaranty of the payment of a note is an obligation arising out of contract by which the guarantors assume liability for payment of the note in case the makers thereof do not pay same upon maturity, and right to sue upon such guaranty arises immediately upon failure of the makers to pay the note according to its tenor, and suit against the guarantors is barred by this section after three years from the maturity of the note. *Wachovia Bank, etc.,*

Co. v. Clifton, 203 N. C. 483, 166 S. E. 334 (1932).

Accrual of Cause.—A cause of action did not accrue at the date of the warranty, but at the date on which it was finally determined that a plant was not free from all defects and flaws. *Heath v. Moncrieff Furnace Co.*, 200 N. C. 377, 156 S. E. 920 (1931).

Demand Necessary if Fiduciary Relation Exists.—Where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until a demand and refusal. *Efird v. Sikes*, 206 N. C. 560, 174 S. E. 513 (1934).

Statute Not Suspended by War Measures.—An action to recover damages for a breach of contract for the sale of goods arising during federal war control of railroads is barred by our State statute of limitations after three years from the time of its accrual. *Vanderbilt v. Atlantic, etc., R. Co.*, 188 N. C. 568, 125 S. E. 387 (1924).

Unpaid Subscription to Corporate Stock.—While as to the stockholders the three-year statute of limitations on the amount unpaid on subscriptions to the capital stock of a corporation will run from the time of demand by the directors, it is otherwise as to the creditors where the corporation has become insolvent, for in the latter case the capital stock is regarded as a trust fund for the benefit of creditors, and the statute will begin to run from the demand of the receiver, representing the creditors, under the order of the court. *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

Same—Construed with Other Sections.—The application of this section with regard to the unpaid balance due a corporation by a subscriber to its capital stock, will be construed in *pari materia* with §§ 55-65 and 55-70. *Windsor Redrying Co. v. Gurley*, 197 N. C. 56, 147 S. E. 676 (1929).

Action on Check Given for Taxes.—A plea of the three-year statute of limitations will bar recovery in a civil action to collect a check given for the payment of taxes, when the action is not instituted within three years of the date the check was issued. *Miller v. Neal*, 222 N. C. 540, 23 S. E. (2d) 852 (1943).

Plea of Statute against Administrator Available to Distributee.—In an action by plaintiff to recover his distributive share of an estate, where defendant administrator sets up and pleads debts of plaintiff's due intestate as an offset, the claims of both plaintiff and defendant being legal, the doctrine of equitable set-off has no application and the plea of the statute of lim-

itations is available to plaintiff as a valid defense to the affirmative claim of offset pleaded by defendant. *Perry v. First Citizens Bank and Trust Co.*, 223 N. C. 642, 27 S. E. (2d) 636 (1943).

Evidence of Matter Not Alleged.—Where defendant by answer denies liability on a note on the ground that it is barred by the three-year statute of limitations, evidence that defendant did not adopt the word "seal" after his name on the note was properly excluded. *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829 (1942).

Jury Question.—In an action by a trustor to compel an accounting of the proceeds of sale by a trustee, the question of whether the action was barred under subsection 1 was properly submitted to the jury under authority of *Efird v. Sikes*, 206 N. C. 560, 174 S. E. 513 (1934); *Garrett v. Stadiem*, 220 N. C. 654, 18 S. E. (2d) 178 (1942).

Applied in *Hall v. Hood*, 208 N. C. 59, 179 S. E. 27 (1935); *Howard v. White*, 215 N. C. 130, 1 S. E. (2d) 356 (1939); *Bynum v. Life Ins. Co.*, 222 N. C. 742, 24 S. E. (2d) 613 (1943); *Sayer v. Henderson*, 225 N. C. 642, 35 S. E. (2d) 875 (1945).

III. SUBSECTION TWO—LIABILITY CREATED BY STATUTE.

Section Absolute Bar.—After the time prescribed in section 1-50, subsection 2, and this subsection, the statute is an absolute bar to the next of kin. *Spruill v. Sanderson*, 79 N. C. 466 (1878); *Vaughan v. Hines*, 87 N. C. 445 (1882); *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889) (dis. op.).

Liability of National Bank Stockholder for Assessment.—Though original liability of a national bank stockholder is contractual in nature, being based upon his original stock subscription, his liability under a stock assessment fixing amount of liability is "statutory" and not contractual, as respects running of limitations. *Briley v. Crouch*, 115 F. (2d) 443 (1940).

Partial payments by national bank stockholder on stock assessment did not toll the running of this section against his liability. *Briley v. Crouch*, 115 F. (2d) 443 (1940).

Action for Failure to Collect Check.—An action against a bank for breach of its duty to collect a check and against another bank which took over the assets of the former is barred as against the latter bank by this section, where not commenced until five years after the transaction and four years after the transfer of the assets.

Standard Trust Co. v. Commercial Nat. Bank, 240 F. 303 (1917).

Action to Recover Delinquent Taxes. — Neither the three nor the ten-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Wilmington v. Cronly*, 122 N. C. 383, 30 S. E. 9 (1898).

Application to Tort against Clerk Failing to Index Judgment.—In an action of tort against a clerk of the superior court for failing to index a docketed judgment as required by § 1-233, this section is applicable. *Shackelford v. Staton*, 117 N. C. 73, 23 S. E. 101 (1895).

Application to Petition to Have Damages Assessed. — Where the charter of a railroad company provides that when the company has appropriated land without authority no action shall be brought by the owner except a petition to have the damage assessed, and fixes no limitation of the action, such petition is neither an action of trespass nor one on a liability created by statute within the meaning of this section, subsections (2) and (3), and the refusal of the trial judge to submit an issue upon the statute of limitations was not error. *Land v. Wilmington, etc., R. Co.*, 107 N. C. 72, 12 S. E. 125 (1890); *Utley v. Wilmington, etc., R. Co.*, 119 N. C. 720, 25 S. E. 1021 (1896).

An action by county against inmate of county home to secure reimbursement or indemnity for sums expended for upkeep in the home comes within this section. *Guilford County v. Hampton*, 224 N. C. 817, 32 S. E. (2d) 606 (1945).

IV. SUBSECTION THREE — TRESPASS UPON REALTY.

Amendment of 1895.—The last sentence of this subsection was added by the act of 1895. *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294 (1897).

Prior to the passage of this act, in such cases, the lapse of 20 years was necessary to bar the action, when the presumption of a grant would arise. *Parker v. Norfolk, etc., R. Co.*, 119 N. C. 677, 25 S. E. 722 (1896); *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294 (1897).

Same—Application to Accrued Actions.—In changing the period of limitation a reasonable time must have been given to accrued actions which would otherwise be barred by the new regulation. A reasonable time for the commencement of an action before the statute works a bar, (*Nichols v. Norfolk, etc., R. Co.*, 120 N. C. 495, 26 S. E. 643 (1897)), is the balance

of the time unexpired according to the law as it stood when the amending act was passed, provided it shall never exceed the time allowed by the new statute. For example, if the action would have been barred in six years, and four years have elapsed before the amending act, then two years more would be a reasonable time. If three years time would bar the action and three years have elapsed, as in the present case, before the amending act as passed, then three years thereafter would be the limit and no more, and this rule will apply to all other periods of limitation on actions. *Culbreth v. Downing*, 121 N. C. 205, 28 S. E. 294 (1897).

Presumption as to Date of Conversion.—In the absence of proof as to the date of the conversion of property, the presumption is that it was as of the date of taking the property into possession. *Parker v. Harden*, 121 N. C. 57, 28 S. E. 20 (1897).

Application in Action to Recover Damages Resulting from Sewage Disposal Plant. — Where the plaintiff executed a deed of trust, deeded his equity of redemption to his sons, and the deed of trust was foreclosed, all more than three years before the institution of the action, and the plaintiff did not again acquire title until less than a year before the action, it was held in an action to recover damages to the land resulting from defendant's sewage disposal plant that the measure of damages should have been predicated upon the difference in value at the time plaintiff again acquired title and the date of the institution of the action, and an instruction that the jury should assess as damages the difference in the market value of the land on the date of the institution of the action and the date three years prior thereto, constitutes reversible error. *Ballard v. Cherryville*, 210 N. C. 728, 188 S. E. 334 (1936).

Negligence in Logging Operations. — Where plaintiff instituted this action to recover for damages resulting from the overflow on his lands of waters of a river alleged to have resulted from the negligent acts and omissions of defendant in its logging operations, even if it be conceded that the alleged negligence constituted a continuing omission of duty toward the plaintiff by defendant, plaintiff must show that defendant was in possession and control of the upper lands within the statutory period. *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818 (1939).

Continuing Trespass Defined.—Speaking of this section in *Sample v. Roper Lumber Co.*, 150 N. C. 161, 63 S. E. 731 (1909), the

court said: "True, the statute declares that actions for trespass on real estate shall be barred in three years, and when the trespass is a continuing one such actions shall be commenced within three years from the original trespass, and not thereafter; but this term, 'continuing trespass,' was no doubt used in reference to wrongful trespass upon real property, caused by structures permanent in their nature and made by companies in the exercise of some quasi-public franchise. Apart from this, the term could only refer to cases where a wrongful act, being entire and complete, causes continuing damage, and was never intended to apply when every successive act amounted to a distinct and separate renewal of wrong." *Teeter v. Postal Tel.-Cable Co.*, 172 N. C. 783, 90 S. E. 941 (1916).

Same—As Applied to Telegraph Line.—

Where a telegraph company has constructed its line of poles and wires along a railroad right of way on the lands of the owner more than three years next before the commencement of the owner's action for trespass, but within three years has constructed an additional line of its wires thereon and repaired its old line, replacing some of the old poles with new ones, in the same holes, it was held that the plaintiff's right to damages for the construction of the old line is barred by the statute, but the wrongful maintenance of the old and the building of the new line was a separate and independent trespass for which permanent damages may be awarded it. *Teeter v. Postal Tel.-Cable Co.*, 172 N. C. 783, 90 S. E. 941 (1916).

An action against a telegraph company for the erection of poles on the land of the plaintiff, if brought within three years of the trespass, is not barred by limitation. *Hodges v. Western Union Tel. Co.*, 133 N. C. 225, 45 S. E. 572 (1903).

Where the owner of land seeks to recover for trespass and for permanent damages to his land resulting from the erection and maintenance by defendant telegraph company of its transmission lines over his land, the action for trespass is barred by the three-year statute of limitations, the trespass being a continuing trespass, but the action for permanent damages as compensation for the easement is not barred until defendant has been in continuous use thereof for a period of twenty years so as to acquire the right by prescription. *Love v. Postal Telegraph-Cable Co.*, 221 N. C. 469, 20 S. E. (2d) 337 (1942).

The law will not permit recovery for negligence which has become a fait ac-

compli at a remote time not within the period specified by subsection 3, although injury may result from it within the period of limitation. *Davenport v. Pitt County Drainage Dist.*, 220 N. C. 237, 17 S. E. (2d) 1 (1941), citing *Hooper v. Carr Lbr. Co.*, 215 N. C. 308, 1 S. E. (2d) 818 (1939).

Allegations that a drainage district failed to cause a canal to follow the channel of a creek as originally planned and stopped the canal on the lands of plaintiff, and failed to keep the mouth of the channel properly cleared out, resulting in plaintiff's land being flooded, commencing immediately after the canal was finished and continuing practically every year thereafter, stated a cause of action for continuing trespass, and the right of action for damages to crops for all the years was barred after the lapse of three years from the original trespass. *Davenport v. Pitt County Drainage Dist.*, 220 N. C. 237, 17 S. E. (2d) 1 (1941).

Action in Tort for Continuing Trespass.

—Plaintiffs alleged that construction of dam caused progressive injury to their land from improper drainage, and that the mere construction was the cause of the injury. It was held that the action being limited to "injury and damage" caused by the "construction" of the dam, rests in tort, and the trespass being continuous rather than a renewing or intermittent one, and the action not being for an appropriation of plaintiffs' property or an easement therein by reason of the operation of the dam, the action was barred by the three-year statute of limitations. *Tate v. Western Carolina Power Co.*, 230 N. C. 256, 53 S. E. (2d) 88 (1949).

Application to Diversion of River Water.

—The unlawful diversion of river water is not a trespass on realty, but it is so nearly in the nature of an easement as to be governed by the same statute of limitations. *Geer v. Durham Water Co.*, 127 N. C. 349, 37 S. E. 474 (1900).

Application to Negligence in Widening Canal.

—In an action brought in 1903 to recover permanent damages caused by the negligent widening of defendant's canal, where it appeared that the entire wrong was done in 1898 and 1899, the action was barred under this subsection. *Cherry v. Lake Drummond Canal, etc., Co.*, 140 N. C. 422, 53 S. E. 138 (1906).

Action for Cutting Timber.

—The three-year statute applies to actions to recover damages for trespass in cutting and removing trees from the land. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Burden of Proof.—Where the defendant pleads this section to an action for trespass, with damages for cutting timber on lands, the burden is on the plaintiff to prove that he commenced his action within the time prescribed; and where from an analysis of the evidence it appears that this has not been done, a judgment of nonsuit is proper. *Tillery v. Whiteville Lumber Co.*, 172 N. C. 296, 90 S. E. 196 (1916).

Cited in *Teseneer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535 (1936); *Ivester v. Winston-Salem*, 215 N. C. 1, 1 S. E. (2d) 88 (1939).

V. SUBSECTION FOUR—GOODS OR CHATTELS.

Section Does Not Confer Title—Period Necessary.—Possession of a chattel for a sufficient period to bar its recovery under this section does not confer title. The prior law, c. 65, § 20 Revised Code, so provided, but it has been repealed so that now there is no statute fixing a period at the end of which title to personal property will vest in the possessor. It is true that if held for a sufficient time the title will vest, but four years possession is insufficient. *Pate v. Hazell*, 107 N. C. 189, 11 S. E. 1089 (1890).

Charging in Conjunction with Section 1-56.—Where if the action has not been barred by the provisions of subsections 4 and 9 of this section, it would have been barred under § 1-56, it was not error to tell the jury that the action was barred in three years, or in ten years. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285 (1891).

When Applicable to Funds Held by Trustee.—When a trustee notifies the party for whom he holds funds that he disavows the trust and will pay the funds over to another party, and does so, this is a conversion, and the statute of limitation begins to run, so that the cause of action is barred in three years. *County Board v. State Board*, 107 N. C. 366, 12 S. E. 452 (1890).

Bonds Held by Bank as Trustee.—In an action instituted against the statutory receiver of an insolvent bank to recover certain bonds which had been held by the bank, trustee, for safekeeping, there was evidence that plaintiffs received a letter from the attorney of the liquidating agent denying the claim for the bonds, and that action was instituted within three years from the receipt of this letter. Held: The action was not barred by the three-year statute, this section, since under the facts of this case the cause of action did not accrue until the disavowal or repudiation of

the trust. *Bright v. Hood*, 214 N. C. 410, 199 S. E. 630 (1938).

Property Advanced by Father.—Where slaves advanced by A to his son B were, on the death of the son, divided between his widow and children and held adversely thereafter for three years, A, the father is barred by the statute of limitations from afterwards reclaiming them. *Jones v. Gordon*, 55 N. C. 352 (1856).

Burden of Proof.—Where the three-year statute of limitations is pleaded in defense to an action for wrongful conversion of personal property, the burden of proof is on the plaintiff to show that the action was brought within the time allowed from the accrual of the cause, or that otherwise it was not barred. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922).

VI. SUBSECTION SIX—SURETIES OF EXECUTORS, ETC.

Purpose of Section.—This section and the other related sections are intended to limit the liability of executors, administrators, next of kin and heirs of decedents, and, after reasonable time, to give quiet and repose to the estates of dead men. *Andres v. Powell*, 97 N. C. 155, 2 S. E. 235 (1887).

Section 1-56 Not Affected.—Section 1-56, limiting the time for the bringing of an action to ten years, and applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of this section, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 557 (1922).

Sureties Also Protected by § 1-50.—In addition to the protection of § 1-50, par. 2, the sureties on the bond are exonerated unless action is brought within three years after breach of the bond. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

While the sureties have the protection of six years under § 1-50 in common with their principal, they have a further exoneration, unless sued within three years after breach of the bond. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Section 1-50, par. 2, expressly applies to actions on the "official bond," this section to sureties only. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

Effect of Surety Being Foreign Corporation.—The statute of limitations is not suspended against the surety on a guardian bond by reason of such surety being a foreign corporation when it is shown that it continuously had a general agent within the jurisdiction of our courts for executing

judicial bonds and collecting premiums thereon for the company and had complied with the section authorizing service of process on the Insurance Commissioner. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948 (1917).

Effect of Payment by Principal.—Payment made by a principal upon a bond, before the cause of action thereon is barred against the sureties, arrests the operation of the statute of limitations. *Moore v. Goodwin*, 109 N. C. 218, 13 S. E. 772 (1891).

Intervening Disabilities.—When this statute begins to run, the subsequent marriage of the feme plaintiff will not stop it. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891). See § 1-17 and note.

When Statute Begins to Run—Demand.—From the demand of the plaintiff for an account and settlement made on the administrator, and his failure and refusal to do so, this section began to run in favor of the defendant sureties on the administration bond. If the action is brought within three years of this time it is not barred. *Gill v. Cooper*, 111 N. C. 311, 15 S. E. 315 (1892); *Stonestreet v. Frost*, 123 N. C. 290, 31 S. E. 718 (1898).

Whether the final account is or is not filed, if there is a demand and refusal, the action is barred as to both the principal and sureties on said bond in three years. *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891).

This section is applicable only when there has been a settlement, either by the acts of the parties or a decree of court. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

An action against a guardian and his bondsman, where no final account has been filed, is barred after three years from the time of default and, at farthest, within three years from the ward's coming of age. *Anderson v. United States Fidelity Co.*, 174 N. C. 417, 93 S. E. 948 (1917).

The cause of action by the administrator d. b. n. under this section does not accrue until his appointment, and the action by such administrator therefore is not barred as against the bondsman until three years subsequent to his appointment. *Dunn v. Dunn*, 206 N. C. 373, 173 S. E. 900 (1934).

Action by Cestui against Trustee after Settlement.—Where there has been a settlement between the trustee and cestui que trust, or a final determination of the amount due by a decree of court, the trust is closed, and an action will be barred within three years from a demand and refusal. *Whedbee v. Whedbee*, 58 N. C. 393

(1860); *Barham v. Lomax*, 73 N. C. 79 (1875); *Spruill v. Sanderson*, 79 N. C. 466 (1878); *Wyrick v. Wyrick*, 106 N. C. 84, 10 S. E. 916 (1890).

Effect of Estate Being Unrepresented during Period.—When there was no one in esse from the death of the first administrator, till the qualification of the administrator de bonis non, who could sue upon the bond, that time should not be counted in applying the statute of limitations in an action against the sureties. *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73 (1891).

Burden of Proof.—This section being pleaded, it was incumbent upon the plaintiff to show that the breach of the bond was within less than three years before the institution of this action against the appellee. *Hussey v. Kirkman*, 95 N. C. 63 (1886); *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732 (1888); *Hobbs v. Barefoot*, 104 N. C. 224, 10 S. E. 170 (1889); *Nunnery v. Averitt*, 111 N. C. 394, 16 S. E. 683 (1892). This was not done, and the surety is protected by the lapse of three years after demand and refusal. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468 (1888); *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889); *Kennedy v. Cromwell*, 108 N. C. 1, 13 S. E. 135 (1891); *Brawley v. Brawley*, 109 N. C. 524, 14 S. E. 73 (1891); *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391 (1894).

Action to Reopen Account.—An action or proceeding to reopen an account stated by an executor and readjust a settlement made under the supervision of a court, and sanctioned by a decree, must be brought within three years from the rendition of such decree, if the plaintiff (or petitioner) be under no disability, and the case involve no equitable element improper for the consideration of a court of law. This conclusion finds some support in the provisions of this subsection. *Spruill v. Sanderson*, 79 N. C. 466 (1878).

Action to recover for alleged breach of bond as administratrix accrues at the time the alleged breach is committed, this subdivision having no provision relating to discovery of the breach of the official bond as is provided for in cases under subdivision (9). *Hicks v. Purvis*, 208 N. C. 657, 182 S. E. 151 (1935).

Ward's Suit against Sureties.—A suit by a ward against the sureties on the bond of his deceased guardian comes within the terms of this section and must be brought within the three-year limit. *Norman v. Walker*, 101 N. C. 24, 7 S. E. 468 (1888).

The running of the statute under this section as against the plaintiffs and in

favor of the sureties was not suspended by the payment of interest by the guardian on the amount due by him to each of the plaintiffs. The liability of the sureties on the bond is a conditional liability, dependent upon the failure of the guardian to pay the damages caused by his breach of the bond. The guardian and the sureties are not in the same class. For that reason the payment by the guardian of interest on the amount due by him to his former wards did not suspend the statute of limitations which began to run against each of his wards, when she became twenty-one years of age. *State v. Fountain*, 205 N. C. 217, 171 S. E. 85 (1933).

Applied in *Copley v. Scarlett*, 214 N. C. 31, 197 S. E. 623 (1938).

Cited in *State v. Purvis*, 208 N. C. 227, 180 S. E. 88 (1935).

VII. SUBSECTION SEVEN—BAIL.

Effect of Bail Being Out of State.—The language and meaning of this section is clear. Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meanwhile. *Albemarle Steam Nav. Co. v. Williams*, 111 N. C. 35, 15 S. E. 877 (1892).

VIII. SUBSECTION EIGHT—CLERK FEES.

Application to Judgment for Costs.—A plaintiff in a judgment on which costs only are due, is not barred by this section from the proper proceedings to enforce his claim, the same being in his favor and not of the officers of the court. *Cowles v. Hall*, 113 N. C. 359, 18 S. E. 329 (1893).

Not Applicable to Referee.—The claim of a referee for payment of services rendered in a cause which is still pending in the courts upon exceptions to his report is not barred by this section. *Farmers' Bank v. Merchants', etc., Bank*, 204 N. C. 378, 168 S. E. 221 (1933).

IX. SUBSECTION NINE—FRAUD OR MISTAKE.

Amendment of 1879 — Mistake. — This subsection was amended by the act of 1879, by inserting after the word "fraud," wherever it occurs, the words "or mistake." Prior to the amendment there was no statutory bar of three years to an action for relief on the ground of mistake. *Mask v. Tiller*, 89 N. C. 423 (1883).

An action to correct a mistake should now be brought within the time limited in this section. *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622 (1890).

The 1889 amendment struck a provision limiting this subsection to cases solely cognizable in a court of equity. There are many cases decided prior to the amendment construing this subsection to be so limited. There are also cases so construing it since its passage but they are restricted to those arising before the amendment became effective. See *Batts v. Winstead*, 77 N. C. 238 (1877); *Blount v. Parker*, 78 N. C. 128 (1878); *Spruill v. Sanderson*, 79 N. C. 466 (1878); *Egerton v. Logan*, 81 N. C. 172 (1879); *Day v. Day*, 84 N. C. 408 (1881); *Jaffray v. Bear*, 103 N. C. 165, 9 S. E. 382 (1889); *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917 (1895); *Dunn v. Beaman*, 126 N. C. 766, 36 S. E. 172 (1900).

The amendment applied to an action for a false warranty in a sale made before the amendment, so that, in actions where relief on the ground of fraud was sought, the cause of action was not deemed to have accrued until the discovery of the fraud complained of. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917 (1895).

This amendment leaves all actions subject to the same rule, whether they were heretofore cognizable solely in courts of equity or not, and makes all actions come under the same rule as if they had been originally cognizable in courts of equity. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917 (1895); *Rouss v. Ditmore*, 122 N. C. 775, 30 S. E. 335 (1898).

Purpose and Construction of Section.—The statute of limitations was mainly intended to suppress fraud, by preventing fraudulent and unjust claims from being asserted after a long lapse of time. It ought not, therefore, to be so construed as to become an instrument to encourage fraud, if it admits of any other reasonable interpretation. The like spirit should govern the construction of the facts and circumstances of a transaction so as to take it out of the operation of the statute, where gross injustice would be worked by its application. *Mask v. Tiller*, 89 N. C. 423 (1883).

When Applied to Exclusion of § 1-56.—This section cannot be applied where the allegations and proof are insufficient to sustain it, in preference to § 1-56, where there is a question as to which applies. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

Applies to Actions at Law and Suits in Equity.—While this subsection originally applied only to actions for relief on the ground of fraud in cases solely cognizable by courts of equity, by statutory amend-

ment and the decisions of our courts it now applies to all actions for relief on the ground of fraud or mistake. *Stancill v. Norville*, 203 N. C. 457, 166 S. E. 319 (1932).

Fraud or Mistake Prerequisite to Application.—This section has no application to an action to recover money for there is no evidence or allegation of fraud and mistake. *Barden v. Stickney*, 132 N. C. 416, 43 S. E. 912 (1903); *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781 (1905).

When Statute Begins to Run.—The statute runs from the discovery of the fraud or mistake, "or when it should have been discovered in the exercise of ordinary care"; and as it was the duty of plaintiff, as executor, to have laid off the land to the devisee and put her in possession, and as he could, by a simple calculation from the deed, have discovered that the description embraced 108 acres, and as for twenty years the various owners of the land had cultivated up to the boundaries, the statute had become a bar to the action. *Sinclair v. Teal*, 156 N. C. 458, 72 S. E. 487 (1911). See also *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387 (1893); *Peacock v. Barnes*, 142 N. C. 215, 55 S. E. 99 (1906).

In an action grounded on fraud, the statute of limitations begins to run from the discovery of the fraud or from the time it should have been discovered in the exercise of reasonable diligence. *Wimberly v. Furniture Stores*, 216 N. C. 732, 6 S. E. (2d) 512 (1940).

A cause of action to set aside an instrument for fraud accrues, and limitations begin running, when the aggrieved party discovers the facts constituting the fraud, or when, in the exercise of reasonable diligence, such facts should have been discovered. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202 (1951).

The three-year statute begins to run against a cause of action to reform an instrument for mutual mistake from the time the mistake is discovered or should have been discovered in the exercise of due diligence, and conflicting evidence in respect thereto presents a question for the jury and its verdict thereon is determinative. *Lee v. Rhodes*, 231 N. C. 602, 58 S. E. (2d) 363 (1950).

It is incumbent upon the plaintiff to show that he not only was ignorant of the facts upon which he relies in his action, but could not have discovered them in the exercise of proper diligence or reasonable business prudence. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623 (1922). See also, *Johnson v. Pilot Life Ins. Co.*, 219 N. C. 202, 13 S. E. (2d) 241 (1941).

This statute begins to run from the time of discovery of a breach of the trust relationship and not from the time the relation was brought to an end. *Egerton v. Logan*, 81 N. C. 172 (1879).

In an action to reform a timber deed for an alleged mutual mistake of the parties, the statute will run three years after the plaintiff had knowledge of the mistake alleged. *Jefferson v. Roanoke R., etc., Co.*, 165 N. C. 46, 80 S. E. 882 (1914). See also *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622 (1890).

Where plaintiff acquired title to real estate, subject to a contract to cut timber within 3 years, thinking the time for cutting was 18 months, and failed to examine the record or to bring suit for wrongful cutting until more than three years after being told that the time was 3 years, the action was barred by this section. *Blankenship v. English*, 222 N. C. 91, 21 S. E. (2d) 891 (1942).

Where insurance company rejected third application of insured for additional insurance on grounds that insured was no longer a satisfactory risk it was held that insured should have been put on notice thereby that company's agent's promise to re-deliver a second policy within seven months after it was tendered to insured and refused because of illness, was false and that insured's claim, if any he had, has atrophied as a result of his procrastination and became barred by this section. *Jones v. Bankers Life Co.*, 131 F. (2d) 989 (1942).

Upon the question of fraudulent concealment of funds, this section runs from the discovery of the facts constituting the fraud or mistake and not from the discovery by a party of rights hereto unknown to him. *Bonner v. Stotesbury*, 139 N. C. 3, 51 S. E. 781 (1905).

Where the person perpetrating the fraud is a fiduciary, the party defrauded is under no duty to make inquiry until something happens which reasonably excites his suspicion that the fiduciary has breached his duty to disclose all the essential facts and to take no unfair advantage. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202 (1951).

It is a question of grave doubt, if the point had been raised, whether the statute as to the plaintiff's cause of action began to run upon the mere declaration of insolvency of the bank, and did not in truth begin to run upon the actual discovery, later on (after the investigation of the receiver) that the bank was insolvent at the time the incorrect statements were put forth. *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827 (1898).

Applying this section to an action to set aside a deed to lands made by the husband to the wife for fraud on the former's creditors, this section by correct interpretation is held to mean until the impeaching facts should have been discovered in the exercise of reasonable business prudence. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348 (1915).

Where a clerk of the superior court embezzles funds and such fraud is not discovered until about 90 days prior to the institution of proceedings against the clerk and the surety on his bonds, and such fraud could not have been discovered earlier by reasonable diligence, this section and not § 1-50 applies. *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931); *State v. American Surety Co.*, 201 N. C. 325, 160 S. E. 176 (1931).

The actual time of the discovery of the alleged mistake is not determinative, but the cause of action for reformation of the bonds accrued when the mistake should have been discovered by plaintiff in the exercise of due diligence, and plaintiff being an educated man, and there being no evidence of any effort to conceal the plain language of the bonds or to prevent plaintiff from reading them, plaintiff's cause of action was barred under this section. *Moore v. Fidelity, etc., Co.*, 207 N. C. 433, 177 S. E. 406 (1934). See also, in this connection, *Hargett v. Lee*, 206 N. C. 536, 174 S. E. 498 (1934); *Hood v. Paddison*, 206 N. C. 631, 175 S. E. 105 (1934).

Defendant was directed by his mother to prepare a conveyance to himself of a certain tract of land. Defendant surreptitiously substituted a description of a larger and more valuable tract, which deed reserved therein, as directed, a life estate in the grantor. The grantor died some three years and seven months thereafter. There was nothing to rebut the inference that she retained possession of the property until her death. It was held that there being nothing to excite the grantor's suspicion or to put her upon inquiry during her lifetime, the statute of limitations did not begin to run against her, and the action of the devisees of the property to set aside the conveyance for fraud, instituted within three years of the grantor's death, is not barred. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202 (1951).

Evidence did not show that guardian knew or should have known of the fraud and his failure to institute suit did not bar the ward. *Johnson v. Pilot Life Ins. Co.*, 217 N. C. 139, 7 S. E. (2d) 475, 128 A. L. R. 1375 (1940).

Same—Record as Notice of Fraud.—The

mere registration of a deed, containing an accurate description of the locus in quo and indicating on the face of the record facts disclosing the alleged fraud, will not, standing alone, be imputed for constructive notice of the facts constituting the alleged fraud, so as to set in motion the statute of limitations. In addition to the record, there must be facts and circumstances sufficient to put the defrauded person on inquiry which, if pursued, would lead to the discovery of the facts constituting the fraud. *Vail v. Vail*, 233 N. C. 109, 63 S. E. (2d) 202 (1951).

True, as indicated in *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387 (1893); *Modlin v. Roanoke R., etc.*, 145 N. C. 218, 58 S. E. 1075 (1907) and *Tuttle v. Tuttle*, 146 N. C. 484, 59 S. E. 1008 (1907), the mere registration of a deed will not usually, in these and like cases, be imputed for constructive knowledge; but in the present case the deed under which feme defendant claims and now holds this property had been on the registry in the proper county for more than eleven years before this action was instituted, and plaintiff's judgment had been docketed in the county since 1897. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348 (1915).

While the mere registration of deed to lands from a husband to his wife will not usually be imputed for constructive knowledge that it was done in fraud of the husband's creditors, it may be otherwise regarded when taken in connection with other relevant circumstances, and under the circumstances of this case it is held that the failure of the plaintiff in not sooner investigating the records was such negligence as will be imputed to her for knowledge, and bar her cause of action. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348 (1915).

Where a foreclosure sale of lands is attacked for fraud upon the ground that the trustee sold the timber on the land separate from the land and made deeds to each to separate parties, which were duly recorded, the record itself gives notice of the transaction, which with knowledge of the sale itself should have put the plaintiffs and their mother, as whose heirs at law they claim, and in whose lifetime foreclosure was had, upon reasonable notice of the fact, and bar their recovery after three years. *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213 (1916).

Same—Sale of Trust Land by Trustee as Notice.—Proceedings before clerk to sell trust lands to make assets to pay the debts of the deceased, and the open, notorious, and adverse possession of the pur-

chasers of the land, under their registered deeds, were sufficient to put the plaintiffs, claiming under the children of the said son, the cestuis que trustent, upon notice of the fraud alleged, if any committed by the executor, and it would bar their right of action within three years therefrom. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623 (1922).

Same—Necessity for Newly Discovered Evidence.—One can derive no aid from this section in an action to reconsider a case which has been sanctioned by the court and settled by a decree from it, in the absence of newly discovered evidence showing fraud. Where the plaintiff knew all the facts at first that are now known the first action must stand notwithstanding this section. *Spruill v. Sanderson*, 79 N. C. 466 (1878).

Same—Sufficiency of Evidence. — See *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213 (1916); *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623 (1922); *Small v. Dorsett*, 223 N. C. 754, 28 S. E. (2d) 514 (1944).

Application to Foreign Corporation.—A foreign corporation cannot set up the statute of limitations in bar of an action for false warranty. *Alpha Mills v. Watertown, etc., Co.*, 116 N. C. 797, 21 S. E. 917 (1895).

Actions to Which Applicable.—The relief afforded by the statute has a broader meaning than the common-law actions of fraud and deceit and applies to any and all actions, legal or equitable, where fraud is the basis or an essential element in the suit. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185 (1924).

Same—Fraudulent Conveyance.—Where the suit is to recover in money the difference between the grossly inadequate consideration paid for a conveyance of land, attacked upon the ground of fraudulent influence used upon the mind of the grantor for the grantee's benefit, and the reasonable value thereof, this section, limiting the action to three years in cases of fraud applies, and it is reversible error for the trial judge to hold, as a matter of law, that the ten-year statute relating to actions to impress a trust upon property only was applicable. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185 (1924).

An action by the heirs of mortgagors to set aside a conveyance of the equity of redemption by mortgagors to the mortgagee is an action based on fraud and must be instituted within three years from the discovery of the acts constituting the fraud, and the ten-year statute has no application. *Massengill v. Oliver*, 221 N. C. 132, 19 S. E. (2d) 253 (1942).

Same—Reformation of Mortgage for

Mistake.—Whether a cause of action for reformation of a mortgage for mistake was instituted within three years from discovery of the facts as provided by this section, or the time they should have been discovered in the exercise of due diligence, held for jury in this case. *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861 (1939).

Same — A Fraudulent Distribution of Dividends.—This section relating to time to commence action after discovery of fraud, has no application to fraudulent distribution of dividends to shareholders of corporations under the facts of this case. *Chatham v. Realty Co.*, 180 N. C. 500, 105 S. E. 329 (1920).

Same—Proceedings to Set Aside Probate.—This section is not necessarily controlling upon the hearing upon petition before the clerk of the superior court to set aside for fraud or imposition on the court, the proceedings admitting a paper-writing to probate as a will; and were it otherwise, it is required that the petitioner show that he could not sooner have discovered the fraud by the exercise of ordinary care, which in the instant case he has failed to do. *In re Will of Johnson*, 182 N. C. 522, 109 S. E. 373 (1921).

Same—Setting Aside Settlement by Guardian.—The time within which settlement of a guardian may be set aside for fraud is by several adjudications and this section restricted to the period of three years. *Wheeler v. Piper*, 56 N. C. 249 (1857); *Whedbee v. Whedbee*, 58 N. C. 392 (1860); *Spruill v. Sanderson*, 79 N. C. 466 (1878); *State v. Smith*, 83 N. C. 306 (1880).

Same—Action for Obtaining Deed by Fraud.—In an action for damages for obtaining by fraud or deceit a deed from plaintiff conveying a larger amount of timber than was intended to be conveyed, the statute of limitations applicable is this section. *Modlin v. Roanoke R., etc., Co.*, 145 N. C. 218, 58 S. E. 1075 (1907).

Same—Action to Declare Purchasing Partner a Trustee. — An action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the surety of their debts, is not barred by this section. *Quaere*, as to the application of subsection 4. *Ross v. Henderson*, 77 N. C. 170 (1877).

Same—Action to Remove Cloud from Title.—The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable. *Cable v. Trexler*, 227 N. C. 307, 42 S. E. (2d) 77 (1947).

Action for Omission from Deed.—Where a reversionary clause was omitted from a deed by mistake of the draftsman it was held that the registration of the deed was insufficient to constitute notice to plaintiffs, and the action was not barred until three years after plaintiffs discovered, or should have discovered, the mistake in the exercise of due diligence. *Ollis v. Board of Education*, 210 N. C. 489, 187 S. E. 772 (1936).

Action Barred by Negligence in Asserting Right.—The plaintiffs contended that usurious interest was paid defendant by their agent without their knowledge, and that therefore their action to recover the penalty for usury was not barred although instituted more than two years after the last usurious payment (see § 1-53). It was held that the plaintiffs are not entitled to invoke the statute, it appearing that plaintiffs did not institute action until more than three years after they had executed a note bearing six per cent interest in renewal of the original note upon which usury was paid, and that plaintiffs were negligent in asserting their rights if any they had. *Ghormley v. Hyatt*, 208 N. C. 478, 181 S. E. 242 (1935).

Where Purchaser Did Not Participate in Fraud.—Where there is no allegation or proof that a purchaser fraudulently concealed the fact of sale or participated in any fraud in connection therewith, then as to him the action is barred by the lapse of three years, this section not applying as to the action against him. *Johnson Cotton Co. v. Sprunt & Co.*, 201 N. C. 419, 160 S. E. 457 (1931).

Remedy Where Action on Contract Barred.—The remedy by the vendor of goods obtained by the fraud of the purchaser, first discovered after the action on the contract has been barred, is by an action for damages under this section as amended by c. 269, Acts of 1889. *Rouss v. Ditmore*, 122 N. C. 775, 30 S. E. 335 (1898).

When Replication Required.—When the date of the accruing of the cause of action appears in the complaint and the statute of limitations is pleaded, the court can, of course, pass judgment, unless matter in avoidance is pleaded as a new promise, or the like. It is only in such cases that a replication is now required. *Moore v. Garner*, 101 N. C. 374, 7 S. E. 732 (1888), though under the former practice a replication was required, whenever the statute of limitations was pleaded. *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387 (1893).

Burden of Proof.—In an action to set aside a conveyance on account of fraud,

the statute of limitations being pleaded thereto, the burden is on the plaintiff to show that the fraud was not discovered until within three years of the commencement of the action. *Hooker v. Worthington*, 134 N. C. 283, 46 S. E. 726 (1904).

The burden is on the plaintiffs to show that neither they nor their predecessor in title, knew of the fraud, or would have discovered it in the exercise of reasonable business prudence. *Sanderlin v. Cross*, 172 N. C. 234, 90 S. E. 213 (1916).

The plea of the statute of limitations put the burden upon the defendant, in the cross-action, to show that the statute of limitation had not barred his right, by a lapse of more than three years from the time he discovered the mistake to the time he had filed his pleading, and in failing to introduce such evidence he is concluded as a matter of law. *Taylor v. Edmunds*, 176 N. C. 325, 97 S. E. 42 (1918).

Effect of Nonresidence of Plaintiff.—The nonresidence of a plaintiff, claiming lands here under an allegation of fraud, etc., does not affect the running of the statute of limitations adverse to his demand in his action. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623 (1922).

A nonresident creditor who seeks to set aside a deed of his debtor for fraud is not excused by his absence for not complying with the provisions of this section, requiring that he must bring his action within three years from the discovery of the fraud. *Ewbank v. Lyman*, 170 N. C. 505, 87 S. E. 348 (1915).

Erroneous Ruling Not Cured by Other Defects.—The reversible error of ruling that as a matter of law the evidence was insufficient under this section, is not relieved by the principle that the statute does not begin to run till the undue influence constituting fraud has been removed, when it does not appear on appeal that such influence had ever been removed, and the jury have found the issue of fraud without being permitted to pass upon this question. *Little v. Wadesboro*, 187 N. C. 1, 121 S. E. 185 (1924).

Effect of Failure of Referee to Find Facts.—When the referee to whom the case was referred failed to find the facts upon which this statute of limitations can be determined, the case must be remanded. *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622 (1890).

Stated in Life Ins. Co. v. Edgerton, 206 N. C. 402, 174 S. E. 96 (1934).

Cited in Fort Worth, etc., R. Co. v. Hegwood, 198 N. C. 309, 151 S. E. 641 (1930); *McCormick v. Jackson*, 209 N. C.

359, 183 S. E. 369 (1936); *Thacker v. Fidelity, etc., Co.*, 216 N. C. 135, 4 S. E. (2d) 324 (1939); *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446 (1950); *Holt v. Holt*, 232 N. C. 497, 61 S. E. (2d) 448 (1950).

X. SUBSECTION TEN—REALTY SOLD FOR TAXES.

This section does not apply where the owner remains in possession. *Bailey v. Howell*, 209 N. C. 712, 184 S. E. 476 (1936).

Application to Tenancy in Common.—

The statute permits the sheriff to sell the lands of tenants in common for the non-payment of taxes, and a tenant in common to pay his or her part of the tax and let the other shares go; and provides that three years' possession by the purchaser under the tax deed bars the former rightful owners. *Ruark v. Harper*, 178 N. C. 249, 100 S. E. 584 (1919).

Application to Suit to Remove Cloud.—

In *Price v. Slagle*, 189 N. C. 757, 128 S. E. 161 (1925), the court said:

"This three-year statute has been held not to apply when the suit is to remove a cloud, as distinguished from a suit to recover the land sold for taxes from the tax sale purchaser, or his assigns, who are in possession of the lands so sold."

Application Where Deed Color of Title Only.—

Where a sheriff's deed given for the nonpayment of taxes is not under seal, it is good as color of title, which seven

years' adverse possession will ripen into an absolute one, under § 1-38. *Ruark v. Harper*, 178 N. C. 249, 100 S. E. 584 (1919).

Applies to Action for and against Claimants.—The three-year statute of limitations barring the right of action in favor of a claimant under a tax deed is broad enough to include actions for and against such claimant. *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214 (1915).

Possession as Affecting Application.—"Semble, the three-year statute of limitations may not be successively pleaded by the claimant under the tax deed against the original owner in possession of the lands." *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214 (1915).

The purchaser's possession for three years under an irregular sheriff's deed would be sufficient to bar action thereon. *Lyman v. Hunter*, 123 N. C. 508, 31 S. E. 827 (1898); *Kivett v. Gardner*, 169 N. C. 78, 85 S. E. 145 (1915).

Necessity of Pleading Section.—The three-year statute of limitations in favor of or against the claimant under a tax deed to lands must be properly pleaded to be made available. *Jordan v. Simmons*, 169 N. C. 140, 85 S. E. 214 (1915).

In an action against the administrator of the deceased to recover taxes paid for him by the plaintiff, it is necessary that the defendant plead the statute of limitations in order to avail himself of it as a bar to the plaintiff's recovery thereon. *Smith v. Allen*, 181 N. C. 56, 106 S. E. 143 (1921).

§ 1-53. Two years.—Within two years—

1. All claims against counties, cities and towns of this State shall be presented to the chairman of the board of county commissioners, or to the chief officers of the cities and towns, within two years after the maturity of such claims, or the holders shall be forever barred from a recovery thereon; provided, however, that the provisions of this paragraph shall not apply to claims based upon bonds, notes and interest coupons, except claims based upon bonds, notes and interest coupons of a county, city, town, township, road district, school district, school taxing district, sanitary district or water district which mature on or after March first, one thousand nine hundred forty-five, and which have been incorporated in and are subject to the terms of a plan of composition or refinancing of indebtedness providing for exchange of bonds and adjustment of interest thereon and pursuant to which any bonds have been exchanged, shall be presented within two years after maturity or, if such bonds, notes and interest coupons have matured subsequent to March twenty-second, one thousand nine hundred thirty-five but prior to March first, one thousand nine hundred forty-five, such claims shall be presented within two years after March first, one thousand nine hundred forty-five, or the holders of any such claims shall be forever barred from recovery thereon, and any such claims shall be presented to the officer or officers charged by law with the payment of the same or with providing for such payment.

2. An action to recover the penalty for usury.

3. The forfeiture of all interest for usury.

4. Actions for damages on account of the death of a person caused by a wrongful act, neglect or default of another, under § 28-173 of the General Statutes of North Carolina. (1874-5, c. 243; 1876-7, c. 91, s. 3; Code, ss. 756, 3836; 1895, c. 69; Rev., s. 396; C. S., s. 442; 1931, c. 231; 1937, c. 359; 1945, c. 774; 1951, c. 246, s. 2.)

Local Modification.—Cartaret, Haywood: 1933, c. 386; Cherokee, Clay: 1933, c. 318.

- I. Subsection One — Political Subdivisions of State.
- II. Subsection Two — Penalty for Usury.
- III. Subsection Three — Forfeiture of All Interest for Usury.
- IV. Subsection Four — Death by Wrongful Act.

Cross References.

As to power of county, to be sued, see § 153-2, paragraph 1. As to power of city or town, to be sued, see § 160-2, paragraph 1. As to requirement of demand before suit, see § 153-64. As to penalty and forfeiture for usury, see § 24-2.

I. SUBSECTION ONE—POLITICAL SUBDIVISIONS OF STATE.

Editor's Note.—The 1937 amendment added the proviso to subsection 1, and the 1945 amendment added the exception to the proviso.

As to necessity for presenting tort claims, see 27 N. C. Law Rev. 145.

The 1937 amendment did not operate retrospectively, and hence did not revive action previously barred for face value of unpaid coupons on bonds issued by county, in township's behalf. *Valleytown Tp. v. Women's Catholic Order, etc.*, 115 F. (2d) 459 (1940), reversing 32 F. Supp. 894.

Purpose of Section.—"The obvious purpose of the law is to enable those municipal bodies mentioned in it to ascertain and make a record of its valid outstanding obligations, and to separate them from such as are spurious or tainted with illegality and denounced in the Constitution." *Wharton v. Commissioners*, 82 N. C. 12 (1880). See post this note, "Nature and Effect of Section."

Constitutionality.—Under the interpretation of this section, it may admit of question whether the condition engrafted by it upon the contract, as affecting the pre-existing rights of the creditor, does not impair its obligation within the prohibition of the federal Constitution. *Wharton v. Commissioners*, 82 N. C. 12 (1880).

Nature and Effect of Section.—The language of this section is plain and explicit, and there is room for but one construction of it. The court has said that the provision of the statute is not in strict terms a limitation of the time within which an action may be prosecuted, but that it imposes

upon the creditor the duty of presenting his claim within a prescribed period of time, and, upon his failure to do so, forbids a recovery in any suit thereafter commenced. *Wharton v. Commissioners*, 82 N. C. 12 (1880). See *Moore v. Charlotte*, 204 N. C. 37, 167 S. E. 380 (1933).

In a later case the court held that "This is a statute of limitation, and such claims against the county should be presented within two years after maturity." *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622 (1890), citing *Moore v. Commissioners*, 87 N. C. 209 (1882); *Royster v. Commissioners*, 98 N. C. 148, 3 S. E. 739 (1887).

In *Board v. Greenville*, 132 N. C. 4, 43 S. E. 472 (1903), the court said, "We think it is unnecessary to inquire or to decide whether the statute is strictly one of limitation, or whether it merely imposes a duty upon the holder of a claim against a municipal corporation, the performance of which is a condition precedent to his right of recovery. In either view of the nature of the statute the claimant, by its very words, is 'barred from a recovery' of any part of the claim that did not mature within the two years immediately preceding the date of his demand, and this conclusion as to the effect of the statute is all sufficient for the disposition of this appeal."

"This section is not strictly a statute of limitation, for it imposes this as a duty on the claimant as a condition upon which he may successfully maintain his action." *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13 (1913).

Liberal Construction.—In *Wharton v. Commissioners*, 82 N. C. 12 (1880), the court said, "We are not disposed to give so strict an interpretation to the requirement of the act, which, as all its useful purposes are met, would be to sacrifice substance for form and convert a judicious measure of legislation into an instrument of injustice and wrong."

When Statute Begins to Run.—Where the plaintiff made a payment, the defendant promising to refund any excess of the amount due, and upon a reference a balance was reported in favor of the plaintiff it was held, in an action to recover the amount, that the statute begins to run only from the date of such finding. *Moore v. Commissioners*, 87 N. C. 209 (1882).

Where the defendants and their predecessors in office had notice from the be-

ginning of the origin, nature and amount of a claim against a county, and of the fact that it could not mature until the accuracy or inaccuracy of their previous settlement with the plaintiff could be ascertained, such a claim falls neither within the letter nor the spirit of this section. *Moore v. Commissioners*, 87 N. C. 209 (1882).

Effect of Failure to Present Claim in Time.—Where a creditor fails to present his claim in the prescribed time, any action thereon thereafter is barred. *Board v. Greenville*, 132 N. C. 4, 43 S. E. 472 (1903).

What Plaintiff Must Allege and Prove.—Where a claim has been made on the city for services rendered, and it nowhere therein appears when the services were rendered, in an action to recover therefor the plaintiff must not only show that the claim had been presented in the statutory period, but that the amount claimed had matured within that time; and when he has failed to make this necessary allegation in his complaint, a demurrer thereto should be sustained. *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13 (1913).

Same—When Defect Attacked by Demurrer.—Where upon the face of a complaint it does not appear that claim was made upon a town's officers as this section provides, within two years after its maturity, the claim is barred, and a demurrer that it states no cause of action should be sustained. *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13 (1913).

Same—When Action Amendable.—The complaint, not stating a cause of action under the requirements of this section, is demurrable; but as the complaint is a defective statement of a cause of action, and not necessarily a statement of a defective cause of action, it was error to dismiss the action, and the plaintiff may amend by setting out the matters required by the statute. *Dockery v. Hamlet*, 162 N. C. 118, 78 S. E. 13 (1913).

Nonsuit as Extending Time under § 1-25.—One who began suit within the time prescribed, took a nonsuit and began a second action within one year after the nonsuit, but more than two years after the maturity of the claims, was not barred. *Wharton v. Commissioners*, 82 N. C. 12 (1880).

Application to Claim of Sheriff.—A sheriff must present his claim against a county for an allowance to him to pay off a county debt within the two years prescribed in the section. *Lanning v. Commissioners*, 106 N. C. 505, 11 S. E. 622 (1890).

Action for Services Rendered as Attorney.—Where plaintiff instituted this action

to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year, subsequent to the termination of the civil action, and defendants alleged that final judgment in the civil action was entered more than two years prior to the institution of the present suit, that plaintiff's cause of action for services rendered therein accrued at the time of the rendition of the judgment, and that plaintiff's cause of action for services rendered therein is barred, the plea of the statute of limitations relates solely to the claim for services rendered in the civil action, and is not a plea in bar which would defeat plaintiff's claim in its entirety. *Grimes v. Beaufort County*, 218 N. C. 164, 10 S. E. (2d) 640 (1940).

Cited in *Lightner v. Raleigh*, 206 N. C. 496, 174 S. E. 272 (1934); *Fletcher v. Parlier*, 206 N. C. 904, 173 S. E. 343 (1934); *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937); *Reed v. Madison County*, 213 N. C. 145, 195 S. E. 620 (1938); *Ivester v. Winston-Salem*, 215 N. C. 1, 1 S. E. (2d) 88 (1939); *Rivers v. Wilson*, 233 N. C. 272, 63 S. E. (2d) 544 (1951).

II. SUBSECTION TWO—PENALTY FOR USURY.

Origin of Section.—The right of action to recover for usurious interest paid is purely statutory, and the plaintiff must comply with the terms of the statute as to the time of bringing his action. *Roberts v. Life Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896).

Section Not Retroactive.—The right added by the act of 1876-77 to recover back interest paid could not apply to contracts made prior to its passage. *Moore v. Beaman*, 112 N. C. 558, 17 S. E. 676 (1893).

The act of 1895, c. 69, which provides for the recovery of usurious interest if the action is brought within two years after the payment in full of the indebtedness, by its express terms, does not apply to contracts antedating its ratification. *Roberts v. Life Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896).

When Statute Begins to Run.—The act of 1895 provides for bringing an action to recover back double the amount of usurious interest paid if the action is brought within two years after the payment in full of such indebtedness, in this respect changing what is now § 24-2, which provided that "the action must be brought within

two years from the time the usurious transaction occurred." *Roberts v. Life Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896). The provision no longer appears in § 24-2.—Ed. Note.

The cause of action for the penalty for each payment of usury arises immediately and accrues upon the date of the payment. The action to recover the penalty for each usurious transaction is therefore barred under this section, upon the expiration of two years from the date of the payment. *Sloan v. Piedmont Fire Ins. Co.*, 189 N. C. 690, 128 S. E. 2 (1925).

Under this section the statute of limitations began to run at the date the cause of action accrued, and as service could have been made under the statute at any time before the commencement of this action, the statute continued to run against the plaintiffs. The defendant, although a non-resident or foreign corporation, was at all times from the date the cause of action accrued until the commencement of this action subject to the jurisdiction of the courts of this State and for that reason, two years having elapsed from the date the cause of action accrued to the date of the commencement of the action, the action is barred. *Smith v. Finance Co.*, 207 N. C. 367, 177 S. E. 183 (1934). See also, *Ghormley v. Hyatt*, 208 N. C. 478, 181 S. E. 242 (1935).

Same — Mutual Running Account. — Where the transaction constitutes a mutual running account an action for the penalty under our statute is not barred within two years next from the last item therein. *English Lumber Co. v. Wachovia Bank*, 179 N. C. 211, 102 S. E. 205 (1920).

Effect of Defendant Being out of State. — This two-year prescription is subject to the provisions of § 1-21 that when a cause of action accrues against a person he shall be out of the State or shall thereafter depart therefrom and reside out of the State, "the time of his absence shall not be deemed or taken as a part of the time limited for the commencement of such action." *Williams v. Iron Belt, etc., Asso.*, 131 N. C. 267, 42 S. E. 607 (1902).

The two years within which an action may be brought, under this section, is to be construed in connection with the provisions of § 1-21, which provides that if the defendant departs from or resides out of the State, such action may be brought within two years after process can be served upon him; otherwise the statute would be illusory and partial, in favor of nonresidents. *Armfield v. Moore*, 97 N. C. 34, 2 S. E. 347 (1887); *Williams v. Iron Belt,*

etc., Asso., 131 N. C. 267, 42 S. E. 607 (1902).

Application to Action against Foreign Corporation.—An action against a foreign corporation to recover usury may be begun within two years from the time there is someone in the State upon whom service can be made. *Williams v. Iron Belt, etc., Asso.*, 131 N. C. 267, 42 S. E. 607 (1902).

Bar of Counterclaim.—Where more than two years has elapsed from the payment of alleged usury until the institution of an action on the debt alleged to have been tainted with usury, the defendant's counterclaim for twice the amount of usury charged is barred. *Farmers' Bank, etc., Co. v. Redwine*, 204 N. C. 125, 167 S. E. 687 (1933).

Attorney's Fee Held Not Usurious.—See *Woody v. Prudential Life Ins. Co.*, 209 N. C. 364, 183 S. E. 296 (1936).

Necessity of Pleading. — This section need not be specifically pleaded. *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896).

Must Be Pleaded When Relied on as a Defense.—In an action to recover the statutory penalty for usury the two-year statute of limitations must be pleaded when relied on as a defense, the clause relating thereto having been taken out of § 3836 of the Code and placed in this section and thereby made a statute of limitations, but when properly pleaded the burden is upon the plaintiff to prove that his suit is brought within two years from the time the cause of action accrued. *McNeill v. Suggs*, 199 N. C. 477, 154 S. E. 729 (1930).

Section 24-2 Defines the Penalty for Usury.—The right to recover interest is governed by § 24-2 which permits a recovery of twice the amount of interest paid if brought within the time prescribed by this section. *Roberts v. Ins. Co.*, 118 N. C. 429, 24 S. E. 780 (1896).

Application illustrated in *Rogers v. Bank*, 108 N. C. 574, 13 S. E. 245 (1891).

III. SUBSECTION THREE—FORFEITURES OF ALL INTEREST FOR USURY.

Editor's Note.—The act of 1931 which added subsection 3 to this section provided that it should not affect pending litigation. It became effective April 1, 1931.

This section is prospective only, and is applicable only to a forfeiture under § 24-2, which has occurred, or shall occur, since its ratification on April 1, 1931. *Farmers' Bank, etc., Co. v. Redwine*, 204 N. C. 125, 167 S. E. 687 (1933).

Continuing Injunction against Foreclo-

sure.—Since a junior lienor seeking to enjoin foreclosure under a prior mortgage on the same land until a bona fide controversy as to the amount due under the prior debt is settled, is not entitled to invoke the forfeiture of all interest, but is required to tender the principal of the debt plus legal interest, a decree continuing the injunction to the final hearing is not error notwithstanding defendants' plea of the two-year statute of limitations for the forfeiture of

interest, even if it be conceded that an action for forfeiture of the interest is barred by the statute. *Pinnix v. Maryland Cas. Co.*, 214 N. C. 760, 200 S. E. 874 (1939).

IV. SUBSECTION FOUR—DEATH BY WRONGFUL ACT.

Editor's Note.—The 1951 amendment, which added subsection 4, applies only to actions where the death occurs subsequent to March 13, 1951.

§ 1-54. **One year.**—Within one year an action or proceeding—

1. Against a public officer, for a trespass under color of his office.
2. Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.
3. For libel, assault, battery, or false imprisonment.
4. Against a public officer, for the escape of a prisoner arrested or imprisoned on civil process.
5. For a widow's year's allowance.
6. For a deficiency judgment on any debt, promissory note, bond or other evidence of indebtedness after the foreclosure of a mortgage or deed of trust on real estate securing such debt, promissory note, bond or other evidence of indebtedness, which period of limitation above prescribed commences with the date of the delivery of the deed pursuant to the foreclosure sale: Provided, however, that if an action on the debt, note, bond or other evidence of indebtedness secured would be earlier barred by the expiration of the remainder of any other period of limitation prescribed by this subchapter, that limitation shall govern. (C. C. P., s. 35; Code, s. 156; 1885, c. 96; Rev., s. 397; C. S., s. 443; 1933, c. 529, s. 1; 1951, c. 837, s. 2.)

Cross References.—As to actions in the nature of quo warranto, see §§ 1-514 et seq. See also § 28-175. As to liability for escape under civil process, see § 162-21. As to permitting escape of prisoners, see § 14-257. As to widow's year's allowance and application therefor, see § 30-15.

Editor's Note.—The 1951 amendment added the words "or proceeding" after the word "action" near the beginning of this section, struck out the words "An application", formerly appearing at the beginning of subsection 5, and transferred, renumbered and rewrote former § 1-48, making it subsection 6 of this section.

Subsection One—Extent to Which Application Limited—Town Officers.—This section is properly restricted to unlawful acts done by a public officer, under color of his office, to the person and property of another, by violence or force, direct or imputed, and does not apply to a breach of official duty in reference to the officials of a town as employees thereof, in wrongfully diverting the funds of the town to a railroad company in acquiring a right of way for it. *Brown v. Southern R. Co.*,

188 N. C. 52, 123 S. E. 633 (1924).

Same—Railroad Conspiring with Officials.—Where a railroad company, through its agents has participated in the unlawful appropriation of a town's funds, the mere fact that the trial court has dismissed the action as to the members of the municipal board participating in the commission of the wrongful act, under the plea of this section, will not likewise or necessarily bar the action against the railroad company, under the same plea, under an alleged privity between them. *Brown v. Southern R. Co.*, 188 N. C. 52, 123 S. E. 633 (1924).

Action against Justice of Peace.—A summons was issued to recover the penalty against a justice of the peace, for performing the marriage ceremony without the delivery of the license therefor to him, G. S., § 51-6, within less than a year from the time he had performed it, it was held, the plea of this section could not be sustained. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628 (1922).

Subsection Two—Application to Clerk of Court.—An action against a clerk for

a penalty, if not brought within one year, is barred by the statute of limitations. *State v. Nutt*, 79 N. C. 263 (1878).

Subsection Three—Disability Preventing Bar.—An action for assault and battery is barred upon the plea of this section, if not commenced within one year, but if the plaintiff alleges and shows that he could not sooner have brought the action because of his mental condition or insanity, the time of such disability will be deducted from the running of the statute. *Hayes v. Lancaster*, 200 N. C. 293, 156 S. E. 530 (1931).

Same—Action for Libel.—Where, in an action for libel, defendants admit that the article was published in defendant magazine on a certain date, and plaintiff shows that the action was instituted one day less than a year thereafter, defendant is not entitled to nonsuit upon his plea of the one-year statute of limitations. *Harrell v. Goerch*, 209 N. C. 741, 184 S. E. 489 (1936).

Same—Action for False Imprisonment.—Where it appeared that plaintiff's cause of action based upon the alleged wrongful

act of defendant in causing plaintiff's detention in an insane asylum was instituted less than one year from the date plaintiff was discharged as sane, plaintiff's cause of action was not barred. *Jackson v. Parks*, 216 N. C. 329, 4 S. E. (2d) 873 (1939).

Subsection Six—Actions to Recover Deficiency Judgments.—The cases cited below were decided under the former statute which became G. S., § 1-48 and was subsequently rewritten as subsection 6 of this section.

The statute protects all substantial rights of the parties and its application was held not to impair plaintiff's contractual rights. *Orange County Building, etc., Ass'n v. Jones*, 214 N. C. 30, 197 S. E. 618 (1938).

An action for a deficiency judgment after foreclosure is not barred by this section when it is instituted less than one year after the expiration of the ten-day period for an increase in bid, even though it is instituted more than one year after the date the property is exposed for sale. *Shelby Bldg., etc., Ass'n v. Black*, 215 N. C. 400, 2 S. E. (2d) 6 (1939).

§ 1-55. Six months.—Within six months an action—

1. For slander.
2. Upon a contract, transfer, assignment, power of attorney or other instrument transferring or affecting unearned salaries or wages, or future earnings, or any interest therein, whether said instrument be under seal or not under seal. The above period of limitation shall commence from the date of the execution of such instrument.
3. For the wrongful conversion or sale of leaf tobacco in an auction tobacco warehouse during the regular season for auction sales of tobacco in such warehouse. This paragraph shall not apply to actions for the wrongful conversion or sale of leaf tobacco which was stolen from the lawful owner or possessor thereof. (C. C. P., s. 36; Code, s. 157; Rev., s. 398; C. S., s. 444; 1931, c. 168; 1943, c. 642, s. 2.)

Local Modification.—Cleveland, Rutherford: 1933, c. 167.

Cross References.—See §§ 1-158, 95-31.

Editor's Note.—The 1931 amendment added subsection 2, and the 1943 amendment added subsection 3.

See 11 N. C. Law Rev. 220.

Necessity for Affirmative Plea.—In an action for slander, if the defendant does not plead the statute of limitations, the plaintiff may recover, though the proof shows that the words were spoken more than six months before the commencement of the action. *Pegram v. Stoltz*, 67 N. C. 144 (1872).

Same—Where Misled by Petition.—If the defendant has been misled by allegation of a different date from the one proved, so that he failed to set up this

statute in his answer, the judge would, of course, allow him to amend his answer. *Pegram v. Stoltz*, 67 N. C. 144 (1872).

An action for slander begun more than six months after the publication of the alleged defamatory words is barred by the statute of limitations under this section, the right of action accruing from the date of publication, regardless of the fact that it is begun within six months from the discovery by plaintiff that defendants were the authors thereof. *Gordon v. Fredle*, 206 N. C. 734, 175 S. E. 126 (1934).

When Action Begun.—Where a writ in slander was issued, returnable to a term of the court, and no alias issued from such return term, but a writ issued from the next term thereafter, it was held that the latter writ was the commencement of the

suit, and the limitation to the action must be determined accordingly. *Hanna v. Ingram*, 53 N. C. 55 (1860).

Application Illustrated.—Where the plaintiff brought an action for slander more than six months after the cause accrued, and then afterwards amended his complaint so as to include words spoken within six months before the beginning of

the action, but more than eighteen after the filing of the amended complaint, and the defendant pleaded the statute of limitations, it was held, (1) the plaintiff's cause of action was barred; (2) the amended complaint set up a new cause of action, and this was also barred. *Hester v. Mullen*, 107 N. C. 724, 12 S. E. 447 (1890).

ARTICLE 5A.

Limitations, Actions Not Otherwise Limited.

§ 1-56. **All other actions, ten years.**—An action for relief not otherwise limited by this subchapter may not be commenced more than ten years after the cause of action has accrued. (C. C. P., s. 37; Code, s. 158; Rev., s. 399; C. S., s. 445; 1951, c. 837, s. 3.)

I. In General.

II. Actions to Which Applicable.

I. IN GENERAL.

Editor's Note.—The 1951 amendment rewrote this section and inserted the article heading.

Purpose of Section.—This section was intended as a sweeping statute of repose and to cure omissions in former statutes. *Brown v. Morsey*, 124 N. C. 292, 32 S. E. 687 (1899) (con. op.).

This section was intended to be a universal statute of repose, applying to all causes of action not included among those specifically enumerated in the preceding sections of the statute of limitation. It could have no other purpose. It being almost impossible to enumerate all cases for which a statute of repose was needed, this section was passed to embrace, in its very words, any "action for relief not herein provided for." *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904) (dis. op.).

See to same effect *Wyrick v. Wyrick*, 106 N. C. 84, 10 S. E. 916 (1890); *Ex parte Smith*, 134 N. C. 495, 47 S. E. 16 (1904).

When Statute Begins Running.—Where a covenant of warranty and seizin was breached at the time of delivery of the deed, this section begins running against an action for such breach from the time of the delivery. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

This section begins to run against an action by the vendor to recover possession from the vendee when the possession of vendee becomes hostile by a refusal to surrender after demand and notice. *Overman v. Jackson*, 104 N. C. 4, 10 S. E. 87 (1889).

An action to impeach the final account

of a personal representative must be brought within ten years from the filing and auditing thereof as provided in this section. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

In an action by one who claims as enterer of "Cherokee Lands," the cause of action is barred in ten years from the registration of the grant. *Frazier v. Gibson*, 140 N. C. 272, 52 S. E. 1035 (1905); *Philips v. Buchanan Lumber Co.*, 151 N. C. 519, 66 S. E. 603 (1909).

This statute does not begin to run until there is a person in esse competent to begin the suit, that is, until the appointment of an administrator. This is a well recognized rule. *Godley v. Taylor*, 14 N. C. 178 (1831); *Lynn v. Lowe*, 88 N. C. 478 (1883).

Application Immaterial Where Period Has Not Run.—Where ten years has not elapsed it is not necessary to determine whether this section applies. *Burgwyn v. Daniel*, 115 N. C. 115, 20 S. E. 462 (1894).

Charging Section with § 1-52.—Where, if the action had not been barred by the provisions of subsections 4 and 9 of § 1-52, it would have been barred under this section, it was not error to tell the jury that the action was barred in three years, or in ten years. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 283 (1891).

Section Not Affected by § 1-52.—This section applying to an action against an executor or administrator for a final accounting and settlement, is not affected by the provisions of § 1-52, as to actions on their official bonds. *Pierce v. Faison*, 183 N. C. 177, 110 S. E. 857 (1922).

Practice.—Under the former practice an objection that the equity of plaintiff seeking to declare a trust in land was barred could be taken by demurrer; under the

present practice it may be taken by a motion to dismiss the action. *Marshall v. Hammock*, 195 N. C. 498, 142 S. E. 776 (1928).

Applied in *Teachey v. Gurley*, 214 N. C. 288, 199 S. E. 83 (1938).

Cited in *Smith v. Smith*, 72 N. C. 139 (1875); *Mauney v. Coit*, 86 N. C. 464 (1882); *Tieffenbrun v. Flannery*, 198 N. C. 397, 151 S. E. 857 (1930); *Creech v. Creech*, 222 N. C. 656, 24 S. E. (2d) 642 (1943); *Jennings v. Morehead City*, 226 N. C. 606, 39 S. E. (2d) 610 (1946); *Lee v. Rhodes*, 231 N. C. 602, 58 S. E. (2d) 363 (1950); *United States v. Pastell*, 91 F. (2d) 575 (1937).

II. ACTIONS TO WHICH APPLICABLE.

Creditor's Action against Purchasing Partners.—The question as to whether an action by the creditors of a partnership to hold the owners of the legal estate (who purchased the interest of one partner in the partnership property) as trustees for the security of their debts, is barred by this section, was raised but not decided. *Ross v. Henderson*, 77 N. C. 170 (1877).

An action for relief against an executor must be filed within ten years after the action accrues. *King v. Richardson*, 136 F. (2d) 849 (1943) (dis. op.).

Passive Trust — Actions by Children against Trustee.—Where the testator creates his executor as trustee of a part of the estate "to collect and apply the rents and hires, and interests thereof, to the support of his certain named son and his family during the son's life and then to convey to his child or children," it constitutes an active trust during the life of the son which becomes passive at his death, at which time the relationship of the parties would be adverse to each other, and start the running of the statute of limitations, against the children, then of age, and not under legal disability, and bar their action for an accounting and settlement after ten years, especially when the relationship of trustee has been openly repudiated. *Latham v. Latham*, 184 N. C. 55, 113 S. E. 623 (1922).

Claim for Admeasurements of Dower.—This section is applicable to the claim for admeasurement of dower against the heirs, or one claiming under them. *Brown v. Morrissey*, 124 N. C. 292, 32 S. E. 687 (1899).

Action to Test Validity of Stockholder's Election.—There is no statute of limitations applicable to an action brought by citizens to test the validity of an election

held relative to subscribing stock to a railroad company, but such action must be brought within a reasonable time. *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890).

Action of Cotenants to Protect Title.—Where one tenant in common in possession has obtained for himself the outstanding title to the locus in quo, equity will declare him to have purchased for the benefit of the others, to be held in trust for them, and the ten-year statute applying to his possession, this section in such instances, will not begin to run in his favor against his cotenants until some act of ouster on his part sufficient to put them to their action. *Gentry v. Gentry*, 187 N. C. 29, 121 S. E. 188 (1924).

Impeachment of Final Account of Representative.—When a final account of a representative is filed and audited, an action to impeach it must be brought within ten years from the filing and auditing of the same. The period of limitation is not specifically declared, but such a case falls within this section. *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889).

When the administrator of A died eight years after filing an ex parte account, the plaintiff qualified as his executor within one month, and within seventeen months began a proceeding to make real estate assets, to which the administrator de bonis non of A became a party, and filed a complaint to recover the amount due on said final account, it was held, that although this section applied for the reason stated in *Woody v. Brooks*, 102 N. C. 334, 9 S. E. 294 (1889), it did not bar the action. *Wyrick v. Wyrick*, 106 N. C. 84, 10 S. E. 916 (1890).

Release of Right to Surcharge and Restate Final Account.—There was no express statute as to the length of time necessary to presume a release of the right to surcharge and restate a final account, duly filed and audited, but by analogy it seems to have been ten years, the same length of time which is now required by this section to bar such action. *Nunnery v. Averitt*, 111 N. C. 394, 16 S. E. 683 (1892).

Action for Balance Due Heirs.—Where the distributees, who until they became of age, had a guardian, did not bring suit for an alleged balance due under the testator's will for 15 years after the executor filed his final account, the action was barred by either § 1-50, par. 2 or this section. *Culp v. Lee*, 109 N. C. 675, 14 S. E. 74 (1891).

Partition Proceedings.—Where a petition in partition is filed, and the petition-

ers enter into possession of their respective shares, in accordance with the judgment of partition therein entered, and it is therein provided that the widow of the intestate should receive a certain sum monthly in lieu of dower, which sum is made a lien upon the lands, an action by the widow to enforce her claim against the land is barred after the lapse of more than ten years from the partition and decree of owelty in view of this section, and the fact that a second decree of confirmation was entered in the case several years thereafter for the purpose of recording the papers, the original papers having been destroyed by fire, does not alter this result. *Aldridge v. Dixon*, 205 N. C. 480, 171 S. E. 777 (1933).

Recovery of Real Estate.—This section does not apply to actions for the recovery of real estate because §§ 1-39, 1-40 apply to its exclusion. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877 (1898).

Same—Defendant in Ejectment.—The ten-year statute of limitations does not apply to defendants in ejectment who claim the land by adverse possession, where they have recognized plaintiff's claim and title thereto within that time. *Williams v. Scott*, 122 N. C. 545, 29 S. E. 877 (1898).

Same—To Declare Senior Grantee a Trustee.—An action brought by plaintiff, claiming under the junior grantee of public land, to have defendants, claiming under the senior grantee, declared to be trustees for plaintiff, and to require them to convey to plaintiff such title as they claimed, was barred, where not brought within 10 years from the registration of the senior grant, by this section. *Ritchie v. Fowler*, 132 N. C. 788, 44 S. E. 616 (1903).

Same—To Declare Vendee a Trustee.—Since the other statutes of limitations do not expressly mention the trust relation between vendor and vendee, it could be only included under this section, and it would then be allowed only where the possession was adverse or where it was necessary to prevent some wrong or gross injustice. *Bradsher v. Hightower*, 118 N. C. 399, 24 S. E. 120 (1896).

Same—Enforcement of Parol Trust in Favor of Wife.—Section apparently not applicable, see *Spence v. Foster Pottery Co.*, 185 N. C. 218, 117 S. E. 32 (1923).

Same—To Recover Possession of Vendee.—In an action to recover possession by vendor against a vendee who enters under the contract, the only statute of limitation applicable is that of this section.

Overman v. Jackson, 104 N. C. 4, 10 S. E. 87 (1889).

Same—Against Remainderman.—Where a remainderman, not being in possession, executes a mortgage, the foreclosure of the mortgage is not barred after ten years from the forfeiture thereof or from the last payment, such action being brought within ten years from the time of the acquisition of the possession by the remainderman. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Same—Contract Action for Breach of Covenant.—An action in contract for the breach of covenants of seizin and warranty in a deed, and not in tort for fraud, is not governed by § 1-52, subsec. 9, but by this section. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

This section applies to an action which is brought upon the covenants in the deed and not upon the theory that there was fraud or mistake in the deed, nor upon the theory that the defendant had made a fraudulent representation as to the quantity or acreage, which would entitle the plaintiff to recover damages for deceit. *Shankle v. Ingram*, 133 N. C. 254, 45 S. E. 578 (1903).

Same—Where No Possession by Either Party.—Where there is no possession by either the mortgagor or mortgagee there can be no running of the statute. If it were intended that this section should apply where there is no possession by either party, it was utterly useless to insert in § 1-47, subsec. 3 the provision in regard to possession, as the statute, under such a construction of this section, would run whether there was any possession or not, and the period of limitation is the same in both sections. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904). But see dissenting opinion, and see the dissenting opinion in *Simmons v. Ballard*, 102 N. C. 105, 9 S. E. 495 (1889).

Same—Action to Foreclose Mortgage.—Since § 1-47, subsec. 3 is an express provision of law directly applicable to an action to foreclose, it must be disregarded altogether before this section would be a complete reversal of the will of the legislature as plainly expressed. *Woodlief v. Wester*, 136 N. C. 162, 48 S. E. 578 (1904).

Same—Where Mortgagee Sells and Repurchases.—Where the mortgagee sells and conveys to one who reconveys to him the mortgagor or his representatives can call upon the mortgagee for an account at any time within ten years after

the cause of action accrues. *Bruner v. Threadgill*, 88 N. C. 361 (1883).

Same—To Declare Defendants in Execution Equitable Owners.—A suit to declare one of the defendants in execution, the equitable owner of lands for the purchase of which he has furnished the price, and his codefendants trustees, is barred by the ten-year statute of limitations. *Sexton v. Farrington*, 185 N. C. 339, 117 S. E. 172 (1923).

Same—Failure to Call for Grant of State Lands.—A failure of the enterer upon unappropriated and vacant State lands, or those claiming under him, to call for the grant within ten years after entry, would presume an abandonment in favor of those claiming under and by virtue of a junior grant. *Frazier v. Cherokee Indians*, 146 N. C. 477, 59 S. E. 1005 (1907).

Same—Taking of Land without Compensation.—Where in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, in which the city pleaded the statute of limitations and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal it is held that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. *Dayton v. Asheville*, 185 N. C. 12, 115 S. E. 827 (1923).

Enforcement of Decree.—An action to enforce the execution of a decree of court confirming a report that an alley was to be laid off in certain lands is barred by this statute. *Hunter v. West*, 172 N. C. 160, 90 S. E. 130 (1916).

Alimony—Accrual of Right.—In proceedings for alimony under the provisions of § 50-16, the right of a wife for alimony pendente lite arises to her, in application of the statute of limitations,

when the action is commenced, and not from the time of the separation from her husband. *Garris v. Garris*, 188 N. C. 321, 124 S. E. 314 (1924). See note of this case under § 50-16.

Action to Declare Trust in Land.—In *Marshall v. Hammock*, 195 N. C. 498, 142 S. E. 776 (1928), this section was held applicable to plaintiff's right of action to declare a trust in land.

Action to Declare Trust in Stock.—An action by the beneficiaries of a trust to establish a constructive or resulting trust in certain stock sold by the executor-trustee, to recover the property, and for an accounting, is not barred by laches or the statute of limitations if brought within ten years from the date of the accrual of the cause of action. *Jarrett v. Green*, 230 N. C. 104, 52 S. E. (2d) 223 (1949).

An action to recover damages for patent infringement and for appropriating and using confidential information relating to the patent was governed by subsections 5 and 9 of § 1-52 and not by this section. *Reynolds v. Whitin Mach. Works*, 167 F. (2d) 78 (1948).

Action for Delinquent Taxes.—Neither the three nor ten-year statute of limitations applies to an act authorizing the State or a county or city to recover delinquent taxes unless such act expressly so provides. *Wilmington v. Cronly*, 122 N. C. 383, 30 S. E. 9 (1898).

Application to Judgments of State Courts.—The words "any state" appearing in § 1-47, subsec. 1, must be taken to mean the judgment of a court of any state including our own, but it could make no material difference even if not construed to include this State, since, every action for relief not specially provided for must be commenced within the same period of ten years after the cause of action shall have accrued. *McDonald v. Dickson*, 85 N. C. 248 (1881).

SUBCHAPTER III. PARTIES.

ARTICLE 6.

Parties.

§ 1-57. **Real party in interest; grantees and assignees.**—Every action must be prosecuted in the name of the real party in interest, except as otherwise provided; but this section does not authorize the assignment of a thing in action not arising out of contract. An action may be maintained by a grantee of real estate in his own name, when he or any grantor or other person through whom he derives title might maintain such action, notwithstanding the conveyance of the grantor is void, by reason of the actual possession of a person claiming under a title adverse to that of the grantor, or other person, at the time of the delivery of the conveyance. In case of an assignment of a thing in action the action by the

assignee is without prejudice to any set-off or other defense, existing at the time of, or before notice of, the assignment; but this does not apply to a negotiable promissory note or bill of exchange, transferred in good faith, upon good consideration, and before maturity. (C. C. P., s. 55; 1874-5, c. 256; Code, s. 177; Rev., s. 400; C. S., s. 446.)

I. Real Parties in Interest.

A. In General.

B. Personal Actions.

C. Actions Concerning Realty.

II. Actions by Grantees.

III. Assignments.

Cross References.

As to bonds of executors, administrators, and collectors, and right of action on such bonds, see §§ 28-34, 28-42. As to bonds of guardians and right of action thereon, see §§ 33-13, 33-14. As to actions on official bonds and bonds in suits, see §§ 109-33, 109-34, 109-35. As to negotiable instruments, rights of holder, see §§ 25-57 et seq.

I. REAL PARTIES IN INTEREST.

A. In General.

Purpose.—The provision requiring every action to be prosecuted in the name of the real party in interest is significant, and was necessary to let in all defenses, equitable as well as legal, against the real party in interest, and save a resort to another action, so as to harmonize with the Constitution, Art. II, [IV] § 1. *Abrams v. Cureton*, 74 N. C. 526 (1876).

Enabling Act.—The section does not confer a right of action; it only enables the enforcement of a right of action already accrued. *Usry v. Suit*, 91 N. C. 406 (1884).

Strict Compliance.—Under this section there is no middle ground; for whenever the action can be brought in the name of the real party in interest it must be so done. *Rogers v. Gooch*, 87 N. C. 442 (1882). See also, *McGuinn v. High Point*, 219 N. C. 56, 13 S. E. (2d) 48 (1941).

Who Is Real Party in Interest.—The real party in interest is the party who would be benefited or injured by the judgment in the case. An interest which warrants making a person a party is not an interest in the action involved merely, but some interest in the subject matter of the litigation. 5 *Western Law Monthly* 80.

The requirement that an action must be maintained by the real party in interest means some interest in the subject matter of the litigation and not merely an interest in the action. *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609 (1936).

Exception Does Not Apply to Fire In-

urance Companies.—If the exception in this section ("But this section does not authorize the assignment of a thing in action not arising out of contract") operated to prevent a fire insurance company, or paying a loss, from suing the one whose negligence caused the loss, it was repealed by Laws 1899, c. 54, § 43 (see now § 58-177), which provides that the insurance company should be subrogated, to the extent of the payment by it, to all right of recovery by assured. *Buckner v. United States Fire Ins. Co.*, 209 N. C. 640, 184 S. E. 520 (1936), citing *Hamburg-Bremen Fire Ins. Co. v. Atlantic Coast Line R. Co.*, 132 N. C. 75, 43 S. E. 548 (1903).

Right to Jury Trial.—On the issue as to whether the plaintiff was the real party in interest he was entitled to a trial by jury. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265 (1934).

Action Dismissed.—When it is shown that a plaintiff is not a real party in interest, his action to recover, brought in his own right, will be dismissed on a motion as of nonsuit upon the evidence. *Chapman v. McLawhorn*, 150 N. C. 166, 63 S. E. 721 (1909).

Actions should be brought by the real parties in interest. *Hyatt v. McCoy*, 194 N. C. 25, 138 S. E. 405 (1927).

Question Cannot Be Raised on Appeal.

—Where an action is instituted by a corporation on the theory that it was a duly substituted trustee of an active trust, under § 1-63, and the plaintiff's right to sue is not raised in the lower court, the question of whether the plaintiff is the real party in interest may not be raised by the defendant for the first time in the Supreme Court. *Asheville Safe Deposit Co. v. Hood*, 204 N. C. 346, 168 S. E. 524 (1933).

Applied in *Berwer v. Union Central Life Ins. Co.*, 214 N. C. 554, 200 S. E. 1 (1938).

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229 (1937); *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

Cited in *In re Wallace*, 212 N. C. 490, 193 S. E. 819 (1937); *Nutt Corp. v. Southern Ry. Co.*, 214 N. C. 19, 197 S. E. 534 (1938); *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941).

B. Personal Actions.

Contract for Benefit of Third Person.

—The principle, sanctioned by several respectable authorities, is this: If A, on receipt of a good and sufficient consideration, agrees with B to assume and pay a debt of the latter to C, then C may maintain an action directly on such contract against A, although C is not privy to the consideration received by A. This section provides that every action must be prosecuted in the name of the real party in interest. In all the cases close attention is given to the language of the agreement. We can see no reason why the plaintiffs may not do directly that which it must be admitted they can do indirectly, nor do we see how the defendant is prejudiced thereby. *Shoaf v. Insurance Co.*, 127 N. C. 311, 37 S. E. 451 (1900); *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31 (1904).

Presumption from Possession of Chose in Action.—The possession of a chose in action raises a presumption that the person producing it on trial is the real party in interest. *Jackson v. Love*, 82 N. C. 408 (1880); *Pate v. Brown*, 85 N. C. 166 (1881).

Where the plaintiff produces an unendorsed bill of lading, and the evidence tends to show that he had sold the shipment to a person named therein as consignee, it is sufficient of the intent of the consignee to transfer the title by delivery of the bill of lading, to sustain the plaintiff's right to maintain his action as the real party in interest. *Lawshe v. R. R.*, 191 N. C. 437, 132 S. E. 160 (1926).

Ward Equitable Owner of Bond Payable to Guardian.—A bond made payable to a guardian is in equity the property of the ward, and suit may be brought upon it by the ward when the same was turned over in the guardian's settlement, notwithstanding the legal title may have been transferred by the guardian's endorsement to another. *Usry v. Suit*, 91 N. C. 406 (1884). See also, *Melbane v. Melbane*, 66 N. C. 334 (1872).

Rights of Subrogated Insurer.—When an insurer against fire has completely indemnified the insured, he is subrogated to the rights of the insured and can alone, under this section, as the real party in interest, maintain an action against the wrongdoer. *Cunningham v. Railroad*, 139 N. C. 437, 51 S. E. 1029 (1905).

Employer or Insurer Subrogated to Rights of Injured Employee.—Where an employee has accepted compensation awarded by the Industrial Commission

for an injury sustained by him in the course of his employment he cannot maintain an action against a third person upon the allegations that the negligence of the third person was the cause of the injury, as the employer or insurance carrier was subrogated to the right of action against the third person and the injured employee was not the real party in interest. *McCarley v. Council*, 205 N. C. 370, 171 S. E. 323 (1933).

And May Sue Third Persons.—Under this section an insurance carrier who has paid compensation to an injured employee may proceed in an action which has been instituted against a third person by the injured employee or his personal representative. *Betts v. Southern Ry. Co.*, 71 F. (2d) 787 (1934).

Endorser Subrogated to Rights of Payee.—Where a person presenting a note to a bank is required to endorse it, and later to endorse the drawer's check payable to the bank and taken by it in payment of the note, and the check is not paid and is charged by the bank to the endorser's account therein, the endorser so paying the check is subrogated to the rights of the payee bank and becomes the real party in interest and may prosecute an action against the drawer, payee, and collecting banks under the provisions of this section to determine the liability of the parties. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

Rights of Undisclosed Principal on Contract.—An undisclosed principal holding the business rights and interests under the contract, may sustain the action thereon. *Peanut Co. v. R. R.*, 155 N. C. 148, 71 S. E. 71 (1911); *Williams v. Honeycutt*, 176 N. C. 102, 96 S. E. 730 (1918).

Liability of Bank Directors to Each Other.—Where directors of a bank have paid the liability of others under an agreement, each one of them may maintain his action against each of the defaulting members under this section, and such is not a misjoinder of parties prohibited by statute. *Taylor v. Everett*, 188 N. C. 247, 124 S. E. 316 (1924).

Agent as Real Party in Interest.—Where, under agreement with his principal, the agent of a manufacturer is obligated to pay the freight charges on shipments made to him, and upon demand of the carrier he has paid its unlawful charges on a shipment, he is the party aggrieved, within the meaning of this section, and may maintain his actions to recover the excess, and also the penalty

when entitled thereunto. *Tilley v. R. R.*, 172 N. C. 363, 90 S. E. 309 (1916).

Agent for Collection.—An agent for the collection of rents is not the real party in interest. *Martin v. Mask*, 158 N. C. 436, 74 S. E. 343 (1912).

A rental agent may not maintain a suit in ejection or for the collection of rents, the owner being the real party in interest, under this section. *Home Real Estate, etc., Co. v. Locker*, 214 N. C. 1, 197 S. E. 555 (1938).

Assignee for Collection.—An assignee for purposes of collection is not a "real party in interest." *Abrams v. Cureton*, 74 N. C. 523 (1876); *Morefield v. Harris*, 126 N. C. 628, 36 S. E. 125 (1900); *Bank v. Exum*, 163 N. C. 199, 79 S. E. 498 (1913); *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927); *Federal Reserve Bank v. Whitford*, 207 N. C. 267, 176 S. E. 584 (1934). See also, 5 N. C. Law Rev. 369.

The assignee of a chose in action may bring an action thereon in his own name, under this section, and a bond given to indemnify a bank from any loss it might sustain by reason of its taking over the assets and discharging the liabilities of another bank is assignable. *North Carolina Bank, etc., Co. v. Williams*, 201 N. C. 464, 160 S. E. 484 (1931).

Transferor of Claim.—A plaintiff having transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collection, and with directions to apply the proceeds to demands which he held for collection against the said plaintiff, an action will not lie in the name of the plaintiff on the claim, he not being the real party in interest. *Wynne v. Heck*, 92 N. C. 415 (1885).

Transferee of Claim.—The discretion conferred by § 1-74 is a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original plaintiff; and one circumstance calling for the exercise of the discretion is the fact that the transferor, as in this case, has parted with all interest to the transferee, since this section requires that the action be prosecuted in the name of the real party in interest. *Hood v. Bell*, 84 F. (2d) 136 (1936).

Action on Note by Liquidating Agent.—In an action on a note executed to a bank, the liquidating agent of the payee bank and the Reconstruction Finance Corporation, to which the note had been

pledged as collateral security are both interested parties and may jointly sue the makers of the note. *Hood v. Progressive Stores*, 209 N. C. 36, 182 S. E. 694 (1935).

Shippers Are Real Parties in Interest in Action for Discrimination in Rates.—Where certain carriers by truck sought injunctive relief against railroad carriers for discrimination in rates against certain cities and against certain commodities, it was held that the basis for injunctive relief must be an interference or threatened interference with a legal right of the petitioner, not of a third party and that the shippers would be the real parties in interest not the contract truck carriers. *Carolina Motor Service v. Atlantic Coast Line R. Co.*, 210 N. C. 36, 185 S. E. 479, 104 A. L. R. 1165 (1936).

Action on Fidelity Bond.—Where stockholders and directors gave their note to the bank for the amount of a shortage due to embezzlement by a cashier to prevent liquidation, and the bank neither surrenders nor assigns the fidelity bond of the defaulting cashier, the bank is the real party in interest and entitled to maintain an action upon the bond. *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933).

Lessor Must Bring Action of Summary Ejectment.—Although an agent of the lessor may make the oath in writing required in summary ejectment under § 42-28, the action must be prosecuted in the name of the lessor as the real party in interest, and it may not be maintained in the name of the lessor's rental agent. *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609 (1936).

Title to Public Office.—Taxpayers may not maintain an action to determine title to a public office, neither claimant to the office being a party, since plaintiffs are not the real parties in interest. *Freeman v. Board of Com'rs*, 217 N. C. 209, 7 S. E. (2d) 354 (1940).

Suit by Retiring State Officer.—Where a State officer goes out of office pending a suit by him in his official capacity, his incoming successor is entitled to be made a party in his stead, the State is the real party in interest, appearing in the name of its successive agents. *Lacy v. Webb*, 130 N. C. 546, 41 S. E. 549 (1902). See also, *Peebles v. Boone*, 116 N. C. 57, 21 S. E. 187, 44 Am. St. Rep. 429 (1895).

Quo Warranto.—Every action must be prosecuted by the party in interest, and hence, in a quo warranto, (now a proceeding by the Attorney General) while it need not appear that the relator is a con-

testant for the office, it must appear from the complaint that he is an inhabitant and taxpayer of the jurisdiction over which the officer, whose title is questioned, exercises his duties and powers. *Board v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892); *Hines v. Vann*, 118 N. C. 6, 23 S. E. 932 (1896).

Transfer beyond Authority of Agent.—When a special agent goes beyond the scope of his authority and sells a negotiable bond, without endorsement, the purchaser thereof is not a real party in interest. *McMinn v. Freeman*, 68 N. C. 342 (1873).

Actions by Executor or Administrator.—An executor or administrator must sue, upon causes of action to which the estate is the real party in interest, in his representative capacity. *Rogers v. Gooch*, 87 N. C. 442 (1882). See also *Sitzer v. Lewis*, 69 N. C. 133 (1873); *Danis v. Fox*, 69 N. C. 435 (1873).

When Action by Administrator d. b. n.—Where a bond for the payment of money is executed to an administrator as such, and he dies, an action on said bond can be maintained only by an administrator de bonis non of the testator. *Ballinger v. Curriton*, 104 N. C. 477, 10 S. E. 664 (1889).

Administrator of Deceased Guardian as Party.—An administrator of a deceased guardian cannot maintain an action to collect a note made payable to his intestate as guardian, unless it be shown that the money due thereon, had become the property of the intestate's estate. *Alexander v. Wriston*, 81 N. C. 193 (1879).

Personal Representative.—Where an action has been instituted by an injured employee who subsequently accepts an award of compensation, the insurance carrier should be made a party plaintiff; but this is not necessary in the case of suit instituted by the personal representative of a deceased employee. Such personal representative continues the suit which has been commenced; but after the acceptance of an award of compensation, the recovery goes, so far as necessary, to the reimbursement of the insurance carrier and only the excess to the persons entitled under the wrongful death statute. *Betts v. Southern Ry. Co.*, 71 F. (2d) 787 (1934).

Widow Entitled to Burial Expenses of Husband.—A widow who pays an account for burial expenses of her husband is the proper party plaintiff in an action against the administrator, being the real party in interest. *Ray v. Honeycutt*, 119 N. C. 513, 26 S. E. 127 (1896).

Action of Heirs at Law on Doubtful

Claim.—Where a trustee in bankruptcy or the creditor has waived a doubtful claim in favor of a bankrupt's estate and he has long since been discharged by the court, after having filed his final account, a motion to dismiss the action of his heirs at law as not being the real parties in interest will be denied. *Cunningham v. Long*, 185 N. C. 613, 125 S. E. 265 (1923).

Parties to Interpretation of Will.—Persons who are interested neither as heirs at law of the deceased nor as beneficiaries under the writing propounded as the will, are neither necessary nor proper parties to a case agreed to interpret its provisions, nor to set it aside, nor to assert that an order made by the court to be vacated on the ground that they had not been duly made parties or given consent that judgment be rendered out of term, etc. It is otherwise as to one who has been named as a beneficiary who has neither been duly made a party nor given consent to the agreed case or the further action of the court thereon. *Bank v. Dustowe*, 188 N. C. 777, 125 S. E. 546 (1924).

Claim under Workmen's Compensation Act.—It is required by this section, that an action be prosecuted in the name of the real party in interest, and where a statute names a person to receive funds and authorizes him to sue therefor, only the person named may litigate the matter, and where a claim under the Workmen's Compensation Act is litigated in the name of the deceased the proceeding is a nullity and will be dismissed on appeal to the Supreme Court. *Hunt v. State*, 201 N. C. 37, 158 S. E. 703 (1931).

Action for Seduction.—In an action brought to recover damages for seduction, if the female is under twenty-one years of age, the father is the real party in interest; if she be over twenty-one, then the wronged female is the real party in interest. *Hood v. Sudderth*, 111 N. C. 219, 16 S. E. 397 (1892); *Scarlett v. Norwood*, 115 N. C. 285, 20 S. E. 459 (1894); *Williford v. Bailey*, 132 N. C. 404, 43 S. E. 929 (1903); *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354 (1903); *Tillaston v. Currin*, 176 N. C. 479, 97 S. E. 395 (1918).

Slander.—Where an action is brought by a husband, without making the wife a party thereunto, for slander of the wife, and the husband alleges no special damages, his action will not lie because he is not the real party in interest. *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161 (1893).

Negligent Mutilation of Dead Body.—In order of their priority of inheritance of

the personal property of the deceased, the next of kin may maintain an action to recover damages for the negligent mutilation of his dead body. *Floyd v. R. R.*, 167 N. C. 55, 83 S. E. 12 (1914).

Applied in Hood v. Mitchell, 206 N. C. 156, 173 S. E. 61 (1934).

C. Actions Concerning Realty.

Conveyance of Land Pendente Lite. — Where it is sought by the owner of land, to remove as a cloud upon his title the lien of one claiming under his mortgage, and pendente lite has conveyed the land to another with full warranty deed, he may continue to prosecute his suit against the mortgagee as to the title, being a real party in interest. *Plotkin v. Bank*, 188 N. C. 711, 125 S. E. 541 (1924).

Where a party has commenced an action concerning an interest in lands, the cause may be continued by his successors in interest as the real parties in interest. *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572 (1926).

Action by Remaindermen. — An action brought by remaindermen, during the lifetime of the first taker, to recover the land will not lie, because they are not the real parties in interest. *Blount v. Johnson*, 165 N. C. 26, 80 S. E. 882 (1914).

Action to Vacate Grant When State Not Interested. — Where the State has no interest in the land, as where title would not revest in the State, an action to vacate a grant must be brought by the party in interest in his own name, the State not being such a party. *State v. Bland*, 123 N. C. 739, 31 S. E. 475 (1898). See also, *State v. Bevers*, 86 N. C. 588 (1882); *Carter v. White*, 101 N. C. 30, 7 S. E. 473 (1888); and *Henry v. McCoy*, 131 N. C. 586, 42 S. E. 955 (1902).

Action by Tenant.—Against any third person, the tenant is entitled to the possession of the land and the crop, and for any injury thereunto while it is being cultivated he may maintain an action in his own name for the injury. He is the real party in interest. *Bridgers v. Dill*, 97 N. C. 222, 1 S. E. 767 (1887); *State v. Higgins*, 126 N. C. 1113, 36 S. E. 113 (1900).

Where the land has broom sage growing thereon the tenant is not the owner thereof in the sense that he may maintain an action against one who has negligently destroyed it by fire, except only for its value for farming purposes on the leased premises. *Chaucy v. Atlantic Coast Line R. Co.*, 195 N. C. 415, 142 S. E. 327 (1928).

Action of Tenant for Trespass.—Under the provisions of this section, the court has the power to order the owner of the

title to be made a party in his tenant's action for trespass involving an injury both to the possession and to the inheritance. *Tripp v. Little*, 186 N. C. 215, 119 S. E. 225 (1923).

Feme Covert as Party.—The rents arising from the real estate of a feme covert belong to her under the Constitution of 1868, Art. 10, § 6, therefore an action therefor must be brought by the wife, she being the real party in interest. *Thompson v. Wiggins*, 109 N. C. 509, 14 S. E. 301 (1891).

A suit by mortgagor to correct mortgage, which through fraud or mistake or the negligence of the register of deeds in cross-indexing has failed to give a priority of lien to one of several mortgages entitled thereto, will be entertained in equity, as he is a real party in interest. *Gray v. Mewborn*, 194 N. C. 348, 139 S. E. 695 (1927).

Reformation of Deed of Trust.—Where a substituted trustee brings an action to reform a deed of trust and certain mortgage notes which are negotiable, the holders of the notes are necessary parties. *First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189 (1933).

In an action to reform a deed, all parties claiming an interest in the land or any part thereof, purported to have been conveyed by the instrument sought to be reformed, and whose interest will be affected by the reformation of the instrument, are necessary parties to the action. *Kemp v. Funderburk*, 224 N. C. 353, 30 S. E. (2d) 155 (1944).

Lease of Hunting Rights.—The grantor of land reserved the hunting rights and later leased them. Defendant successor to grantee refused to permit the lessee to enter upon the property for the purpose of hunting. It was held that the lessee and not the lessor was the proper party to maintain an action against defendant for damages. *Jones v. Neisler*, 228 N. C. 444, 45 S. E. (2d) 369 (1947).

II. ACTIONS BY GRANTEES.

Constitutionality.—This section permitting a grantee of real estate to maintain an action in his own name is not unconstitutional. It is concerned only with the mode of procedure and does not affect the merits of the case. *Buie v. Carver*, 75 N. C. 559 (1876); *Justice v. Eddings*, 75 N. C. 584 (1876).

Rights of Grantee in Ejectment Suit.—An action of ejectment may be maintained by a grantee in his own name whenever the grantor has a right to sue, notwithstanding the person in actual possession

claims under a title adverse to that of such grantor. *Buie v. Carver*, 75 N. C. 559 (1876); *Osborne v. Anderson*, 89 N. C. 263 (1883); *Johnson v. Prairie*, 94 N. C. 775 (1886); *Bland v. Beasley*, 145 N. C. 168, 58 S. E. 993 (1907). As to summary ejectment, see § 42-26, and the note thereto.

III. ASSIGNMENTS.

Effect in General. — A construction was given to this section in *Harris v. Burnwell*, 65 N. C. 584 (1871), where Pearson, C. J., says, "it abrogates the principle of the common law, that a chose in action cannot be assigned—confers an unlimited right to assign 'anything in action' arising out of contract, and subjects the assignee to any set-off or other defense existing at the time of or before notice of the assignment; the only saving being in regard to 'negotiable promissory notes and bills of exchange transferred in good faith and upon good consideration before due.' This language is as broad as it well can be; so that a note assigned after it is due, a half dozen times, will be subject to any set-off or other defense that the maker had against any one or all of the assignees at the date of the assignment or before notice thereof."

The provision in the first sentence as to assignment means merely that the statute does not authorize for the first time the assignment of a "thing in action not arising out of contract" which was not assignable under the existing law. The provision does not in itself forbid the assignment of all choses in action not arising out of contract. *American Surety Co. v. Baker*, 172 F. (2d) 689 (1949).

General Rule. — It would seem that something of a general rule concerning the relation of this section to assignability was laid down in *Woodcock v. Bostic*, 118 N. C. 830, 24 S. E. 362 (1896), in which Montgomery, J. says: "If an assignee can make no possible use of the thing assigned to him, the assignment is a vain thing. If the courts would not and could not entertain a suit at the hands of an assignee, because of the uselessness to him in any event of the thing transferred, how can it be said that such a thing is assignable? The law could not say that a matter, even though based on contract, could be assigned if it could not possibly be of use to the assignee. The law means, when it says that a thing is assignable, that the assignment carries with it rights of property, and that those rights can be enforced in the courts. It would seem to be clear, too, that a thing to be assignable, must be the subject of assignment generally, to every

one, and not to be confined in its application to particular persons."

Effect of Assignment of Negotiable Paper.—In *Holly v. Holly*, 94 N. C. 670 (1886), it was said: "Unquestionably, the complete equitable title to, and the substantial ownership of, a note or bond, negotiable by endorsement, may, without endorsement, be passed by the payee or obligee, to another person, by a sale and delivery thereof, and in this State, the purchaser thus becomes so thoroughly the owner, that an action upon the note or bond so transferred, can only be maintained in the name of the real or equitable owner."

Assignee Sues in Own Name.—An assignee may sue in his own name, under this section, as an equitable assignee or cestui que trust could formerly have done in equity. *Miller v. Tharel*, 75 N. C. 148 (1876). See also, *Sutton v. Owen*, 65 N. C. 124 (1871).

Equitable Owner Real Party in Interest.—In the case of an assignment of a bill or note, which transfers only the equitable ownership, as distinguished from an endorsement according to the law merchant, which transfers the legal title, the equitable owner being the real party in interest may sue in his own name. *Andrews v. McDaniel*, 68 N. C. 385 (1873); *Milley v. Gatling*, 70 N. C. 410 (1874); *Egerton v. Carr*, 94 N. C. 653 (1886); *Tyson v. Joyner*, 139 N. C. 73, 51 S. E. 803 (1905); *Ball-Thrash v. McCormick*, 162 N. C. 472, 78 S. E. 303 (1913).

Assignee of Negotiable and Non-Negotiable Notes.—The assignee of a promissory note or bill of exchange endorsed before maturity, takes it free from all equities and defenses it may be subject to in the hands of the payee, but the assignee of a non-negotiable instrument, even before maturity, takes it subject to all equities or counterclaims existing between original parties at the time of the assignment; bonds or sealed notes, are on the same footing with non-negotiable instruments. *Hanens v. Potts*, 86 N. C. 31 (1882); *Spence v. Tabscott*, 93 N. C. 248 (1885); *Loan Association v. Merritt*, 112 N. C. 244, 17 S. E. 296 (1893). See also, *Andrews v. McDaniel*, 68 N. C. 385 (1873); *Bank v. Bynum*, 84 N. C. 24 (1881).

The assignee of a non-negotiable instrument for value and in good faith before maturity nevertheless takes same subject to all defenses which the debtor may have had against the assignor which are based upon facts existing at the time of the assignment or facts arising thereafter but prior to the debtor's knowledge of the as-

signment. *Iselin & Co. v. Saunders*, 231 N. C. 642, 58 S. E. (2d) 614 (1950).

Unauthorized Endorsement of Negotiable Paper.—The assignee of a negotiable note endorsed by the clerk of the payee without authority is simply the holder of unendorsed negotiable paper and, as such, has, *prima facie*, the equitable title, and can maintain a suit thereon. *Bresee v. Crumpton*, 121 N. C. 123, 28 S. E. 351 (1897).

Assignment of Note by One of Joint Payees.—A note payable to three persons as executors of their testator, assigned by one of them without the concurrence of the others, does not enable the assignee to sue the makers thereon, under this section. *Johnson v. Mangum*, 65 N. C. 148 (1871).

Past Due Notes Subject to Defenses.—A note taken after it is due is subject to any set-off, or any other defense existing at the time of or before notice of assignment. *Vaughan v. Jeffreys*, 119 N. C. 144, 26 S. E. 94 (1896); *Guthrie v. Moore*, 182 N. C. 24, 108 S. E. 334 (1921). See also *Mosby v. Hodge*, 76 N. C. 387 (1877); *Capell v. Long*, 84 N. C. 17 (1881).

Action on Assigned Non-Negotiable Note.—The assignee of a non-negotiable note can maintain an action thereon; and so can the owner where there is no written assignment. *Wilcoxon v. Logan*, 91 N. C. 452 (1884).

When Judgments Treated as Contracts.—While judgments are not treated as contracts for all purposes, they are so treated for the purpose of distinguishing them from causes of action arising *ex delicto*, and are not embraced by this section, forbidding the assignment of things in an action not arising out of contract. *Winbury v. Koonce*, 83 N. C. 351 (1880); *Moore v.*

Norvell, 94 N. C. 270 (1886).

Assignment of a Judgment Pending Appeal.—Where an assignment of a judgment for one of the defendants against the plaintiff was made during the pendency of the appeal, and it appeared that the judgment was brought by another person, such person, and not the nominal assignee, should be substituted as plaintiff. *Field v. Wheeler*, 120 N. C. 270, 26 S. E. 812 (1897).

Assignor of Contract Not a Party.—The vendee under a contract for the sale and delivery of cotton cannot maintain an action thereon when it uncontradictedly appears from his own evidence and he has assigned the contract to a third party, not to the action, and has no further interest therein. *Vaughan v. Davenport*, 157 N. C. 156, 72 S. E. 842 (1911).

When Executory Contracts Assignable.—As a general rule, executory contracts of an ordinary kind are now assignable, except that contracts involving a personal relation, are imposing liabilities which by express terms or by the nature of the contracts themselves import reliance on the personal credit, trust, or confidence in the other party cannot be assigned. *R. R. v. R. R.*, 147 N. C. 368, 61 S. E. 185 (1908).

Installments of Pension.—Installments of a pension payable in the future are not assignable. *Gill v. Dixon*, 131 N. C. 87, 42 S. E. 538 (1902).

The assignee of a contract to convey real estate may maintain an action thereon against the seller for specific performance. *Harry's Cadillac-Pontiac Co. v. Norburn*, 230 N. C. 23, 51 S. E. (2d) 916 (1949).

Cited in Atlantic Joint Stock Land Bank v. Foster, 217 N. C. 415, 8 S. E. (2d) 235 (1940).

§ 1-58. **Suits for penalties.**—Where a penalty is imposed by any law, and it is not provided to what person the penalty is given, it may be recovered, for his own use, by any one who sues for it. When a penalty is allowed by statute, and it is not prescribed in whose name suit therefor may be commenced, suit must be brought in the name of the State. (*R. C.*, c. 35, ss. 47, 48; *Code*, ss. 1212, 1213; *Rev.*, ss. 401, 402; *C. S.*, s. 447.)

Editor's Note.—The three provisions permitting the plaintiff to reply fraud to a plea of release in a suit for penalty; the defendant to plead satisfaction in a suit on bonds; and that the sum due, with interest and costs, discharges penalty bonds, were §§ 932, 933, 934 of the *Code of 1883* and §§ 1521, 1522, 1523 of the *Revisal of 1905*. They were left out of the *Consolidated Statutes*, but were again inserted by *Public Laws 1925*, c. 21. See §§ 1-59 to 1-61.

The construction of this section in *Nor-*

man v. Dunbar, 53 N. C. 319 (1861), is that the suit should be in the name of the person claiming the penalty, and to whom, upon a recovery, it belongs, while in the subsequent case of *Duncan v. Philpot*, 64 N. C. 479 (1870), it is held that it should be prosecuted in the name of the State for his use. But in looking to the cases which have been maintained in the Supreme Court, and to which no objection on this ground seems to have been taken, we find that all have been in the name of the per-

son suing and none in the name of the State. *Branch v. R. R.*, 77 N. C. 347 (1877); *Katzenstein v. R. R.*, 84 N. C. 688 (1881); *Keeter v. R. R.*, 86 N. C. 346 (1882); *Whitehead v. R. R.*, 87 N. C. 255 (1882); *Branch v. R. R.*, 88 N. C. 570 (1883); *Middleton v. Wilmington, etc., R. Co.*, 95 N. C. 167 (1886); *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891); *Carter v. R. R.*, 126 N. C. 439, 36 S. E. 14 (1900). This uniform practice, acquiesced in, if not sanctioned by the court, must be deemed a settlement of the construction of the statute.

Constitutionality. — This section does not conflict with the Constitution. *Kat-*

zenstein v. R. R., 84 N. C. 688 (1881); *Hodge v. R. R.*, 108 N. C. 24, 12 S. E. 1041 (1891); *Sutton v. Phillips*, 116 N. C. 502, 21 S. E. 968 (1895); *Goodwin v. Fertilizer Works*, 119 N. C. 122, 25 S. E. 795 (1896).

Penalty against Railroads Recovered by Statute. — The penalty prescribed by statute against railroads for failure to make returns can only be recovered in an action brought by the State. *Hodge v. R. R.*, 108 N. C. 24, 12 S. E. 1041 (1891).

Applied, in fixing penalty for illegal weighing of cotton, in *State v. Briggs*, 203 N. C. 158, 165 S. E. 339 (1932).

§ 1-59. Suit for penalty, plaintiff may reply fraud to plea of release. — If an action be brought in good faith by any person to recover a penalty under a law of this State, or of the United States, and the defendant shall set up in bar thereto a former judgment recovered by or against him in a former action brought by any other person for the same cause, then the plaintiff in such action, brought in good faith, may reply that the said former judgment was obtained by covin; and if the collusion or covin so averred be found, the plaintiff in the action sued with good faith shall have recovery; and no release made by such party suing in covin, whether before action brought or after, shall be in anywise available or effectual. (4 Hen. VII, c. 20; R. C., c. 31, s. 100; Code, s. 932; Rev., s. 1521; C. S., s. 447(a); 1925, c. 21.)

§ 1-60. Suit on bonds; defendant may plead satisfaction. — When an action shall be brought on any single bill or on any judgment, if the defendant had paid the money due upon such bill or judgment before action brought, or where the defendant hath made satisfaction to the plaintiff of the money due on such bill or judgment in other manner than by payment thereof, such payment or satisfaction may be pleaded in bar of such action; and where only part of the money due on such single bill or judgment hath been paid by the defendant, or satisfied in other manner than by payment of money, such part payment or part satisfaction may be pleaded in bar of so much of the money due on such single bill or judgment, as the same may amount to; and where an action is brought on any bond which hath a condition or defeasance to make void the same upon the payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors or administrators have, before the action brought, paid to the obligee, his executor or administrator, the principal and interest due by the condition or defeasance of such bond, though such payments were not made strictly according to the condition or defeasance; or if such obligor, his heirs, executors or administrators have before action brought made satisfaction to the plaintiff of the principal and interest due by the condition or defeasance of such bond, in other manner than by payment thereof, yet the said payment or satisfaction may be pleaded in bar of such action, and shall be effectual as a bar thereof, in like manner as if the money had been paid at the day and place, according to the condition or defeasance, and so pleaded. (4 Hen. VII, c. 20; R. C., c. 31, s. 101; Code, s. 933; Rev., s. 1522; C. S., s. 447(b); 1925, c. 21.)

§ 1-61. Payment into court of sum due discharges penalty of bonds. — If at any time, pending an action on any bond with a penalty, the defendant shall bring into court, where the action shall be pending, all the principal money and interest due, and also such costs as have been expended in any suit upon such bond, the said money shall be deemed and taken to be in full satisfaction and discharge of said bond, and the court shall give judgment accordingly. (4 Anne,

c. 16; R. C., c. 31, s. 102; Code, s. 934; Rev., s. 1523; C. S., s. 447(c); 1925, c. 21.)

§ 1-62. Action by purchaser under judicial sale.—Any one given possession under a judicial sale confirmed, where the title is retained as a security for the price, is the legal owner of the property for all purposes of bringing suits for injuries thereto, after the day of sale, by trespass or wrongful possession, in the same manner as if the title had been conveyed to him on day of sale, unless restrained by some order of the court directing the sale; and the suit brought is under the control of the court ordering the sale. (1858-9, c. 50; Code, s. 942; Rev., s. 403; C. S., s. 448.)

No Rights Acquired by Bidder before Confirmation.—In *Attorney-General v. Navigation Co.*, 86 N. C. 411 (1882), it is said: "The doctrine has been settled in this State, that the bidder at a judicial sale acquired no right before the confirmation of the report of the commissioner who made the sale under the order of the court." In *re Dickerson*, 111 N. C. 114, 15 S. E. 1025 (1892), holds: "The sale then, not having been confirmed, the commissioner's deed has not yet divested the title out of the petitioner. While a formal direction to make a title is not always necessary, a confirmation of the sale cannot be dispensed with." Both cases being quoted, approved and followed in *Vanderbilt v. Brown*, 128 N. C. 498, 39 S. E. 36 (1901).

§ 1-63. Action by executor or trustee.—An executor or administrator, a trustee of an express trust, or a person expressly authorized by statute, may sue without joining with him the person for whose benefit the action is prosecuted. A trustee of an express trust, within the meaning of this section, includes a person with whom, or in whose name, a contract is made for the benefit of another. (C. P., s. 57; Code, s. 179; Rev., s. 404; C. S., s. 449.)

Includes Suits by Agent.—This section, permitting "a trustee of an express trust" to maintain an action in his own name, by its explanation of such a trustee, that he "shall be construed to include a person with whom, or in whose name a contract is made for the benefit of another," extends the meaning of the statute so as to include an agent who sues upon a note to him, as an agent, with the consent and for the benefit of his principal. *Martin v. Mask*, 158 N. C. 436, 74 S. E. 343 (1912).

Excludes Personal Representatives of Trustee.—The "trustee of an express trust," as used in this section, does not include the personal representative of such trustee. *Alexander v. Wriston*, 81 N. C. 192 (1879).

By this section, fiduciaries are not made the real parties in interest, but are empowered to bring an action for the real beneficiaries. *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229 (1937).

Exception to § 1-57.—Under the provisions of this section a trustee of an express

trust may sue without joining the one for whose benefit the action is brought, this being an exception to § 1-57, requiring actions to be brought by the real party in interest. *Sheppard v. Jackson*, 198 N. C. 627, 152 S. E. 801 (1930).

When Name of Beneficiary Undisclosed.—Under this section, when a person contracts in his own name, but really for the benefit of another, he is to be regarded as the trustee of an express trust, whether the name of the beneficiary is disclosed or not. *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440 (1906).

Collection of Purchase Price.—The remedy to enforce a decree under a judicial sale of land for the collection of the purchase price of the land is by motion in the cause. *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182 (1914).

Where a note was made payable to "J, cashier," and collateral security delivered to him, he being a member and cashier of the firm of "C & J," the owners of the debt, an action for the foreclosure of the mortgage security was properly brought in the name of the cashier, he being the holder of the collateral as trustee for the firm. *Jenkins v. Wilkinson*, 113 N. C. 532, 18 S. E. 696 (1893).

Beneficiary Not a Necessary Party.—This

section provides that an executor or trustee of an express trust may sue without joining with him the party equitably interested. *Biggs v. Williams*, 66 N. C. 429 (1872); *Davidson v. Elms*, 67 N. C. 229 (1872). See also, *Jones v. McKinnon*, 87 N. C. 294 (1882).

When Beneficiary May Be a Party.—

This section does not apply so as to exclude the beneficiary as a necessary party in a suit involving the question as to whether the trustee has exceeded his authority under the terms of the instrument creating the trust, and wherein the interests of the beneficiary may be seriously affected. *Barbee v. Penny*, 172 N. C. 653, 90 S. E. 805 (1916).

Suit upon Administration Bond.—In a suit upon an administration bond, the next of kin of the intestate are not necessary parties, and in such a suit the administrator of the principal in the bond need not be joined. *Flack v. Dawson*, 69 N. C. 44 (1873).

When Assignor May Sue Alone.—This section applies where a judgment creditor has assigned the judgment as security, and in such case an action may be brought by the assignor without joining the assignee. *Chatham v. Realty Co.*, 180 N. C. 500, 115 S. E. 329 (1920).

Transferee as Trustee of Express Trust.

—Where a plaintiff transferred the claim, upon which his action was subsequently brought, to an attorney at law, for collec-

tion, and with directions to him to apply the proceeds to demands which he held for collection against the plaintiff due other parties. The effect of the transfer was to vest ownership of the claim in the attorney, as a "trustee of an express trust," and the action should have been brought in his name alone, or in conjunction with those of the cestuis que trustent. *Wynne v. Heck*, 92 N. C. 414 (1885).

An answer setting forth that B is the real owner of a note sued upon, but that it was assigned to the plaintiff, is to be taken as meaning that the plaintiff is trustee of an express trust, and so is properly plaintiff. *Rankin v. Allison*, 64 N. C. 673 (1870).

Speaking Demurrer Not Allowed.—

Where the holder of a promissory note in due course, etc., sues thereon, who, as it appears, is a trustee of an express trust to collect certain certificates of deposit, and apply the proceeds to its payment for the benefit of himself and the holders of the certificates, a demurrer that the plaintiff is, in fact, suing as the agent of the holders of the certificates, and that they are in truth parties, is a speaking demurrer, and bad. *Union Trust Co. v. Wilson*, 182 N. C. 166, 108 S. E. 500 (1921).

Question Cannot Be Raised on Appeal.

—See note to § 1-57.

Cited in *Orr v. Twigg*s, 210 N. C. 578, 187 S. E. 791 (1936).

§ 1-64. Infants, etc., sue by guardian or next friend.—In actions and special proceedings when any of the parties plaintiff are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this State, they must appear by their general or testamentary guardian, if they have any within the State; but if the action or proceeding is against such guardian, or if there is no such guardian, then said persons may appear by their next friend. The duty of the State solicitors to prosecute in the cases specified in chapter entitled Guardian and Ward is not affected by this section. (C. C. P., s. 58; 1870-1, c. 233; 1871-2, c. 95; Code, s. 180; 1893, c. 5; Rev., s. 405; C. S., s. 450.)

Distinction between Next Friend and Guardian ad Litem.—A next friend is appointed to bring or prosecute a proceeding in which the infant suitor is plaintiff or seeks to assert some positive right, while a guardian ad litem is appointed to defend, and the distinction between them in legal effect is substantial and not merely formal. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

Thus, while a next friend, in the prosecution of some positive relief for an infant suitor, may be called upon to defend against incidental or opposing rights, such as offsets, counterclaims, or other defenses or demands connected with the

original claim, a next friend of minor heirs at law seeking to set aside a tax foreclosure is not required to defend a mortgage foreclosure asserted by an intervener in the action, and his representation of the minors in such unrelated and independent cause does not legally exist. His office as next friend becomes functus officio. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

Court's Duty to Exercise Care in Making Appointment.—In *Morris v. Gentry*, 89 N. C. 248 (1883), it was said, "It is the duty of courts to have special regard for infants, their rights and interests, when they come within their cognizance. The

law makes this so, for the good reason, they cannot adequately take care of themselves. It is a serious mistake to suppose that a next friend or a guardian ad litem should be appointed upon simple suggestion; this should be done upon proper application in writing, and due consideration by the court. The court should know who is appointed, and that such person is capable and trustworthy. The appointment of guardians ad litem and their duties are prescribed by a statute. But while the statute allows infants to sue by their next friends, the manner of the appointment of them and their duties are left as at the common law."

Presumption of Proper Appointment.—Where the lands of infants are sold under an order of the superior court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634 (1889).

Appointment of Next Friend in Justice's Court.—There being no statutory special method indicated by which a next friend may be appointed to represent an infant in an action properly brought in justice's court, the appointment should be made by the justice of the peace, using the same care and circumspection in investigating the fitness of the person to be appointed as is required by the clerk, in actions properly brought in the superior court. *Houser v. Bonsal & Co.*, 149 N. C. 51, 62 S. E. 776 (1908).

Next Friend an Officer of Court.—The next friend of an infant ought always to be appointed by the court, and really he is an officer of the court, and under its supervision and control. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

Removal of Next Friend.—The court has power, for good cause shown, to remove the next friend of an infant litigant, and appoint another as often as may be necessary. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

Designation as Guardian Instead of Next Friend.—It would have been more regular if the representative of infants had been designated in a proceeding as next friend, rather than as guardian, but as he did not undertake to represent the infants otherwise than as next friend, it is immaterial that he was designated as guardian and not as next friend. *Ex parte Huffstetler*, 203 N. C. 796, 167 S. E. 65 (1933).

Interest of Guardian or Next Friend.—Any person who has an interest in the

action hostile to that of the infants' will not be allowed to conduct it on their behalf—whether he be guardian or next friend. *George v. High*, 85 N. C. 113 (1881).

Foreign Guardian Sues as Next Friend.—A guardian appointed in another state has no authority to represent his wards in suits and proceedings in this State, but when he brings suit for them as guardian it will be treated as if he were next friend. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

Foreign or Domestic Corporation Can Not Be Appointed Next Friend.—Only a person whose fitness has first been ascertained by the court is eligible for appointment by the court as next friend of a minor to institute suit, and neither a foreign nor domestic corporation may be appointed next friend of an infant. *In re Will of Roediger*, 209 N. C. 470, 184 S. E. 74 (1936).

Suits by Persons Non Compos Mentis.—There can be no question but that persons non compos mentis may sue by their next friend when they have no general or testamentary guardian. *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188 (1890).

Same—Inquisition of Lunacy Not Essential.—Where allegation of insanity of husband is admitted by demurrer, suit may be brought by his next friend though no inquisition of lunacy was had; and the wife may bring the action as such next friend, being regularly appointed. *Abbott v. Hacock*, 123 N. C. 99, 31 S. E. 268 (1898).

Widow May Sue by Next Friend.—In dissenting from her husband's will and applying for year's allowance, the widow, being a minor without guardian, may be represented by next friend, duly appointed. *Hollmon v. Hollmon*, 125 N. C. 29, 34 S. E. 99 (1899).

Infants Are Real Parties Plaintiff.—One who conducts a suit as guardian or next friend for infants is not a party of record, but the infants themselves are the real plaintiffs. *George v. High*, 85 N. C. 113 (1881); *Krachanake v. Mfg. Co.*, 175 N. C. 435, 95 S. E. 851 (1918).

Infant Need Not Know of the Suit.—It is not essential that the infant should know that an action has been brought in his favor by a next friend, as his incapacity to judge for himself is presumed, but the court may inquire into the propriety of the action and take such steps as may be necessary. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

When Infant Appears by Attorney.—A judgment for or against an infant, when

he appears by attorney, but has no guardian or next friend, is not void, but only voidable. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

Opposite Party Cannot Object to Appointment.—The defendant cannot object to the next friend appointed by the trial judge. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874 (1901).

Not Subject to Collateral Attack.—The presence of a next friend or guardian ad litem to represent an infant party, as the case may be, and his recognition by the court, in proceeding with the cause, precludes an inquiry into his authority in a collateral proceeding. *Sumner v. Sessoms*, 94 N. C. 371 (1886). See also, *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887).

Objection by a Plea in Abatement.—The objection that the next friend has not been regularly appointed should be taken by a plea in abatement. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874 (1901).

When Next Friend Pays Costs.—While the "next friend" is not, strictly speaking, a party to the action, and generally will not be taxed with costs, yet where the court finds the fact that he officiously procured his appointment, or was guilty of mismanagement or bad faith, it may tax him with costs. *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113 (1891).

Attorney's Fees.—Where it is proper for the attorneys for a ward, employed by the next friend, to receive compensation out of the estate for the prosecution of an action against the guardian, the amount is for sole determination of the court, irrespective of any contract that may have been made, to be fixed with regard to the

value of the services in relation to that of the estate. *In re Stone*, 176 N. C. 336, 97 S. E. 216 (1918).

Where Administrator Represents Minor Heir.—In an ex parte proceeding to sell land for assets, infant heirs are represented by a guardian or next friend, and the order of sale must be approved by the judge. While it is irregular for the administrator in such cases to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of the purchaser. *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480 (1887); *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877 (1898).

When Infant Reaches Majority Pendente Lite.—Where an infant institutes an action in his own name and arrives at full age before the trial, the judgment is binding on both plaintiff and defendant. *Hicks v. Beam*, 112 N. C. 642, 17 S. E. 490 (1893).

Infants Bound by Judgment.—Infants without general guardians may appear by their next friend, appointed in the manner prescribed by the statute, and judgments rendered in such proceedings, otherwise valid, are binding upon and conclusive of the rights of infants in the same manner and to the same extent as persons sui juris. *Tate v. Mott*, 96 N. C. 19, 2 S. E. 176 (1887); *Settle v. Smith*, 141 N. C. 553, 54 S. E. 445 (1906).

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229 (1937).

Cited in *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458 (1946).

§ 1-65. **Infants, etc., defend by guardian ad litem.**—In all actions and special proceedings when any of the defendants are infants, idiots, lunatics, or persons non compos mentis, whether residents or nonresidents of this State, they must defend by their general or testamentary guardian, if they have one within this State; and if they have no general or testamentary guardian in the State, and any of them has been summoned, the court in which said action or special proceeding is pending, upon motion of any of the parties, may appoint some discreet person to act as guardian ad litem, to defend in behalf of such infants, idiots, lunatics, or persons non compos mentis. The guardian so appointed shall, if the cause is a civil action file his answer to the complaint within the time required for other defendants, unless the time is extended by the court; and if the cause is a special proceeding, a copy of the complaint, with the summons, must be served on him. After twenty days' notice of the summons and complaint in the special proceeding, and after answer filed as above prescribed in the civil action, the court may proceed to final judgment as effectually and in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants. (C. C. P., s. 59; 1870-1, c. 233, s. 5; 1871-2, c. 95, s. 2; Code, s. 181; Rev., s. 406; C. S., s. 451.)

Cross References.—As to service of summons on minor or insane, see § 1-97, paragraphs 2 and 3. As to minor veterans, see § 165-16.

See note under § 41-11.

Editor's Note.—This section and § 1-97, par. 2, were intended to afford protection to infants, persons non compos mentis, etc., against the able and the cunning who might seek to take advantage of their handicaps. There can be no question but that the requirement as to service of summons on persons falling within the purview of these sections should be strictly observed.

However, the question inevitably arises as to what is the legal effect of failure to make such summons. In *Allen v. Shields*, 72 N. C. 504 (1875), it is doubted by the court whether personal service on an infant is not indispensable, with a strong intimation that it is. But it appears that our authorities are fairly uniform on the point, and the doctrine has long and almost universally prevailed, that the interests of the minor having been presented, and an answer having been filed by his general guardian, or guardian ad litem, the failure to serve on the minor personally was only an irregularity, to be corrected, if at all, by motion in the cause. *Matthews v. Joyce*, 85 N. C. 258 (1881); *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968 (1905); *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975 (1908); *Glisson v. Glisson*, 153 N. C. 185, 69 S. E. 55 (1910); *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217 (1912); *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921).

Should Be Strictly Observed.—The provisions of the statute in regard to the appointment of guardians ad litem should be strictly observed, but mere irregularities in observing them, not affecting a substantial right, will not vitiate judgments and decrees obtained in the action or proceeding in which such irregularities exist. *Ward v. Lowndes*, 96 N. C. 367, 2 S. E. 591 (1887); *White v. Morris*, 107 N. C. 93, 12 S. E. 80 (1890); *Cox v. Cox*, 221 N. C. 19, 18 S. E. (2d) 713 (1942).

Enforced as Mandatory.—In *Moore v. Gidney*, 75 N. C. 34 (1876), *Bynum, J.*, speaking for the court, says: "Infants are, in many cases, the wards of the courts, and these forms, enacted as safeguards thrown around the helpless, who are often the victims of the crafty, are enforced as being mandatory, and not directory only. Those who venture to act in defiance of them must take the risk of their action being declared void, or set aside."

The object of the appointment of a guardian ad litem is to protect the interest of the infant defendant to which protection he is entitled at every stage of the

proceeding. *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873 (1938).

When Clerk May Appoint.—In a special proceeding by an executor to sell lands, the clerk has the power to appoint a guardian ad litem for an infant defendant, where the executor is the general guardian of such infant. *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968 (1905).

Removal of Guardian Ad Litem.—In *Carraway v. Lassiter*, 139 N. C. 145, 51 S. E. 968 (1905), it was said: "The superior court has, independently of this section, the power to appoint a guardian ad litem for an infant defendant. It may at any time during the progress of the cause, for sufficient reason looking to the proper protection of the infant's interests, remove a guardian theretofore appointed and name some other person. We can see no good reason why the clerk who acts as and for the court, may not do the same in special proceedings pending before him. The object to be obtained is the protection of the infant, whose interest is the special care of the court; the guardian ad litem is the officer of the court, and we can see no good reason or conflict with well-settled principles why it may not for any good reason appoint such guardian."

When Husband Need Not Appear.—Where an infant feme covert cestui que trust who has no general guardian, appears in a proceeding for the appointment of a trustee by guardian ad litem, the husband need not appear. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518 (1900).

Ward Protected by Court.—Where a guardian ad litem has been duly appointed to represent a party, who is under disability, in an action, the court will protect his interest, and though our statute specifies that a summons must be served on such persons, no practical harm would result therefrom to the ward where a guardian ad litem has been appointed, and he accepts the service of summons and presumably performs his statutory duty; and the proceedings will not be declared void as to the ward when such has been done. *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921).

Return as Evidence of Service.—Where it is sought to condemn the lands of an infant, such infant must defend by general guardian where one has been appointed; and where service of process has been made upon the general guardian, and it appears from the officer's return of notice that service has been executed, upon the infant, such return is sufficient evidence

of its service to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461 (1924).

Decree Not Conclusive When Guardian Negligent of Interest.—A decree for the sale of land in a special proceeding is not conclusive upon infant defendants who were not served with process, but who were represented by a guardian ad litem, appointed before the petition was filed on nomination of plaintiff, and who filed an answer prepared for him at plaintiff's instance and without inquiry as to the rights of the infant defendants. *Moore v. Gidney*, 75 N. C. 34 (1876); *Gulley v. Macy*, 81 N. C. 356 (1879).

Appointment on Day of Trial.—Where a guardian ad litem for infants and incompetents is appointed on the day of trial, and such guardian accepts service and copies of the pleadings, and files his answer the same day, the judgment is irregular and may be declared void or set aside. *Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554 (1942).

Irregularities Cured.—The appointment of a guardian ad litem before service of summons upon the infant is an irregularity which may be cured by the service of summons upon the infant thereafter, and the filing of the answer of the guardian, etc. *Dudley v. Tyson*, 167 N. C. 67, 82 S. E. 1025 (1914).

Plaintiff Need Not Move for Appointment.—A plaintiff is not bound to move for the appointment of a guardian ad litem for an infant defendant; and his failure to do so is not such laches as will work a discontinuance of the action. *Turner v. Douglass*, 72 N. C. 127 (1875).

When Change of Venue Is Erroneous.—In an action against an infant who appears by an attorney, an order changing the venue is not irregular or void; it is erroneous, and may be reversed or vacated upon application of the infant, upon his arriving at age. *Turner v. Douglass*, 72 N. C. 127 (1875).

Vacation of Irregular Judgment.—Where it appears that there was no service of process upon infant defendants, and no guardian was appointed to protect their interests, a judgment rendered against them is absolutely void ab initio, and may be set aside at any time for irregularity. *Mason v. Miles*, 63 N. C. 564 (1869); *Larkins v. Bullard*, 88 N. C. 35 (1883). See also, *White v. Albertson*, 14 N. C. 241 (1831); *Pearson v. Nesbitt*, 14 N. C. 315 (1832).

Judgment Not Subject to Collateral Attack.—Where infant defendants are served

with a summons in proceedings for the partition of land and a guardian ad litem is appointed, a judgment affirming the sale cannot be set aside in a collateral proceeding for alleged fraud or irregularity. *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200 (1895).

Appointment Valid When Infant Not Regularly Served.—The appointment of a guardian ad litem is valid, although the infant has not been regularly served with process, but has only accepted service thereof. *Cates v. Pickett*, 97 N. C. 21, 1 S. E. 763 (1887).

Jury Trial Waived.—It is competent for the attorney and guardian ad litem to waive a jury trial for infants, even where they have not been regularly served with summons. *White v. Morris*, 107 N. C. 93, 12 S. E. 80 (1890).

Nominal Plaintiff Disqualified to Represent Infant.—A plaintiff of record, though nominal and made so without his consent, is utterly disqualified to appear for any infant defendants. His most faithful performance of duty and energetic and persistent defense, in every way commendable, and approved by the court, do not relieve the impropriety of his appointment as guardian ad litem, so long as his name appears on the plaintiff side of the docket. *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240 (1900).

Mere Colorable Interest Disqualifies.—A mere colorable interest, if at all adverse, is sufficient to disqualify either a guardian ad litem or his attorney from appearing for an infant defendant. *Molyneux v. Huey*, 81 N. C. 106 (1879); *Ellis v. Massenburg*, 126 N. C. 129, 35 S. E. 240 (1900).

Where Minors Not Represented by Guardian Ad Litem in Suit to Enforce Tax Lien.—In a suit to enforce a tax lien by foreclosure where the affidavit, orders and notices appear sufficient in form to constitute service by publication of notice of summons in accordance with prescribed procedure upon all persons named therein, including heirs at law, both adult and minors, under § 1-98, yet the minors, if any, not having been represented by a guardian ad litem would not be bound by the judgment of confirmation rendered in the action. *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

Exception that judgment was rendered before sufficient time had elapsed after notice as prescribed by this section was held not borne out by the record. *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845 (1948).

Supreme Court May Appoint.—The Su-

preme Court may appoint a guardian ad litem. *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263 (1890); *Perry v. Perry*, 175 N. C. 141, 95 S. E. 98 (1918).

Applied in *Wyatt v. Berry*, 205 N. C. 118,

170 S. E. 131 (1933); as to service on insane persons, in *Hood v. Holding*, 205 N. C. 451, 171 S. E. 633 (1933).

Cited in *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

§ 1-66. Appointment of guardian ad litem in actions begun by publication.—In all actions and special proceedings wherever any of the defendants are infants, idiots, lunatics, or persons non compos mentis, and it shall become necessary to serve the summons on said infants, idiots, lunatics, or persons non compos mentis by publication, it shall not be necessary to await the completion of the service of summons by publication before moving for the appointment of a guardian ad litem for said infants, idiots, lunatics, or persons non compos mentis, but a guardian ad litem may be appointed on motion at the time of the issuance of the order of publication; and the service of a summons, with a copy of the complaint or petition, can be made on the guardian ad litem returnable on the same date as the infant defendants are required to appear in the notice of publication; and after ten days' notice of said summons and complaint in special proceedings and after answer filed as prescribed in § 1-65 under this article, the court may proceed in the same cause to final judgment and decree therein, in the same manner as if there had been personal service upon the said infant, idiot, lunatic, or person non compos mentis, defendants, and any decree or judgment in the cause shall conclude the infant, idiot, lunatic, or person non compos mentis, defendants, as effectually as if he, or they, had been personally summoned. (1919, c. 246; C. S., s. 452.)

Cross Reference.—As to service by publication, see §§ 1-98 et seq.

Cited in *Hines v. Williams*, 198 N. C. 420, 152 S. E. 39 (1930); *McIver Park,*

Inc. v. Brinn, 223 N. C. 502, 27 S. E. (2d) 548 (1943); *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

§ 1-67. Guardian ad litem to file answer.—When a guardian ad litem is appointed, he shall file an answer in the action or special proceeding, admitting or denying the allegations thereof. The costs and expenses of the answer, in all applications to sell or divide the real estate of said infants, shall be paid out of the proceeds of the property, or in case of division shall be charged upon the land if the sale or division is ordered by the court, and, if not ordered, in any other manner the court directs. (1870-1, c. 233, s. 4; Code, s. 182; Rev., s. 407; C. S., s. 453.)

Minors Not Properly Represented Not Bound.—Where, in a proceeding to caveat a will, the interests of minors are involved, who are not properly represented, the issue of *devisavit vel non* cannot be answered by consent of the parties to the action so as to bind the infants. *Holt v. Ziglar*, 159 N. C. 272, 74 S. E. 813 (1912). See also, *Moore v. Gidney*, 75 N. C. 34 (1876).

Where, in an action for divorce against a person who has been declared non compos mentis, process has been duly served in accordance with § 1-97 (3), guardian ad litem under this section must

answer, and demurrer on the ground that marital relation is so personal only the spouse may elect to prosecute or defend the action and that defendant's inability to appear and answer in person defeats the jurisdiction of the court, is untenable. *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458 (1946).

Applied in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873 (1938).

Cited in *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548 (1943); *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

§ 1-68. Who may be plaintiffs.—All persons having an interest in the subject of the action and in obtaining the relief demanded may be joined as plaintiffs, either jointly, severally, or in the alternative, except as otherwise provided. If, upon the application of any party, it shall appear that such joinder may embarrass or delay the trial, the court may order separate trials or make such other order

as may be expedient. (C. C. P., s. 60; Code, s. 183; Rev., s. 409; C. S., s. 455; 1931, c. 344, s. 1.)

Cross References.—As to rules governing plaintiffs generally, see § 1-57. As to suits for penalties, see § 1-58. As to what causes of action may be joined, see § 1-123.

Editor's Note.—The 1931 amendment added all of this section appearing after the word "plaintiffs," and omitted the phrase "except as otherwise provided" formerly ending the section. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

There May Be Several Plaintiffs Whose Interests Are Not Identical.—In a suit for damages to a truck where the cause of action of the individual plaintiff for damage to his truck, as well as the cause of action of the corporate plaintiff for the loss of his security by reason of the damage to said truck, both arose out of the same transaction or transaction connected with the same subject of action, namely, the damage to the same truck proximately caused by the same negligent act of the same agent of the defendant, it was held that both parties could be joined as plaintiffs. Clearly both parties plaintiff had an interest in the subject of this action and in obtaining the relief demanded. Neither this section nor § 1-123 requires, by word or by implication, that the causes of action of the party plaintiffs shall be identical. *Wilson v. Horton Motor Lines*, 207 N. C. 263, 176 S. E. 750 (1934).

The fact that the interests of plaintiffs are legally severable, or not common or identical, is no bar to their joinder where they have a common interest in the subject of the action and the relief sought. *Wilson v. Horton Motor Lines*, 207 N. C. 263, 176 S. E. 750 (1934).

Trustee as Plaintiff.—A duly appointed trustee of a religious society may maintain an action for the removal of faithless

or incompetent trustees, and compel them to convey the property held by them to the purposes for which it was designed, and such trustee may also maintain an action to set up a lost deed executed for the benefit of the cestui que trust. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891).

Nonresidents Not Barred.—Nonresidents may be parties plaintiff in the courts of this State. *Miller v. Black*, 47 N. C. 342 (1855); *Walters v. Breder*, 48 N. C. 64 (1855); *Thompson v. Western Union Tel. Co.*, 107 N. C. 449, 12 S. E. 427 (1890).

Uninterested Party as Co-Plaintiff.—It is wholly immaterial that an uninterested party is united with the true owner as plaintiff, in an action to recover a debt, because a reception of payment by either plaintiff would be with the assent of the other. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621 (1889).

Creditors as Plaintiff.—In *Pelletier v. Saunders*, 67 N. C. 261 (1872), *Rodman, J.*, who delivered the opinion, said, "In a proceeding for the sale of lands, the creditors are not necessary parties. Nevertheless, as they have an interest, as well in the taking of the administration accounts as in the terms on which the land shall be sold, and the application of the proceeds, they must have a right to become parties at some stage of the proceedings, and we cannot see that any inconvenience, or injury to any interest, can arise by allowing them to come in at the beginning, by commencing the proceeding." See also, *Ex parte Moore*, 64 N. C. 90 (1870).

Applied in *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944).

Stated in *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

Cited in *Powell v. Smith*, 216 N. C. 242, 4 S. E. (2d) 524 (1939); *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

§ 1-69. Who may be defendants.—All persons may be made defendants, jointly, severally, or in the alternative, who have, or claim, an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. In an action to recover the possession of real estate, the landlord and tenant may be joined as defendants. Any person claiming title or right of possession to real estate may be made a party plaintiff or defendant, as the case requires, in such action. If the plaintiff is in doubt as to the persons from whom he is entitled to redress, he may join two or

more defendants, to determine which is liable. (C. C. P. s. 61; Code, s. 184; Rev., s. 410; C. S., s. 456; 1931, c. 344, s. 2.)

Editor's Note.—The 1931 amendment inserted the words "jointly, severally, or in the alternative" appearing in the first sentence of this section, and added the last sentence. This is a form of alternative pleading explained in 9 N. C. Law Rev. 24.

For an interesting and exhaustive treatment of permissive joinder of parties, see 25 N. C. Law Rev. 1. See also 25 N. C. Law Rev. 245.

Interest in Controversy.—In *Wade v. Sanlers*, 70 N. C. 277 (1874), *Pearson, C. J.*, while admitting the wording of the section to be very broad refused the construction of "any person may be made defendant who claims an interest in the controversy adverse to the plaintiff" to mean "any person who claims an interest in the thing which is the subject of controversy," as placed upon it by a superior court judge. However, it would seem that cases subsequent to this decision have apparently given it a wider scope. *Bryant v. Kenlaw*, 90 N. C. 337 (1884).

This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original parties to the action, may, in some instances, and must in others, be made parties plaintiff for defendant. But it does not imply that any persons who may have a cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. *Harkey v. Houston*, 65 N. C. 137 (1871); *Batchelor v. Macon*, 67 N. C. 181 (1872); *McDonald v. Morris*, 89 N. C. 99 (1883).

See also, *Gregory v. Gregory*, 69 N. C. 522 (1873); *Attorney General v. Simonton*, 78 N. C. 57 (1878); *Emry v. Parker*, 111 N. C. 261, 16 S. E. 236 (1892), and cases therein cited.

It is not everyone who may have a remote interest in a cause who must be made a party, but it will suffice if those are before the court who are in a legal sense necessary to the determination or

settlement of the questions involved. *McCaskill v. Lancashire*, 83 N. C. 393 (1880).

It has been held that this section applies only when the person applying is connected in interest with one or the other of the parties, as co-tenant with the plaintiff or in privity with the defendant, or on claim of a common possession with them. *Colgrove v. Koonce*, 76 N. C. 363 (1877). See also, *Harkey v. Houston*, 65 N. C. 137 (1871).

Where alleged fraudulent conveyances are made to several grantees, they all have an interest in the subject matter, and are necessary and proper parties in order to a final determination of the controversy. *Dawson Bank v. Harris*, 84 N. C. 206 (1881).

Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper to join them as defendants in an action for damages. *Long v. Swindell*, 77 N. C. 176 (1877); *Gill v. Young*, 82 N. C. 274 (1880).

Same—Judgment Creditors.—The judgment creditors of the decedent, having an interest in the sale of realty to make assets to pay debts, are such necessary or proper parties as to entitle them to intervene in the proceedings of the executor, and make themselves parties before final judgment. *Wadford v. Davis*, 192 N. C. 484, 35 S. E. 353 (1926).

Under this section and § 1-73, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney General to annul and vacate the charter of the corporation. *Attorney General v. Simonton*, 78 N. C. 57 (1878).

A creditor of the deceased has a right, to come in and be made a party defendant, for the purpose of excepting to an admeasurement of dower, in the course of a petition by the widow. *Ex parte Moore*, 64 N. C. 90 (1870).

Same—Plaintiff in a Creditor's Bill.—A plaintiff in a creditor's bill may join causes of action for the recovery of an indebtedness not theretofore reduced to judgment; for the removal of an insolvent trustee; for the appointment of a receiver; to declare a conveyance to the creditor of the principal defendant void, and that a prior mortgage shall be foreclosed and the surplus money applied to the debts of the other creditors, and persons having an interest in these several causes of ac-

tion should be made parties defendant. *LeDuc v. Brandt*, 110 N. C. 389, 14 S. E. 778 (1892).

Same—Wife as Defendant.—Where the plaintiff bought at an execution sale the interest of the husband in land claimed by the wife and whereon both resided, she was held entitled to come in and defend her estate and their possession. *Cecil v. Smith*, 81 N. C. 285 (1879).

Same—When Causes Are Separable.—Where there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it, is separable and may be accurately measured. In such case the jury can properly assess several damages. *Long v. Swindell*, 77 N. C. 176 (1877).

Necessary Parties.—The law does not allow unnecessary and improper parties to be brought into an action. The plaintiff has the right to have his action tried upon its merits, uninfluenced and unaffected by persons who have no concern in it. *McDonald v. Morris*, 89 N. C. 99 (1883).

In an action against the vendee under a conditional sales contract the joinder of one claiming title as purchaser for value from the vendee is not objectionable, the subject of the action being the same, and the claimant in possession being a necessary party to the action. *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929).

Same—Removal of Cause to Federal Courts.—A nonresident defendant surety of a contractor for the completion of the building may not remove the cause from the State to the federal court upon the ground that the resident defendants were not necessary parties to the determination of the controversy. *Morgantown v. Hutton, etc., Co.*, 187 N. C. 736, 122 S. E. 842 (1924), cited in *Jackson County Bank v. Hester*, 188 N. C. 68, 123 S. E. 308 (1924). As to who are necessary parties, see § 1-57 and notes thereto.

Landlord and Tenant—When Two Persons Claim as Landlord.—Where two parties, each claiming to be landlord of a tenant in possession, and one sues, the other has an interest in the controversy and may be admitted to defeat the action. *Rollins v. Rollins*, 76 N. C. 264 (1877).

Same—Defenses of Landlord.—Under the provisions of this section, a landlord let in to defend in a civil action for the recovery of land is not restricted to the defenses to which his tenant is confined, nor is this principle varied by the circumstance that the plaintiff is the purchaser

at execution sale against such tenant, and that the latter was in possession at the date of the sale and of the commencement of the action. *Isler v. Foy*, 66 N. C. 547 (1872); *Maddrey v. Long*, 86 N. C. 383 (1882).

Action to Recover Land—Joint Owner Made Party Defendant.—In an action to recover land a third party, claiming to be joint owner with defendant, has the right, on affidavit, to be let in as a party defendant. *Lytle v. Burgin*, 82 N. C. 301 (1880).

Same—Purchaser under Mortgage Sale as Party.—In *Keathly v. Branch*, 84 N. C. 202 (1881), the mortgagor was sued, and the purchaser of the land sold under the mortgage was allowed to come in and set up his own title.

Same—Action against Administrator.—Where a suit was pending by the next of kin against an administrator for the distribution of the estate in his hands, and the defendant died, the action could not be continued by the next of kin, and the court had no power to allow an administrator de bonis non to be made a party plaintiff in the pending action. *Merrill v. Merrill*, 92 N. C. 657 (1885).

Same—Undivided Interest in Lands.—One who claims an undivided interest in lands in proceedings to sell them and divide the proceeds among tenants in common and to pay debts, etc., may be properly made a party to such proceedings. *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445 (1913).

Same—Adverse Holder to Title to Both Parties.—In an action for the recovery of real estate, a third person who claims title paramount and adverse both to plaintiff and defendant, should not be permitted to make himself a party to the action. *Colgrove v. Koonce*, 76 N. C. 363 (1877).

Same—Authority of Clerk.—The clerk of the superior court, under the general provisions of this section, has the authority to permit persons claiming an interest in the land to be made a party defendant. *Empire Mfg. Co. v. Spurill*, 169 N. C. 618, 86 S. E. 522 (1915).

Parties for Purpose of Setting up Counterclaim.—Where mother has placed her son in a sanitarium for treatment and is personally responsible for the services therein rendered, in an action to recover therefor against her she may not qualify as guardian for her son and make herself and him parties for the purpose of recovering for him damages upon a counterclaim alleged to have been caused by malpractice, as such does not fall within the scope of the plaintiff's cause of action, and she in her capacity as guardian is not a

necessary party under this section or § 1-73. *Michigan Sanitarium, etc., Ass'n v. Neal*, 194 N. C. 401, 139 S. E. 841 (1927).

Before allotment of dower is made in the lands of a deceased husband dying intestate his heirs at law should be made parties plaintiff or defendant. *Holt v. Lynch*, 201 N. C. 404, 160 S. E. 469 (1931).

Surety.—Where a contractor gives a surety bond for the faithful performance of a contract for the cutting of timber, it is not necessary to first ascertain by action or otherwise the amount of the liability of the contractor before uniting his surety as a party to an action for damages for its breach, the surety being a proper party for the complete determination or settlement of the question involved. *Watson v. King*, 200 N. C. 8, 156 S. E. 93 (1930).

Junior Mortgagee.—In an action to set aside a sale under a deed of trust the junior mortgagee should be made a party. *Lockbridge v. Smith*, 206 N. C. 174, 173 S. E. 36 (1934).

Assignee of Judgment and Levying Officer.—In an action against the makers of a note and to have a judgment obtained by one of the makers against the payee applied to the payment of the note, it was held that the assignee of the judgment and the sheriff, who was about to obtain execution on the judgments, were properly made parties defendant. The principal relief sought was against the makers and the relief sought against the other defendants was but incidental. *North Carolina Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 175 S. E. 102 (1934).

In an action against a stockholder in an insolvent bank to collect the statutory assessment on his stock parties who had contracted to pay the liabilities of the bank in case of insolvency and save the stockholders from liability should have been made parties defendant on motion of defendant stockholder. *Hood v. Burrus*, 207 N. C. 560, 178 S. E. 362 (1935).

Joinder of Beneficiaries in Deeds of Trust.—In an action by a judgment creditor to set aside alleged fraudulent conveyances of property by deeds of trust and mortgages as made to hinder, delay and defraud him in the collection of his judgment under execution, the joinder therein of the grantees and beneficiaries in the

deeds is not objectionable as a misjoinder and demurrer to the complaint alleging such conveyances entered on the ground of misjoinder of causes and parties, and that it failed to state a cause of action is properly overruled. *Moorefield v. Roseman*, 198 N. C. 805, 153 S. E. 399 (1930).

Action against Town or Officials.—Plaintiff sought to recover against a town on a contract or, if the town were not liable on the contract, to recover against individual defendants as mayor and clerk, for wrongfully inducing him to enter into an unauthorized contract. It was held that the facts alleged were not in the alternative, but that the complaint alleged a series of transactions forming one whole and connected story, and under the provisions of this section, plaintiff, being in doubt as to those from whom he is entitled to redress, may seek to recover of defendants in the alternative under § 1-123, and defendants' demurrer for misjoinder of parties and causes is properly overruled. *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416 (1941).

Review on Appeal.—The action of the trial judge in making necessary parties to an action is reviewable on appeal, and the making of proper parties is addressed to his sound discretion and not reviewable. *Williams v. Hooks*, 200 N. C. 419, 157 S. E. 65 (1931).

Applied in *State v. Griggs*, 219 N. C. 700, 14 S. E. (2d) 836 (1941); *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944); *Owen v. Hines*, 227 N. C. 236, 41 S. E. (2d) 739 (1947).

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928); *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929); *Shemwell v. Lethro*, 198 N. C. 346, 151 S. E. 729 (1930); *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 154 S. E. 42 (1930); *Robertson v. Robertson*, 215 N. C. 562, 2 S. E. (2d) 552 (1939); *Ebert v. Disher*, 216 N. C. 36, 3 S. E. (2d) 301 (1939); *Powell v. Smith*, 216 N. C. 242, 4 S. E. (2d) 524 (1939); *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648 (1941); *Riddick v. Davis*, 220 N. C. 120, 16 S. E. (2d) 662 (1941); *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

§ 1-70. **Joinder of parties; action by or against one for benefit of a class.**—Of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants; but if the consent of any one who should have been joined as plaintiff cannot be obtained, he may be made a defendant, the reason thereof being stated in the complaint. When the question is one of a common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend

for the benefit of all. Any and/or all unincorporated, beneficial organizations, fraternal benefit orders, associations and/or societies, or voluntary fraternal beneficial organizations, orders, associations and/or societies issuing certificates and/or policies of insurance, foreign or domestic, now or hereafter doing business in this State, shall have the power to sue and/or be sued in the name commonly known and/or used by them in the conduct of their business to the same extent as any other legal entity established by law, and without naming any of the individual members composing it: Provided, however, this section shall apply only in actions concerning such certificates and/or policies of insurance. (C. C. P., s. 62; Code, s. 185; Rev., s. 411; C. S., s. 457; 1933, c. 182.)

Cross References.—As to real parties in interest, see § 1-57. As to plaintiff and defendants generally, see §§ 1-68, 1-69. As to amendments to proceeding by adding or striking out parties, see § 1-163.

See note under § 1-123.

Editor's Note.—The last sentence of this section, relating to unincorporated, beneficial organizations, fraternal orders, etc., was added by the 1933 amendment.

For discussion of class actions, see 26 N. C. Law Rev. 223.

Provisions of Chapter Controlling.—Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

Extent of Abrogation of Common Law.—It is clear that the General Assembly has by the provisions of this section abrogated the common law in respect of the parties to an action at law to the extent, and only to the extent, that (1) when the question is one of common or general interest of many persons, or where the parties are so numerous that it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all; and (2) when an unincorporated association of the kind or character enumerated, is engaged in issuing certificates and policies of insurance, or either, and doing business in this State, it may sue or be sued in any action concerning such certificates and policies, or either, without naming any of the individual members composing it. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

Parties Not Necessary to Determination.—See note under § 1-127.

Persons in Interest.—Persons in interest are necessary parties to a final adjudication. *Meadows v. Marsh*, 123 N. C. 189, 31 S. E. 476 (1898).

But it is necessary as a rule that all defendants have a responsible interest; a judgment that determines points of law adverse to a person, is not sufficient ground

for making him defendant. *Clark v. Bon-sal & Co.*, 157 N. C. 270, 72 S. E. 954 (1911).

Where the stockholders of an insolvent bank authorize the trustee of the bank to bind them individually, but not jointly, for money to be borrowed on their credit and agree to repay the same in proportion to the amount of the stock held by each, they are properly joined as defendants in an action to recover money so lent, since the subject of action is of common and general interest. *Hanover Nat. Bank v. Cocke*, 127 N. C. 467, 37 S. E. 507 (1900).

No Consolidation Where Parties Not United in Interest.—An action in the nature of quo warranto was instituted by the person elected to the office by the municipal aldermen against the person previously elected to the office by the aldermen, to try title to the office. Another action was instituted by a taxpayer against the town and its aldermen to restrain them from paying the emoluments of office to the person elected by them upon the contention that the person previously elected to the office by the aldermen and discharging the duties of the office, was entitled to the emoluments thereof up to the time he surrendered possession of the office. Held: Neither the parties nor the purposes of the two separate causes of action are the same and the respective plaintiffs therein are not united in interest, and therefore the causes cannot be joined in the same action under this section. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Where the parties are not the same, the purposes are not the same, the plaintiffs are not united in interest, and separate causes of action are alleged, two causes of action cannot be joined. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Representation of Community by Members.—Where property was conveyed to trustees for use as a community house or playground for the benefit of the residents of the community, and an action was instituted involving title to the property in which representative members of the community were made parties, the judgment in

the action is binding upon the minors and all members of the community not made parties under provision of this section for class representative. *Carswell v. Creswell*, 217 N. C. 40, 7 S. E. (2d) 58 (1940).

Breach of Trust.—The principal actress in a breach of trust and fraud, must be joined with the other defendants, alleged to have concurred with her as coadjutors. *Paxton v. Wood*, 77 N. C. 11 (1877).

Will Not Yet Established.—One who claims under a will, which is not established, must have before the court all the parties interested, to establish it. *Thompson v. Applewhite*, 16 N. C. 460 (1830).

Joint Contractors.—If a quarry company and a stone company contracted jointly to furnish rock, both companies were interested in an action to recover the amount due to each company, and were properly joined as plaintiffs. *Balfour Quarry Co. v. West Const. Co.*, 151 N. C. 345, 66 S. E. 217 (1909).

A petition to vacate a grant, brought against a person in possession by purchase from the original grantee, where such grantee is not before the court, will be dismissed. *Tyrrell v. Logan*, 10 N. C. 319 (1824).

When Wife an Unnecessary Party.—A wife is an unnecessary party to a bill to set aside a deed for her land, fraudulently procured from her husband alone, her right being unaffected by the conveyance. *Browning v. Pratt*, 17 N. C. 44 (1831).

The executor, and not the heirs, represents the estate where land is directed by will to be sold and converted into money, and the latter are not necessary parties to a suit concerning the disposition of and charges on such estate. *Harris v. Bryant*, 83 N. C. 568 (1880).

It is not necessary to join as parties the heirs of a deceased tenant in common who disposed of his interest in the common property pendente lite. *Dawkins v. Dawkins*, 93 N. C. 283 (1885).

Ultior Legatees as Parties.—In an action against an executor, the ultior legatees should be parties where it is sought to charge him with a fund arising out of a sale of land under a power in a will, the land being bequeathed to plaintiff for life, and after his death to his children, with a remainder over in case of his death without children. *Peacock v. Harris*, 85 N. C. 147 (1881).

Donee in Suit by Donor.—A deed by a feme covert conveying slaves to her after the death of the donor, creates an interest which survives to her, after the death of her husband, and she is a necessary party

to a bill by him, seeking relief upon her title. *Kornegay v. Carroway*, 17 N. C. 403 (1833).

Unconnected Parties with Common Interest.—When several persons, although unconnected with each other, are made defendants, a demurrer will not lie if they have a common interest centering in the point in issue in the cause. *Virginia-Carolina Chemical Co. v. Floyd*, 158 N. C. 455, 74 S. E. 465 (1912).

Joinder Necessary to Disposition of Cause.—Demurrer for misjoinder of parties is properly overruled, where it appears that the two defendants are so intimately connected with the transactions that it would be almost impossible to investigate any of the grounds of complaint unless both are made parties. *Oyster v. Iola Min. Co.*, 140 N. C. 135, 52 S. E. 198 (1905).

Insolvency of Defendant.—Mere insolvency of a defendant cannot alone determine the right of a plaintiff to join him with others in an action for tort, if he is liable, since the test is in the validity of the cause of action and the good faith of the plaintiff in making the joinder, and insolvency does not destroy the remedy, but merely effects the prospects of collection. *Hough v. Southern R. Co.*, 144 N. C. 692, 57 S. E. 469 (1907).

Party Unheard of for Years.—Where a person concerned in interest is stated in the bill to have moved away and not since heard of for many years, so that he cannot be served with process, that is a good reason as between third parties for not making him a party; and the court will proceed to a hearing notwithstanding. *Ingram v. Lanier*, 2 N. C. 221 (1795).

Tenant in Common May Sue Alone.—One tenant in common may sue without joining his cotenants for the recovery of the possession of the common property. *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692 (1887). See also, *Wilson v. Arentz*, 70 N. C. 670 (1874).

Suit against Unincorporated Society.—This section permitting the joinder of parties and recognizing representation by common interests, cannot have application to an attempted suit against an unincorporated society, when no individual has been made a party defendant, or appears to defend the action in behalf of himself or other members of the society. *Tucker v. Eatough*, 186 N. C. 505, 120 S. E. 57 (1923).

An unincorporated labor union is without capacity to sue or be sued in the name of the association, since in law it has no legal entity, and there being no statutory provisions enabling it to sue or be sued as an association, since this section and § 1-97

apply only to suits by or against mutual benefit associations on certificates or policies of insurance. *Hallman v. Wood, Wire, etc., Union*, 219 N. C. 798, 15 S. E. (2d) 361 (1941).

An unincorporated fraternal association may not, as such, maintain an action at law—but the provisions of this section are open to its members. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

Action by Member of Congregation.—Where, there is no higher governing body in any denomination than the congregation, every member has such a beneficial interest as would enable him, in behalf of his brethren and associates, to maintain an action to restore a lost title deed for the church at which he worships, and for the removal of trustees who have attempted to defraud their beneficiaries, and for the substitution of others or the adjudication that the title is in the congregation at large. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891).

A complaint in an action by the State on the relation of certain parties claiming to be school trustees against defendants, also claiming to be such officers, is not subject to demurrer for misjoinder of parties because of no community of interest between plaintiffs; their terms being separate and distinct. *School Trustees v. Baker*, 164 N. C. 382, 80 S. E. 415 (1913).

That the defendants have separate defenses does not affect the plaintiff's right to sue them jointly, if he has a cause of action against them in which they may be properly joined. *Davis v. Rexford*, 146 N. C. 418, 59 S. E. 1002 (1907).

One having a joint and several cause of action in tort against several may sue such of them as he may elect. *Gudger v. Western, etc., R. Co.*, 87 N. C. 325 (1882).

Consent of Proper Plaintiff.—Notice to a person to show cause why he should not be made a party was an invitation to make him a party plaintiff if he chose, or notice to make him a party defendant in invitum. It was therefore a substantial compliance with the statute to serve such notice on him. *McCormac v. Wiggins*, 84 N. C. 278 (1881); *Emry v. Parker*, 111 N. C. 261, 16 S. E. 236 (1892).

Same—Suit by Purchaser against Mortgagee.—A purchaser of land from a mortgagor upon consideration that the former pay off the mortgage, the amount of which the latter agreed to ascertain, but failed or refused so to do, may maintain his action against the mortgagee as a necessary party under this section as the mortgagee refused to be joined as a party plaintiff, for

an accounting, in order that he may relieve the land from the lien of the mortgage, and remove the cloud upon his title. *Elliot v. Brady*, 172 N. C. 828, 90 S. E. 951 (1916).

Same—Administrator d. b. n.—If an administrator de bonis non refuses to join as plaintiff, he must be made a party defendant. *Hardy v. Miles*, 91 N. C. 131 (1884); *Wilson v. Pearson*, 102 N. C. 290, 9 S. E. 707 (1889).

Necessity for Summons.—When additional parties plaintiff are made, no summons issues, because the plaintiff is the moving party, and comes into court voluntarily. *Reynolds v. Smathers*, 87 N. C. 24 (1882); *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272 (1890). But if the party objects to appearing as plaintiff and he is made a party defendant, under this section, he must be served with summons. *Plemmons v. Southern Improve. Co.*, 108 N. C. 614, 13 S. E. 188 (1891).

Existence of Common Interest of Many Persons.—The construction of this section, "has been established by the courts, and the rule is settled, as already stated, that where the question to be decided is one of common or general interest to a number of persons, the action may be brought by or against one or all the others, even though the parties are not so numerous that it would be impracticable to join them all as actual plaintiffs or defendants; but, on the other hand, when the parties are so very numerous that it is impracticable to bring them all into court, one may sue or be sued for all the others, even though they have no common or general interest in the question at issue, and the necessary facts to bring the case within one or the other of these conditions must be averred." *Bronson v. Wilmington, N. C. Life Ins. Co.*, 85 N. C. 411 (1881), quoting *Pom. Rem. sec. 391*. The cases of *Glenn v. Farmers Bank*, 72 N. C. 626 (1875); *Von Glahn v. De Rosset*, 81 N. C. 467 (1879), are cases sustaining the proposition here laid down. See also, *Thames v. Jones*, 97 N. C. 121, 1 S. E. 92 (1887).

The exception to the general rule that all persons interested in and to be affected by the determination of the suit must be made parties on one or the other side obtains when they "may be very numerous and it may be impractical to bring them all before the court," a rule prevailing in the former equity practice, and recognized by the express terms of this section. *Glenn v. Farmers Bank*, 72 N. C. 626 (1875); *Bronson v. Wilmington, N. C. Life Ins. Co.*, 85 N. C. 411 (1881); *Foster v. Hack-*

ett, 112 N. C. 546, 17 S. E. 426 (1893); Story Eq. Pl., sec. 122.

But where one rests his right to sue alone in behalf of himself and others on the ground that the parties in interest are so numerous that it is impractical to bring them before the court, he must so allege. *Foster v. Hackett*, supra; *Thames v. Jones*, 97 N. C. 121, 1 S. E. 692 (1887); *McMillan v. Reeves*, 102 N. C. 550, 9 S. E. 449 (1889).

Common Grantor of Plaintiff and Defendant Made Party Defendant after Mu-

tual Mistake. — Where there is allegation of mutual mistake of the common grantor of the plaintiff and defendant, and of the plaintiff and defendant as grantees in the deeds simultaneously executed and delivered to them by said grantor, it was held proper for the court to make the grantor a party defendant. *Smith v. Johnson*, 209 N. C. 729, 184 S. E. 486 (1936).

Cited in *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648 (1941); *Smoke Mount Industries v. Eureka, etc., Ins. Co.*, 224 N. C. 93, 29 S. E. (2d) 20 (1944).

§ 1-71. **Persons severally liable.**—Persons severally liable upon the same obligation, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action at the option of the plaintiff. (C. C. P., s. 63; Code, s. 186; Rev., s. 412; C. S., s. 458.)

Cross Reference.—As to joint and several debtors, see § 1-113.

Makers and Endorsers of Bills and Notes.—The makers and endorsers of bills of exchange and promissory notes, or any of them, may be joined as defendants. *Wooten v. Maultsby*, 69 N. C. 462 (1873).

Judgment as a Merger. — Between the parties to an action wherein a judgment is rendered the judgment is a merger and the note or instrument sued upon is extinguished; but as to sureties or indorsers who are not parties to the judgment, there is no merger or extinguishment of the note or instrument. *Bank v. Eureka Lumber Co.*, 123 N. C. 24, 31 S. E. 348 (1898).

Action on Surety Bond. — In an independent action by plaintiff in claim and delivery to recover upon the defendant's surety bond damages for the deterioration, etc., of the property wrongfully detained, the surety may be sued alone without joining the principal defendant in the former action. *Moore v. Edwards*, 192 N. C. 446, 135 S. E. 302 (1926).

In an action against one surety on an official bond, the other sureties need not

be joined. *Brown v. McKee*, 108 N. C. 387, 13 S. E. 8 (1891). See also, *Flack v. Dawson*, 69 N. C. 42 (1873); *Syme v. Bunting*, 86 N. C. 175 (1882).

Action for Trust Funds Loaned by Guardian. — Where a guardian lent trust funds to a firm of which he was a member and took their note payable to himself, it cannot be objected that the guardian is not made a party to a suit brought thereon by the husband of the cestui que trust, to whom the guardian had assigned it, as under this section, persons severally liable may all or any be included as defendants. *Gudger v. Baird*, 66 N. C. 438 (1872).

Action on Promissory Note.—Since the holder of a note may sue any or all persons severally liable thereon, an endorser may not attack for fraud a judgment entered against him on the note in a suit maintained by the maker in his capacity of administrator of the holder, in which suit he takes a nonsuit against himself as maker of the note. *Castleberry v. Sasser*, 210 N. C. 576, 187 S. E. 761 (1936).

Cited in *Wachovia Bank, etc., Co. v. Black*, 198 N. C. 219, 151 S. E. 269 (1930).

§ 1-72. **Persons jointly liable.**—In all cases of joint contracts of partners in trade or others, suit may be brought and prosecuted against all or any number of the persons making such contracts. (R. C., c. 31, s. 84; 1871-2, c. 24, s. 1; Code, s. 187; Rev., s. 413; C. S., s. 459.)

Editor's Note. — Contracts made by co-partners (or other joint obligors) were made separate by statute, and the plaintiff could sue one or more at his election without impairing his right to proceed against others afterwards, by the Revised Code, c. 31, § 84. This provision was not introduced into the Code of Civil Procedure and hence the principle governing contracts as construed at common law was restored. The necessity for remedy arose.

The omitted section, which in *Merwin v. Ballard*, 65 N. C. 168 (1871), was decided to have been repealed, was enacted at the session of the General Assembly of 1871-72, c. 24, § 1, which was § 187 of the Code, and now constitutes this section. See *Ruffy v. Claywell*, 93 N. C. 306 (1885).

Effect. — In *Ruffy v. Claywell*, 93 N. C. 306 (1885), it was said: "The result is to render contracts joint in form, several in legal effect, and to neutralize, if not dis-

place, those provisions which operate only upon contracts that are joint. * * * That the contract possesses the two-fold quality of being joint as well as several in law, cannot render available provisions which, in terms, are applicable to such as are joint only. It is solely to remove the resulting inconveniences of an action prosecuted to judgment against part of those whose obligation is joint only, that the remedy is provided, and it becomes needless when the obligation is several also. Such is the construction adopted in the courts of New York."

A firm in Maryland gave its promissory note to A signed in the name of the firm, and A sued one of the partners alone, he was permitted to do so, as this section does not affect the contract, but only extends the remedy. *Palyart v. Goulding*, 1 N. C. 691 (1796).

Partnership Liability. — Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the

partners, *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155 (1893). See also, *Bain v. Clinton Loan Ass'n*, 112 N. C. 248, 17 S. E. 154 (1893); *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307 (1914).

Where a judgment has been obtained in an action against a partnership and summons therein has been issued and served only on one of the partners, and the other has not made himself a party or taken proper steps by independent action to prevent it, execution may issue on the partnership property and on the property of the individual member who has been served with process. *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307 (1914).

Procedure in Partnership Actions. — Where a judgment is taken against two or three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which such judgment was rendered, it is only when the liability is joint and not several that the motion in the cause is proper. *Davis v. Sanderlin*, 119 N. C. 84, 25 S. E. 815 (1896).

Cited in *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255 (1930).

§ 1-73. New parties by order of court.—The court either between the terms, or at a regular term, according to the nature of the controversy, may determine any controversy before it, when it can be done without prejudice to the right of others, but when a complete determination of the controversy cannot be made without the presence of other parties, the court must cause them to be brought in. When in an action for the recovery of real or personal property, a person not a party to the action, but having an interest in its subject matter, applies to the court to be made a party, it may order him to be brought in by the proper amendment. A defendant against whom an action is pending upon a contract or for specific real or personal property, upon proof by affidavit that a person not a party to the action makes a demand against him for the same debt or property without collusion with him, may at any time before answer apply to the court, upon notice to that person and the adverse party, for an order to substitute that person in his place, and to discharge him from liability to either, on his paying into court the amount of the debt, or delivering the possession of the property or its value to such person as the court directs. The court may make such an order. (C. C. P., s. 65; Code, s. 189; Rev., s. 414; C. S., s. 460.)

Cross References. — As to amendments to proceeding by adding or striking out parties, in discretion of court, see § 1-163. As to necessary and proper parties, see §§ 1-57 et seq. As to demurrer for defect of parties, see § 1-127, paragraph 4. As to intervention in claim and delivery, see § 1-482.

Scope of Section.—This section contemplates that all persons necessary to a complete determination of the controversy, the matter in litigation, and affected by the same in some way, as between the original

parties to the action, may, in some instances, and must in others, be made parties plaintiff or defendant. But it does not imply that any person who may have cause of action against the plaintiff alone, or cause of action against the defendant alone, unaffected by the cause of action as between the plaintiff and defendant, may or must be made a party. It does not contemplate the determination of two separate and distinct causes of action, as between the plaintiff and a third party, or the defendant and a third party, in the same

action. It is only when, as between the original parties litigant, other parties are material or interested, that it is proper to make them parties. *Moore v. Massengill*, 227 N. C. 244, 41 S. E. (2d) 655 (1947), citing *McDonald v. Morris*, 89 N. C. 99 (1883).

This section does not authorize the joinder of a party claiming under an independent cause of action not essential to a full and complete determination of the original cause of action. *Moore v. Massengill*, 227 N. C. 244, 41 S. E. (2d) 655 (1947).

Court Brings in New Parties. — The court, to the end that substantial justice may be done, may before or after judgment direct the bringing in of new parties. *Bullard v. Johnson*, 65 N. C. 436 (1871); *Walker v. Miller*, 139 N. C. 448, 5 S. E. 123, 1 L. R. A. (N. S.) 157, 111 Am. St. Rep. 805 (1905).

In General.—This section serves to confer upon the trial court the power if not as a matter of right, then as a matter in its discretion, to allow an intervenor to claim property while it is still in custodia legis. *Unaka, etc., Nat. Bank v. Lewis*, 203 N. C. 644, 166 S. E. 800 (1932).

Necessary Parties. — When a complete determination of the matter cannot be had without the presence of other parties, the court must cause them to be brought in. *Kornegay & Co. v. Farmers, etc., Co.*, 107 N. C. 115, 12 S. E. 123 (1890); *Maxwell v. Barringer*, 110 N. C. 76, 14 S. E. 516 (1892); *Parton v. Allison*, 111 N. C. 429, 16 S. E. 415 (1892); *Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412 (1906); *McKeel v. Holloman*, 163 N. C. 132, 79 S. E. 445 (1913); *Barbee v. Cannady*, 191 N. C. 529, 132 S. E. 572 (1926); *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156 (1934).

It is the duty of the court to bring in all parties necessary to a complete determination of the controversy. *State v. Griggs*, 219 N. C. 700, 14 S. E. (2d) 836 (1941).

Persons Entitled to Intervene. — A claimant under another title to land in dispute between parties to a suit cannot intervene. *Keathly v. Branch*, 84 N. C. 202 (1881); *Bryant v. Kinlaw*, 90 N. C. 337 (1884); *Asheville Division v. Aston*, 92 N. C. 588 (1885).

The right of an outside claimant to intervene is well settled by precedent, and, if not directly authorized by statute, subserves the general policy of the new system which aims to adjust in one action, when practicable, conflicting claims to the

same property. *Sims v. Goettle Bros.*, 82 N. C. 269 (1880).

A party may intervene who has an interest in the controversy, but not when he claims an interest in the thing which is the subject of controversy. *Wade v. Sanders*, 70 N. C. 277 (1874); *Asheville Division v. Aston*, 92 N. C. 588 (1885).

But when the action is for the recovery of real or personal property, a person not a party to it, who has an interest in the subject matter of the action may, upon his application, be made a party by proper amendment. *Kornegay & Co. v. Farmers, etc., Co.*, 107 N. C. 115, 12 S. E. 123 (1890).

The right of interpleader given by this section was intended to apply to a controversy or action properly constituted in court. *Bates v. Lilly*, 65 N. C. 232 (1871); *Millikan v. Fox*, 84 N. C. 107 (1881).

Requisite Interest of New Party. — To entitle one to the benefits of this section allowing new parties to be brought in, such additional parties must have a legal interest in the subject matter of the litigation; and the interest of a new party must be of such direct and immediate character that he will either gain or lose by the direct operation and effect of the judgment. *Griffin & Vose v. Non-Metallic Minerals Corp.*, 225 N. C. 434, 35 S. E. (2d) 247 (1945).

Discretion of the Court.—As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. *Service Fire Ins. Co. v. Horton Motor Lines*, 225 N. C. 588, 35 S. E. (2d) 879 (1945).

The fact that plaintiff alone, without joinder of the owner, could not maintain the action does not limit the discretionary power of the judge. *Service Fire Ins. Co. v. Horton Motor Lines*, 225 N. C. 588, 35 S. E. (2d) 879 (1945).

Necessity Must Clearly Appear. — An order to bring additional parties into an action will not be granted until the necessity for making them parties clearly appears. *Lee v. Eure*, 92 N. C. 283 (1885).

To Order New Process. — A court has no power to order a new process to bring in a new defendant during the pendency of a suit. *Camlin v. Barnes*, 50 N. C. 296 (1858).

To Validate Action by Making Necessary Parties. — The court has no authority to correct a pending action, that cannot be maintained, into a new one by admitting a

new party plaintiff solely interested, and allow him to assign a new and different cause of action, if the defendant shall object. There is neither principle, nor statute, nor practice that allows such a course of procedure. An action separate and distinct from the pending one, must be begun according to the ordinary course of procedure. *Merrill v. Merrill*, 92 N. C. 657 (1885); *Turner v. Turner*, 96 N. C. 416, 2 S. E. 51 (1887).

Consent of the Parties.—Unless by consent of the parties, only such new parties can regularly be admitted, by amendment, to the action as are necessary to its proper determination; but, where defendants do not object to such amendment introducing new plaintiffs, their assent is to be taken as implied. *Richards v. Smith*, 98 N. C. 509, 4 S. E. 625 (1887).

Determination of Right Preliminary to Proceeding with Suit.—Where one is entitled, as a matter of right, to intervene in a suit and applies for leave to do so, it is error to proceed with the case until the question of such right is determined. *Jones v. Asheville*, 116 N. C. 817, 21 S. E. 691 (1895), citing *Keathly v. Branch*, 84 N. C. 202 (1881).

Continuance for Bringing in Necessary Parties.—Nonsuit on the ground of want of necessary parties is improper, but if other parties are necessary to a final determination of the cause, the court should order a continuance to provide a reasonable time for them to be brought in and to plead. *Plemmons v. Cutshall*, 230 N. C. 595, 55 S. E. (2d) 74 (1949).

Pleadings.—Amendments by the court to the complaint, and the bringing in of new parties, which merely broadens the scope of the action so as to take in the whole controversy for its settlement in one action, and made without substantial change in the action as originally constituted, do not change the original cause, but are within the contemplation of our statute, and may be allowed by the court. *Lumberman's Mut. Ins. Co. v. Southern R. Co.*, 179 N. C. 255, 102 S. E. 417 (1920).

On appeal to the superior court in summary ejectment brought by the rental agent of the owner of the property, the trial court has the power to allow an amendment making the owner of the property a party plaintiff and to allow it to adopt the pleadings and affidavits filed by its rental agent, and although the rental agent is not a necessary party, it is a proper party, whose continuance in the case is a matter within the discretion of the

trial court and not subject to review. *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S. E. 817 (1937).

A party permitted to intervene under its claim of an interest in the subject matter of the action, must file its pleading to be entitled to an adjudication of its rights. *Sykes v. Ætna Ins. Co.*, 216 N. C. 353, 4 S. E. (2d) 875 (1939).

A Partner Made a Party after Judgment.—Where a partner was not served with summons, he may be made a party after judgment is rendered, and then execution may issue against his separate property. *Daniel v. Bethell*, 167 N. C. 218, 83 S. E. 307 (1914).

Where one partner is sued individually for a tort committed by him in the course of the partnership business, the court even after judgment may direct that the other partner be made a party. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

Proceedings Supplemental to Execution.—Proceedings supplemental to execution are in the nature of a creditor's bill, and it being the policy of the law to settle the entire controversy in one action, it is not error to permit a third party to interplead and assert title to the property which is sought to be subjected. *Munds v. Cassidey*, 98 N. C. 558, 4 S. E. 353 (1887).

Action for Conveyance of Land.—During the pendency of an action relating to land between P and C, in which there was subsequently a decree directing P to convey the land to C upon the payment by the latter of the balance of the purchase money, P conveyed to other parties; thereafter C brought suit for the land against P and his grantees, who were in possession: Held, that P was not a necessary party, and it was not error to allow plaintiff to enter a nonsuit as to P, the grantor of the other defendants. *Carr v. Alexander*, 112 N. C. 783, 17 S. E. 577 (1893).

In action by purchaser against real estate brokers to recover earnest money paid, wherein the seller was a necessary party to a complete determination of the controversy, denial of motion for his joinder as additional party defendant was held reversible error. *Lampros v. Chipley*, 228 N. C. 236, 45 S. E. (2d) 126 (1947).

Real Owners as Parties in Action between Lessor and Lessee.—Where lessors sued lessees for rent, and the latter showed, as a counterclaim, that the lessors had no right to make the lease, and that the real owners thereof had brought suit against one of the lessees, and would re-

cover damages for its use during such lease, the persons claiming as real owners should be made parties to the action. *McKesson v. Mendenhall*, 64 N. C. 286 (1870).

In an action to set aside a deed to a purchaser at a foreclosure of a tax sale certificate, the purchaser at the sale, the owners of the property and all persons having any interest in the property should be made parties for a complete determination of the controversy. *Buncombe County v. Penland*, 206 N. C. 209, 173 S. E. 609 (1934).

Limitation of Parties.—The statute does not confer the power to make parties to actions generally, but it designates particularly a variety of classified cases in which it may be done, thus clearly indicating a limitation upon the power conferred, and recognizing its importance to the original parties to the action. Who shall and who shall not be made additional parties, are questions in many cases of serious moment, and we can see no reason why the decision of a question of law, arising in the exercise of the power to make it, shall not be reviewed like the decision of any other question of law affecting the merits in the progress of an action. There is nothing in the statute or in the nature of the power that forbids it, and justice may require it. *Merrill v. Merrill*, 92 N. C. 657 (1885).

When Trustee Is Necessary Party. — Where the plaintiff claims under a volun-

tary conveyance made by *cestui que trust*, he cannot, in any form of action, obtain the legal title and possession until the trustee is made a party, which may be done under this section. *Matthews v. McPherson*, 65 N. C. 191 (1871).

Action against Sheriff.—When a sheriff has money in his hands raised under executions against the same defendant, in favor of two or more different creditors, and the money is claimed by one of the creditors, to the exclusion of the others, he may, for the purpose of asserting his claim, obtain a rule against the sheriff, and under this section cause the other creditors to be brought in by notice. *Dewey v. White*, 65 N. C. 225 (1871).

After Nonsuit.—No one can be made a party to an action after nonsuit therein. *Shell v. West*, 130 N. C. 171, 41 S. E. 65 (1902).

Applied in *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944).

Quoted in *Peterson v. McManus*, 208 N. C. 802, 182 S. E. 483 (1935); *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941).

Cited in *Shemwell v. Lethco*, 198 N. C. 246, 151 S. E. 729 (1930); *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 154 S. E. 42 (1930); *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 643 (1941).

§ 1-74. Abatement of actions.—1. No action abates by the death, or disability of a party, or by the transfer of any interest therein, if the cause of action survives, or continues. In case of death, except in suits for penalties and for damages merely vindictive, or in case of the disability of a party, the court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued, by, or against, his representative or successor in interest. In case of any other transfer of interest, the action shall be continued in the name of the original party, or the court may allow the person to whom the transfer is made to be substituted in the action.

2. After a verdict is rendered in any action for a wrong, the action does not abate by the death of a party.

3. At any time after the death or disability of the party plaintiff, the court in which an action is pending, upon notice to such persons as it directs and upon application of any person aggrieved, may order that the action be abated, unless it is continued by the proper parties, within a time to be fixed by the court, not less than six nor more than twelve months from the granting of the order.

4. No action against a receiver of a corporation abates by reason of his death, but, upon suggestion of the facts on the record, it continues against his successor, or against the corporation in case a new receiver is not appointed. (R. C., c. 1, s. 4; R. C., c. 46, s. 43; C. C. P., s. 64; Code, s. 188; 1901, c. 2, s. 85; Rev., s. 415; C. S., s. 461.)

Cross References.—As to survival of actions, see § 28-172. As to actions which do not survive, see § 28-175. As to re-

ceivers for corporations, see §§ 55-147 et seq.

Section Changes Common-Law Rule.—

The rule of the common law that a personal right of action dies with the person has been changed by this section and § 28-172 and, except in the instances specified in § 28-175, an action originally maintainable by or against a deceased person is now maintainable by or against his personal representative. *Suskin v. Maryland Trust Co.*, 214 N. C. 347, 199 S. E. 276 (1938).

The discretion conferred by this section is a sound discretion to be exercised where the circumstances render it proper that the action be prosecuted in the name of the transferee rather than in that of the original plaintiff; and one circumstance calling for the exercise of the discretion is the fact that the transferor, as in this case, has parted with all interest to the transferee, since § 1-57 requires that the action be prosecuted in the name of the real party in interest. *Hood v. Bell*, 84 F. (2d) 136 (1936).

Death of a Party.—No action abates with death except as herein provided. *Baggarly v. Calvert*, 70 N. C. 688 (1874); *Sledge v. Reid*, 73 N. C. 440 (1875); *Wood v. Watson*, 107 N. C. 52, 55, 12 S. E. 49 (1890).

In case of death, except in suits for penalties and for damages merely vindictive, the court, on motion, may allow the action to be continued by or against the personal representative of the deceased. *Shields v. Lawrence*, 72 N. C. 43 (1875); *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131 (1919).

If a defendant to a cause in the Supreme Court die pending the suit there, his representative may be made a party by process from that court. *Justices v. Crawford*, 8 N. C. 17. (1820).

Death, Resignation or Removal of Representative.—Once personal representative of estate is duly appointed, if such representative dies, resigns or is removed, the law contemplates a continuity of succession until estate has been fully administered, and upon death, resignation or removal of representative, who has properly brought action for wrongful death, action does not abate. *Harrison v. Carter*, 226 N. C. 36, 36 S. E. (2d) 700, 164 A. L. R. 697 (1946).

Actions for Penalties.—"The court has no power in actions for penalties to make the personal representative of a deceased defendant a party, and in this condition of the record the action must abate." *Wallace v. McPherson*, 139 N. C. 297, 51 S. E. 897 (1905).

Where an action was brought against the administrator of a clerk on his official

bond, for the penalty, for issuing a writ without requiring security to the protection of the bond, the court held that the right to sue for the penalty abated at the death of the clerk. *Fite v. Lander*, 52 N. C. 247 (1859).

Continuance of Action.—In case of death, the court, at any time within one year thereafter or afterwards, on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest. *Pennington v. Pennington*, 75 N. C. 356 (1876).

State's Action upon Official Bond.—In an action brought by the State upon official bonds, the relator is but an agent of the State in seeking to recover the moneys due, and if he dies or goes out of office the action does not abate. *Davenport v. McKee*, 98 N. C. 500, 4 S. E. 545 (1887).

Petition to Make Assets.—An administrator d. b. n. cannot be compelled by the creditors of an estate to proceed with a petition to make assets begun by the former administrator, deceased. *Brittain v. Dickson*, 111 N. C. 529, 16 S. E. 326 (1892).

Right of Counterclaim Survives to Executor.—Under the laws of New York State, and of North Carolina and under this section which provide that, on the death of any person, all demands against him with certain exceptions and the right to prosecute any action or proceeding thereon shall survive against his executors, a claim against a firm of factors doing business in New York, arising out of a consignment of goods to such firm for sale, may be set up as a counterclaim in an action brought in North Carolina against the owner of such claim by the executors of a general partner in such firm of factors. *Davis v. Bessemer City Cotton Mills*, 178 F. 784 (1910).

Survival of Insurance Due.—The member of an insurance order becomes entitled, as a matter of right, to the sick benefits accruing to him under his policy of insurance, and upon his death without having received payment thereof the cause of action against the order survives and is enforceable under this section. *Kelly v. Trimont Lodge*, 154 N. C. 97, 69 S. E. 764 (1910).

Assignment Pendente Lite.—Under this section a cause may proceed, notwithstanding a transfer of the property, in the name of the original party, or the assignee may be allowed to be substituted in his place by the express provisions hereof. *Davis v. Higgins*, 91 N. C. 382 (1884).

Actions for Personal Torts.—At common law, a right of action sounding in tort

for personal injuries inflicted does not survive the tortfeasor, and the doctrine is not changed where the injury does not cause death by this section, providing that no action shall abate by death, etc., or that the court may allow the action to continue, etc.; these provisions relating to such actions as survive, and not to actions for personal injuries, which do not survive. *Watts v. Vanderbilt*, 167 N. C. 567, 83 S. E. 813 (1914).

Personal Injuries.—An action brought by a plaintiff against a railroad company, to recover damages for personal injuries, does not abate by the death of the plaintiff. *Peebles v. North Carolina R. Co.*, 63 N. C. 238 (1869). See also, *Collier v. Arrington*, 61 N. C. 356 (1867).

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834 (1939).

Action for Trespass.—In an action for trespass by two plaintiffs, in which one died pending the action, his devisee cannot be made a party and recover in his stead, but his administrator must be joined. *Rowe v. Cape Fear Lumber Co.*, 133 N. C. 433, 45 S. E. 830 (1903).

Breach of Promise.—An action for damages for breach of marriage does not abate upon the death of the defendant. *Shuler v. Millsaps*, 71 N. C. 297 (1874); *Allen v. Baker*, 86 N. C. 92 (1882).

Action for Seduction.—An action by a father for the seduction of his daughter abates by the death of the father, and cannot be revived by his executors. *McClure v. Miller*, 11 N. C. 133 (1825).

Mental Anguish.—An action against a telegraph company to recover for mental anguish caused by its delay in delivering a telegram dies with the person. *Morton v. Western Union Tel. Co.*, 139 N. C. 299, 41 S. E. 484 (1905).

Action of Deceit.—An action of deceit may be brought against an executor for the deceit of testator in selling an unsound slave. *Arnold v. Lanier*, 4 N. C. 143 (1814); *Helme v. Sanders*, 10 N. C. 563 (1825).

Trover.—An action of trover does not abate by the death of the party doing the wrong. *Weare v. Burge*, 32 N. C. 169 (1849).

Right of Appeal.—The right of appeal is not lost on account of the death of the

adverse party. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49 (1890).

Want of Jurisdiction.—The want of jurisdiction is a ground of abatement. *Green v. Mangum*, 7 N. C. 39 (1819); *Allison v. Hancock*, 13 N. C. 296 (1830); *Newman v. Tabor*, 27 N. C. 231 (1844).

Administrator d. b. n. Bound by Judgment.—A privity exists between an administrator de bonis non and the first administrator, as well in the case of plaintiff as of defendants, so that a judgment against the first administrator is conclusive evidence against the administrator de bonis non in an action to renew it. *Thompson v. Badham*, 70 N. C. 141 (1874).

When Action Abates.—Where a cause of action survived, the action does not abate by the death of the plaintiff ipso facto, but only upon the application of the party aggrieved; and then only in the discretion of the court, and in a time to be fixed, not less than six months nor more than one year from the granting of the order. *Moore v. North Carolina R. Co.*, 74 N. C. 528 (1876).

In *Moore v. Moore*, 151 N. C. 555, 66 S. E. 598 (1909), *Hoke, J.*, said: "Under this section, where the right survives, an action does not abate by the death of a party, except by order of the court, *Burnett v. Lyman*, 141 N. C. 500, 54 S. E. 412, 115 Am. St. Rep. 691 (1906); and while we have held in *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596 (1907), that a failure of the court to make such order for a period of eight years or more, and when there was nothing to indicate that the heirs of deceased were aware that an action was pending against them, was such an abuse of legal discretion as to constitute error, and might be available in some instances as a defense, the principle does not apply, we think, to the facts presented here, when the mother of these heirs was and continued to be a party of record, and these heirs themselves, or all who were resident in the State, were served within two years from the death of their ancestor and within the time fixed by order of the court; for we hold that the order which was made in this case, by fair intendment, meant the next civil term, and did not contemplate the intervening criminal term of the court; and there was no error, therefore, in denying defendants' motion for abatement of the action."

Death of Part of Plaintiffs.—Where two of several plaintiffs died and, there being no personal representative within a year thereafter, no motion was made to continue the action as to them, but the cause

remained upon the docket and was proceeded with by the remaining plaintiffs, whose rights were finally determined, and the defendants did not apply to have the action abated as to the deceased parties, it was within the discretion of the presiding judge to allow the personal representative of such deceased parties to file a supplementary complaint and prosecute the action, his motion to be allowed to do so having been made before the final judgment was rendered in the cause. *State v. Flythe*, 114 N. C. 274, 19 S. E. 701 (1894).

Judgment Ex Mero Motu.—A judgment

is necessary to abate an action, for the court may, *ex mero motu*, enter judgment when it appears that plaintiff failed for a year to prosecute his action against the "representatives or successors in interest" of the original defendant, whose death has been suggested though the records show there had been no discontinuance of the action. *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596 (1907).

Applied in *People's Bank v. Fidelity, etc., Co.*, 4 F. Supp. 379 (1933); *Betts v. Southern Ry. Co.*, 71 F. (2d) 787 (1934).

§ 1-75. Procedure on death of party.—When a party to an action in the superior court dies pending the action, his death may be suggested before the clerk of the court where the action is pending, during vacation. It is then the duty of the clerk to issue a summons to the party who succeeds to the rights or liabilities of a deceased defendant, commanding him to appear before him within thirty days after the service of the summons, and answer the complaint, and the issue joined by the filing of the answer stands for trial at the succeeding term of the superior court. It is the duty of the clerk to issue a notice to the party succeeding to the rights of a deceased party who will be necessary to the prosecution of the action to final judgment to appear and become party plaintiff; and if the party made plaintiff files an amended complaint, the defendant has thirty days after notice of same in which to file an answer thereto, and the issue thus made up stands for trial at the succeeding term. For good cause shown, the clerk may extend the time of filing such answer to a day certain, but the clerk shall not extend such time more than once, nor for a period of time exceeding twenty days, except with the consent of the parties. (1887, c. 389; Rev., ss. 416, 417, 418; C. S., s. 462; 1949, c. 46.)

Cross Reference.—As to substitution of administrator d. b. n. or c. t. a. as party in proceeding for final settlement, see § 28-168.

Editor's Note.—The 1949 amendment substituted in the second sentence the words "within thirty days after the service of the summons" for the words "on a day named in the summons, which must be at least twenty days after its service." It also substituted "thirty days" for "twenty days" in the third sentence and added the last sentence. For brief comment on 1949 amendment, see 27 N. C. Law Rev. 438.

Continuity of Action.—In an action begun by or against a person who has since died, and the action is continued by or against his representative or successor in interest, this section requires that, in such instances, the summons shall be returnable before the clerk and in effect the action shall be ready for a speedy trial, thus recognizing the continuity of the action and the trial thereof in the county in which it had been brought. *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131 (1919).

Duty of Adverse Party.—When either party to a suit dies before judgment, it

is the duty of the adverse party to suggest the death to the court. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49 (1890).

Upon the suggestion of death of defendant, it is the duty of the clerk to issue summons to the representatives or persons who succeed to the rights or liabilities of the deceased defendant; the law does not contemplate that plaintiff may keep his action in semidormant condition until it suits his pleasure or interest to call the heir at law into court, when by such conduct he has become disabled to make his defense. *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596 (1907).

Presumption When Administrator Defends.—Where the record shows that a party through his counsel assumed the defense of an action as administrator, the regularity of his admission as a party in place of his intestate is sufficiently established, though the death of the intestate as having occurred during the progress of the cause was not suggested, and no service of the notice issued to him appeared to have been made. *Alexander v. Patton*, 90 N. C. 557 (1884).

Administrator of Obligee on Bond Made a Party.—Where the obligor on a bond

given for the support of another for life, and for a valuable consideration, has failed to comply therewith, and the obligee has since died, leaving the obligor responsible under the terms of the bond for moneys due for the former's reasonable support, the action upon the bond, brought by the obligee, does not abate upon his death, and the superior court clerk has the authority to make his administrator a party under this section. *Martin v. Martin*, 162 N. C. 41, 77 S. E. 1104 (1913).

Action for Account.—In an action for an account and settlement, the death of the defendant being suggested, his executor comes in and is made a party de-

fendant. *Grant v. Bell*, 91 N. C. 495 (1884).

Judgment Set Aside Where No One Authorized to Represent Estate at Trial.—Where it appears that at the time of trial there was no one authorized to represent the estate, this constitutes a meritorious reason for setting aside the judgment, and this result is not affected by the payment of fees to the attorneys purporting to represent defendant by the executor c. t. a., under order of court, since the executor c. t. a. was not made a party to the suit, and did not appear therein. *Taylor v. Caudle*, 208 N. C. 298, 180 S. E. 699 (1935).

SUBCHAPTER IV. VENUE.

ARTICLE 7.

Venue.

§ 1-76. **Where subject of action situated.**—Actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial in the cases provided by law:

1. Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.
2. Partition of real property.
3. Foreclosure of a mortgage of real property.
4. Recovery of personal property when the recovery of the property itself is the sole or primary relief demanded. (C. C. P., s. 66; Code, s. 190; 1889, c. 219; Rev., s. 419; C. S., s. 463; 1951, c. 837, s. 4.)

- I. In General.
- II. Actions Relating to Real Property.
- III. Partition of Realty.
- IV. Foreclosure of Mortgage of Real Property.
- V. Recovery of Personal Property.

Cross References.

As to change of venue, see § 1-83. As to removal for fair and impartial trial, see § 1-84. As to venue in criminal actions, see §§ 15-128 et seq. As to venue in indictment for beating way on trains, see § 60-104; for receiving stolen goods, see § 14-71; for discrimination against the Atlantic and North Carolina Railroad, see § 60-8. As to venue in partition proceedings, see § 46-2.

See note under § 1-82.

I. IN GENERAL.

Venue a Matter of Legislative Control.—The venue of civil actions is a matter for legislative regulation, and is not governed by the rules of the common law. *Interstate Cooperage Co. v. Eureka Lumber Co.*, 151 N. C. 455, 66 S. E. 434

(1909). It deals with the procedure and is not jurisdictional, in the absence of statutory provision to that effect. *State v. Seaboard Air Line Railway*, 146 N. C. 568, 60 S. E. 506 (1908); *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131 (1919); *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20 (1925).

This subchapter is in restraint of the common law, as, without such express enactment, the plaintiff might make a choice of venue anywhere within the State. *State v. Stone*, 52 N. C. 382 (1860).

Contract Stipulation Regarding Venue.

—There is a difference between the venue of an action, the place of trial, and jurisdiction of the court over the subject matter of the action, and the parties to a contract may not, in advance of any disagreement arising thereunder, designate a jurisdiction exclusive of others, and confine the trial thereto in opposition to the will of the legislature expressed by this section; and a motion to remove a cause brought in the proper jurisdiction on the ground that the contract otherwise speci-

fied it, will be denied. *Gaither v. Charlotte Motor Car Co.*, 182 N. C. 498, 109 S. E. 362 (1921).

Determining Nature of Transaction.—In *Councill v. Bailey*, 154 N. C. 54, 69 S. E. 760 (1910), it is said: "This court has recently held in *Bridgers v. Ormond*, 148 N. C. 375, 62 S. E. 422 (1908), that such a motion as this one (as to proper venue) must be considered with reference to the questions that may be raised by the pleadings, and do not depend for their decision solely upon the allegations of the complaint."

Applicability to Trials before Justices.—In *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799 (1891), the court said: "We do not find any statute making the provisions of the Code of Civil Procedure (this section), as to the place for trial, applicable to trials before a justice." But § 7-149 provides that the whole chapter on civil procedure is applicable in certain attachment cases before justices. *Mohn v. Creesey*, 193 N. C. 568, 137 S. E. 718 (1927).

Habeas Corpus.—The sections of this subchapter relating to venue refer to "actions" and have no reference to the writ of habeas corpus which has been denominated a "high prerogative writ." *McEachern v. McEachern*, 210 N. C. 98, 185 S. E. 684 (1936).

An action by an administrator is not within any of the subdivisions of this section. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911).

Applied in *Holden v. Totten*, 224 N. C. 547, 31 S. E. (2d) 635 (1944).

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 701, 153 S. E. 262 (1930); *Guy v. Gould*, 199 N. C. 820, 155 S. E. 925 (1930); *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934); *Guilford County v. Estates Administration*, 212 N. C. 653, 194 S. E. 295 (1937).

II. ACTIONS RELATING TO REAL PROPERTY.

A suit to set aside a deed of trust for lands, and to establish a prior lien thereon in plaintiff's favor, involves an estate or interest therein, within the intent and meaning of this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915 (1920).

Where the wife of a debtor is made party defendant in an action in the nature of a creditors' bill in order to set aside his deed to her for fraud and subject the land to the satisfaction of the demands of his creditors, the suit to establish the plaintiffs' claims will be considered as in-

cident to the essential and controlling purpose of setting aside the deed, and the venue is governed by this subdivision. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612 (1917).

Setting Sale Aside.—A suit by a purchaser of land to set aside the purchase and to cancel certain of his notes given for the deferred payment of the purchase price, alleging a fraudulent representation by the owner as to the quantity of land in dispute in one of the lots, without which he would not have purchased, the controversy involves an interest in the lands as required by this section, to be brought in the county where the land is situated. *Vaughan v. Fallin*, 183 N. C. 318, 111 S. E. 513 (1922).

An action to impress a parol trust upon lands and for an accounting involves a determination of an interest in lands, and the proper venue, under this section, therefore, is in the county in which the land is situated. *Williams v. McRackan*, 186 N. C. 381, 119 S. E. 746 (1923).

Action on Note Secured by Deed of Trust.—An action against the endorser of a negotiable note, secured by a deed of trust on land, is not an action involving an estate or interest in land and does not have to be brought where the land is located. *White v. Rankins*, 206 N. C. 104, 173 S. E. 282 (1934).

Specific Performance.—The fact that there are other questions to be determined in the action, does not alter the case when the chief purposes of the suit are to compel one defendant (trustee) to sell and another defendant to convey lands situated in a county other than that in which the action is pending. *Falls, etc., Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313 (1890).

An action for subrogation to the rights of the vendor must be tried in the county where the land is situated. *Fraleigh v. March*, 68 N. C. 160 (1873).

Conversion as Aggravation of Damages.—Where the intent of the pleading was to sue for a trespass on the land, and an allegation of a conversion was inserted in aggravation of damages, the refusal of the lower court upon motion properly made in due time, to remove the cause to the county in which the land was situated, was erroneous. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

Setting Aside Grant or Patent.—This section applies to the exclusion of § 146-67, which controls where there are separate transactions affecting distinct pieces

of property lying wholly in different counties. *Kanawha Hardwood Co. v. Waldo*, 161 N. C. 196, 76 S. E. 680 (1912).

Docketed judgments confer no estate or interest in real estate within the meaning of this subdivision of the section, but merely the right to subject the realty to the payment of the judgments by sale under execution, and hence an action to set aside judgments as fraudulent and for the appointment of a receiver need not be brought in the county where the property upon which such judgments are liens is situated. *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447 (1895).

An action for the breach of covenants of seizin and the right to convey is not required to be tried in the county in which the realty is situated. *Eames v. Armstrong*, 136 N. C. 392, 48 S. E. 769 (1904).

Petitions for dower should be filed in the county of the husband's usual residence, but the jury of allotment may assign the same in one or more tracts situated in one or more counties. *Askew v. Bynum*, 81 N. C. 350 (1879).

Injuries to Land.—The fact that a complaint for injuries to real estate fails to expressly allege in what county the land lies is immaterial where the complaint sets up as a cause of action a breach of an agreement contained in a former judgment between the same parties which is appropriately referred to in the complaint and set out in the answer and which shows the proper county. *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897).

In an action for wrongful conversion of oysters taken from oyster beds, the defendant is not entitled to a change of venue to the county in which the beds are situated. *Makely v. Boothe Co.*, 129 N. C. 11, 39 S. E. 582 (1901).

The action to recover for injuries to land caused by backing water upon it is transitory. *Cox v. Oakdale Cotton Mills*, 211 N. C. 473, 190 S. E. 750 (1937).

Same—Burning Timber.—An action against a railroad company to recover damages for burning land is a local one in its nature and triable in the county in which the injury occurred irrespective of § 1-81. *Perry v. Seaboard Air Line R. Co.*, 153 N. C. 117, 66 S. E. 1060 (1910). See note of this case under § 1-81.

Same—By Public Officers.—Section 1-77, providing for venue in actions against public officers, constitutes an exception to this section; see notes to § 1-77.

Pollution of Stream.—An action for

damages caused by the pollution of a stream resulting in forcing the plaintiff to shut down his clay mining machine appears to be a transitory one and is not such as contemplated by this section. *Harris Clay Co. v. Carolina China Clay Co.*, 203 N. C. 12, 164 S. E. 341 (1932).

Cutting and Removing Timber.—The character of trees severed by a trespasser from the lands is changed from realty to personalty, and when the trees have been carried away, the owner of the lands and trees may sue in trover and conversion, or in trespass de bonis asportatis, for the value of the trees, both of which actions are transitory, or for trespass quare clausum fregit, which is local, and should be brought in the county wherein the land is situated. *Blevens v. Kitchen Lbr. Co.*, 207 N. C. 144, 176 S. E. 262 (1934).

An action to recover the value, or "worth," of timber cut, removed and converted to its own use by the defendant is an action of trover and conversion, or of trespass de bonis asportatis, and is therefore transitory. *Blevens v. Kitchen Lbr. Co.*, 207 N. C. 144, 176 S. E. 262 (1934).

Action was one to determine amounts to be paid for extension of rights under timber and not one affecting realty. *Hilton Lbr. Co. v. Estate Corp.*, 215 N. C. 649, 2 S. E. (2d) 869 (1939).

A complaint alleging that defendant entered upon the land of plaintiff and cut and removed therefrom a specified amount of timber and praying that plaintiff recover the value of the timber wrongfully cut and removed states a transitory cause of action, and defendant's motion to remove from the county of plaintiff's residence to the county wherein the land is situate, was properly denied. *Bunting v. Henderson*, 220 N. C. 194, 16 S. E. (2d) 836 (1941).

Fraudulent Representations Inducing Conveyance of Lands.—When an action sounds in damages arising from a fraudulent representation inducing the purchase and conveyance of lands for which purchase money notes have been given, and not a foreclosure of a mortgage or the nullification of the transaction, it does not involve an interest in or title to lands under subsection 1 of this section and the action is not removable as a matter of the movant's right, and the plaintiff may select the county of his residence as the venue under § 1-82. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928).

Removal of Action to County Where Land Lies.—Where on the facts alleged in

his complaint, the plaintiff is entitled not only to a judgment that he recover of the defendant the amount of his debt, but also to a decree for the foreclosure of the mortgage by which his debt is secured, and the action was begun and is pending in the county in which the plaintiff resides, but the land conveyed by the mortgage is in another county, the plaintiff cannot deprive the defendant of his right, under the statute, to the removal of the action to the county in which the land is situate, for trial, by his failure to pray for a foreclosure of the mortgage, at least, when he prays judgment for his debt, and also for such other and further relief as he may be entitled to, in law or in equity, on the facts alleged in his complaint. *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 172 S. E. 209 (1934).

Appeal from Order of Removal.—See note under § 1-583.

III. PARTITION OF REALTY.

Editor's Note.—Section 46-2, in the article on Partition, is substantially the same as subdivision two of this section. The two provisions seem to constitute simply an illustration or application of the first subdivision of this section, as proceedings for partition certainly determine "a right or interest" in real property.

This subsection has never received a direct construction from the courts, but in *The Matter of Skinner*, 22 N. C. 63 (1838), decided prior to the merger of the courts of law and equity, it is held that land situated in two counties could be sold for partition by a decree of the court of equity of either county.

IV. FORECLOSURE OF MORTGAGE OF REAL PROPERTY.

Vendor's Lien.—When it appears from the complaint in an action to enforce specific performance by the vendee of a contract to convey lands that a court of equity would decree a vendor's lien on the land and order it sold for the payment of the purchase price, if the alleged facts were established, the suit partakes in substance of the nature of one for the foreclosure of a mortgage, and is within this subdivision. *Councill v. Bailey*, 154 N. C. 54, 69 S. E. 760 (1910).

Subrogation.—An action by the holder of certain notes given for the purchase of land against the purchaser of the land, and others, to be subrogated to the rights of the vendor, in the contract of sale of the land, which is substantially the same as an action "for the foreclosure of a mortgage, of real estate," must be tried in the county in which the land is situate

within the meaning of this subdivision. *Fraley v. March*, 68 N. C. 160 (1873).

In *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641 (1901), it is said: The action is "substantially for the foreclosure of a mortgage" (*Fraley v. March*, 68 N. C. 160 (1873)), and the judgment could be enforced only by subjecting a particular tract of real estate in another county. The enforcement of the judgment against that land is the sole object of the action. *Falls, etc., Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313 (1890). If the action had been for a mere personal judgment, though on a mortgage note, it could have been brought where plaintiff resides, and docking the judgment would not convey to plaintiff any estate in debtor's land. *McLean v. Shaw*, 125 N. C. 491, 34 S. E. 634 (1899); *Gammon v. Johnson*, 126 N. C. 64, 35 S. E. 185 (1900).

Land in Two Counties.—A foreclosure sale of land lying in two counties under a mortgage registered in but one is authorized by this subdivision. *King v. Portis*, 81 N. C. 382 (1879).

Injunction.—The similar section of the Ohio code was held not applicable to an injunction against enforcing a lien claimed to be invalid. 8 Circuit Court Reports 614, 619.

V. RECOVERY OF PERSONAL PROPERTY.

Editor's Note.—The 1951 amendment rewrote subsection 4, which formerly read, in its entirety, "Recovery of personal property".

In *Smithdeal v. Wilkerson*, 100 N. C. 52, 6 S. E. 71 (1888), it was held that the requirements of subsection 4 of this section, were restricted to personal property, "distrainted for any cause." Thereupon the 1889 amendment struck out the restriction and made the venue for the "recovery of personal property" in all cases in the county where the property is situated. *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515 (1904).

It is now held that the venue of actions for the recovery of personal property is in the county where the property is situated, though the ancillary remedy of claim and delivery is not resorted to. *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515 (1904).

Recovery as Sole Object.—Where the recovery of personal property is not the sole or chief relief demanded, an action need not necessarily be brought in the county in which the property is located. *Woodard v. Sauls*, 134 N. C. 274, 46 S. E. 507 (1904); *Bowen Piano Co. v. Newell*, 177 N. C. 533, 98 S. E. 774 (1919).

Thus an action being for an accounting, and the question of ownership of notes and bonds being raised only incidentally, it need not be brought in the county in which they are situated. *Clow v. McNeill*, 167 N. C. 212, 83 S. E. 308 (1914).

But where it appears that the relief sought is not the recovery of the debt or to enjoin a sale, but the recovery of the specific personal property with the injunctive restraint as an incident thereto, the cause is within this subdivision. *Fairley Bros. v. Abernathy*, 190 N. C. 494, 130 S. E. 184 (1925).

Where the recovery of personal property is the sole relief demanded or even the chief, main or primary relief, other matters being incidental, the county in which the personal property or some part thereof is situated is the proper venue. *Marshburn v. Purifoy*, 222 N. C. 219, 22 S. E. (2d) 431 (1942).

If an action be one in which the recovery of personal property is not the sole

or chief relief demanded, it is not removable to the county in which the personal property is located; but, if the recovery of specific personal property is the principal relief sought, the action is removable to the county where the property is situated. *House Chevrolet Co. v. Cahoon*, 223 N. C. 375, 26 S. E. (2d) 864 (1943).

Section Does Not Apply to Actions for Monetary Recovery.—This section applies to action for the recovery of specific tangible articles of personal property and not to actions for monetary recovery. *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751 (1947).

Setting Aside Transfer.—An action to set aside the transfer of personal property as fraudulent, and for the appointment of a receiver, is not an action for the recovery of such property, and hence need not be brought in the county where the same is located, as provided by this subdivision of the section. *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447 (1895).

§ 1-77. Where cause of action arose.—Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:

1. Recovery of a penalty or forfeiture, imposed by statute; except that, when it is imposed for an offense committed on a sound, bay, river, or other body of water, situated in two or more counties, the action may be brought in any county bordering on such body of water, and opposite to the place where the offense was committed.

2. Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer. (C. C. P., s. 67; Code, s. 191; Rev., s. 420; C. S., s. 464.)

Cross References.—See note to § 1-82. As to suit on official bond, by board of county commissioners, of sheriff, etc., see § 155-18. As to neglect of duty by member of board of county commissioners, a misdemeanor, see § 153-15. As to actions against registers of deeds, see §§ 161-16, 161-27. As to corporate powers of municipal corporation, see § 160-2. As to quo warranto, see §§ 1-514 et seq. As to mandamus, see §§ 1-511 et seq.

Editor's Note.—In spite of the fact that § 1-76 provides that actions for injuries to realty must be brought in the county where the land lies, it is held that damage to land occasioned by the acts of public officers, officiating in counties other than where the land lies, must be brought, as provided in this section, where the cause arose. For example in *Cecil v. High Point*, 165 N. C. 431, 81 S. E. 616 (1914), it was held that the venue of an action to recover from an incorporated town damages to the

lands of an owner situated in an adjoining or different county, caused by the improper method of emptying its sewage into an insufficient stream of water, is properly in the county wherein the town is situated, for such cause arose by reason of the official conduct of municipal officers and consequently is regulated by this section.

Nature of Acts of Officer.—An action is controlled by this section irrespective of the question as to whether the damages arose from a negligent discharge by the officer of an administrative duty or a technically governmental one. *Light Company v. Comm.*, 151 N. C. 558, 66 S. E. 569 (1909).

Thus a cause of action for damages for breach of contract made by a board of a municipal corporation is within the meaning of this subsection. *Light Company v. Comm.*, 151 N. C. 558, 66 S. E. 569 (1909).

"By His Command" or "in His Aid."—The words, "in his aid," immediately fol-

lowing the words, "by his command," were meant to extend the immunity to all who assisted and took part in the act with his assent, though not by his direct orders, for all such stand upon the same footing. *Harvey v. Brevard*, 98 N. C. 93, 3 S. E. 911 (1887).

The obligors on a bond to indemnify a sheriff against loss, etc., in seizing and selling property under execution, are not included in that class of persons "who by his command or in his aid shall do anything touching the duties of such office." *Harvey v. Brevard*, 98 N. C. 93, 3 S. E. 911 (1887).

Officers of Counties and Cities. — The Supreme Court has repeatedly and uniformly held that actions against county commissioners and other officers must be brought in the county of which they are officers, and cities and towns are of the like nature, and should stand upon the same footing as to actions against them. *Johnston v. Board*, 67 N. C. 101 (1872); *Alexander v. Commissioners*, 67 N. C. 330 (1872); *Jones v. Board*, 69 N. C. 412 (1873); *Steele v. Commissioners*, 70 N. C. 137 (1874); *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346 (1887).

In *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346 (1887), this section was construed by this court, in the following language, to embrace a municipal corporation: "The defendant is a municipal corporation, public in its nature; it is an artificial person, created and recognized by the law, invested with important corporate powers, public and, in a sense, artificial in their nature, and charged with public duties, which it executes by and through its officers and agents. We therefore think that actions against it fairly come within the meaning of and are embraced by the statutory provision first above recited (this section)." *Brevard Light, etc. Co. v. Board*, 151 N. C. 558, 66 S. E. 569 (1909).

Action against Municipality Is Action against Public Officer.—Since a municipality may act only through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of this section. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1 (1940); *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27 (1944).

Venue of Action against Municipality.—The proper venue of an action against a municipality is the county where the cause of action, or some part thereof, arose. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1 (1940); *Godfrey v. Tidewater*

Power Co., 224 N. C. 657, 32 S. E. (2d) 27 (1944).

Where Cause of Action Arose. — The complaint alleged damage to plaintiff's land resulting from the negligent operation of defendant municipality's sewage disposal plant. The action was instituted in the county in which the land lies and in which the municipality maintained and operated its sewage disposal plant. The municipality made a motion that the action be removed to the county in which it is located. Held: The alleged negligent acts resulting in the injury to the land occurred at the point where defendant municipality maintained its sewage disposal plant and the cause of action there arose, and therefore the municipality's motion for change of venue was erroneously granted. *Murphy v. High Point*, 218 N. C. 597, 12 S. E. (2d) 1 (1940).

Against Register of Deeds.—An action for the penalty against a register of deeds for unlawfully issuing a marriage license is controlled by this section. *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1 (1912).

Action Dismissed as to Town Is Properly Remanded to County of Origin. — Where the plaintiff instituted a suit in the county of her residence, the county in which defendant administrator qualified, and upon joinder of a town as a party defendant, the action was removed to the county in which the town is located, the town's demurrer being sustained and the action dismissed as to it, it was held that the court properly remanded the action to the county in which it was originally instituted. *Banks v. Joyner*, 209 N. C. 261, 183 S. E. 273 (1936).

Acts Not Done by Virtue of Office.—In an action in Catawba County, residence of plaintiff, for an alleged wrongful conspiracy and damages therefor which occurred in Wilkes County, against a corporation and two individuals acting as the corporation's agents, one of the individuals being described as a deputy sheriff of Wilkes County, a motion for change of venue to Wilkes County, under this section was properly denied, there being no allegation that the acts complained of were done by the deputy sheriff by virtue of his office. *Potts v. United Supply Co.*, 222 N. C. 176, 22 S. E. (2d) 255 (1942).

Quo Warranto and Mandamus. — This section should apply in the writs of quo warranto (no longer used in this State) and mandamus, where an official act of usurpation, or failure to do some act which the duties of the office require, constitute the charge, and in effect amounts to a criminal action, or an action to subject the

parties to pains and penalties. *Johnston v. Board*, 67 N. C. 101 (1872).

Action by an administrator does not come within this section. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911).

Co-Defendants—Nol Pros of Officers.—An action against the sheriff of X county instituted in Y county does not entitle the co-defendant of the sheriff to have the suit removed to X county where the cause is nol prossed as to the sheriff. *Harvey v. Rich*, 98 N. C. 95, 3 S. E. 912 (1887).

Proving Defendants Are Officers.—If made to appear properly by affidavit or otherwise that the defendants came within the terms of this section, the fact that they insist that the action was brought against them as individuals and not as public officers, is immaterial. *Shaver v. Huntley*, 107 N. C. 623, 12 S. E. 316 (1890).

Venue in Other Cases.—Section 1-82 may constitute an exception to this section. See notes to § 1-82.

Trial of Whole Controversy in County Where Offense Occurred.—Where in an action against the clerk of the superior court of one county and the sheriff of another county the clerk makes motion for removal of the cause as to him to the

county of his office under this section, the motion should have been denied in order to avoid the possibility of conflicting verdicts and judgments and to dispose of the controversy in one action, the spirit of this section being effected in such instances by trial of the whole controversy in the county where the offense occurred. *Kellis v. Welch*, 201 N. C. 39, 158 S. E. 742 (1931).

Actions for Penalties—Applicability to Justice's Court.—This section, providing that actions for recovery of penalties must be brought in the county where the cause of action arose, applies to those actions of which the superior court has jurisdiction; it does not embrace those within the jurisdiction of justices of the peace (i. e. \$200 or less). *Fisher v. Bullard*, 109 N. C. 574, 13 S. E. 799 (1891); *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1 (1912).

Same—Applied.—In *State v. Seaboard Air Line Railway*, 146 N. C. 568, 60 S. E. 506 (1908).

Cited in *McFadden v. Maxwell*, 198 N. C. 223, 151 S. E. 250 (1930); *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736 (1943); *Flythe v. Wilson*, 227 N. C. 230, 41 S. E. (2d) 751 (1947).

§ 1-78. Official bonds, executors and administrators.—All actions against executors and administrators in their official capacity, except where otherwise provided by statute, and all actions upon official bonds must be instituted in the county where the bonds were given, if the principal or any surety on the bond is in the county; if not, then in the plaintiff's county. (1868-9, c. 258; Code, s. 193; Rev., s. 421; C. S., s. 465.)

Applicable to All Actions against Administrators.—This section applies to all actions against executors and administrators in their official capacity, whether upon their bonds or not. *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27 (1944).

It was the intent of the legislature to require all actions against the executors and administrators in their official or representative capacity to be instituted in the county where the letters of administration were taken out, except where otherwise provided by statute. And all actions against executors and administrators upon their official bonds must be instituted in the county where the bonds were given, if the maker or any surety thereon lives in the county, if not, then in the plaintiff's county. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

"The object of the statute was to have suits against these persons, whether upon their bonds or not, in the county where they took out letters and where they make their returns and settlements and transact

all the business of the estate in their hands." *Stanley v. Mason*, 69 N. C. 1 (1873); *Foy v. Morehead*, 69 N. C. 512 (1873); *Bidwell v. King*, 71 N. C. 287 (1874). The same principle is recognized, in reference to an action upon a guardian bond, in *State v. Staton*, 78 N. C. 235 (1878).

These cases were followed in *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785 (1896) which criticizes and refuses to follow *State v. Peebles*, 100 N. C. 348, 6 S. E. 798 (1888).

A personal action against an administrator is not, of course, within the meaning of this section. *Craven v. Munger*, 170 N. C. 424, 87 S. E. 216 (1915).

To Foreclose Tax Liens.—An action against the estate of a deceased person to foreclose a tax sale certificate must be brought in the county where the land is situate. *Guilford County v. Estates Administration, Inc.*, 212 N. C. 653, 194 S. E. 195 (1937).

Applies to Actions against Not by Administrators.—This section applies only to

actions against administrators and not to actions brought by them. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911). See *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

The clear inference from this section is that it was the purpose of the legislature to make a distinction between actions by and against administrators, and when it is said that actions against administrators shall be brought in the county where the bond is filed, and nothing is said as to actions by administrator, it excludes the idea that actions instituted by the administrator are necessarily to be brought in the county in which letters are granted. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911).

"Instituted."—The word "instituted" as used in this section signifies the commencement of the proceedings—to institute an action is to bring an action. Here a difference is apparent from the language of the other sections pertaining to venue as they provide that the action shall be "tried."

In consequence of this distinction it is held that this section has no application where an action has been commenced in another county against a defendant, who has since died, and his administrator has been made a party. *Latham v. Latham*, 178 N. C. 12, 100 S. E. 131 (1919).

Where plaintiff instituted an action in the county of his residence to collect damages resulting from an automobile collision, and the defendant died prior to service of process and thereupon defendant's administratrix was joined as a party defendant, the administratrix may not claim that the action is not properly pending because not instituted in the county in which she had given bond, since venue is governed by the status of the parties at the commencement of the action, but defendant administratrix may move for a removal of the cause to the county of her residence and the scene of the collision involved for the convenience of witnesses and the promotion of the ends of justice. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834 (1939).

Action for Account and Settlement.—

Where an action involves an account and settlement of an estate, by the express words of this section, such an action must be instituted in the county where the administrator qualified. The case of *Roberts v. Connor*, 125 N. C. 45, 34 S. E. 107 (1899), does not conflict with this position. That was a suit which concerned the conduct of a bank operated by an executor, and the decision was put on the express ground that the official acts and conduct

of the executor were in no wise involved. *Thomas v. Ellington*, 162 N. C. 131, 78 S. E. 12 (1913).

Suits against Successor of Administrator.—A qualified as administrator of B, in Halifax County, and gave bond there. Afterwards A died in Northampton, and C qualified as his administratrix in that county. C, administratrix, and D, one of the sureties on the bond of A, resided in Northampton, and were sued in Halifax County on the bond of A, by a resident of Halifax: Held, that the action was properly brought in Halifax, under this section. *State v. Peebles*, 100 N. C. 348, 6 S. E. 798 (1888).

An action against an executrix to recover on a guardianship bond executed by testator is properly brought in the county in which the bond was given and the sureties thereon resided and in which the administrators of the sureties qualified, and the motion of defendant executrix to remove as a matter of right to the county in which she qualified is properly denied, the primary and controlling intent of this section being that actions on official bonds should be instituted in the county in which the bonds were given if the principal or any surety on the bond is in the county. *State v. Patterson*, 213 N. C. 138, 195 S. E. 389 (1938).

In an action on a guardianship bond instituted in the county in which the bond was given and the sureties resided, the contention that the sureties were insolvent and that their administrators were joined to prevent removal to the county in which the executrix of the principal on the bond qualified, is untenable, since the controlling factors are the place where the bond was given and the residence of the sureties and not the solvency or insolvency of the sureties. *State v. Patterson*, 213 N. C. 138, 195 S. E. 389 (1938).

Motions for Change of Venue. — The right of an administratrix in regard to motions for change of venue under this section may not be invoked by another party to the action. *Herring v. Queen City Coach Co.*, 231 N. C. 430, 57 S. E. (2d) 307 (1950).

Compelling Institution of Action in Particular County Does Not Prevent Motion for Removal.—Where a plaintiff was compelled to institute his action in a particular county by reason of the mandate of this section, his act in so doing could not therefore be imputed to him as a voluntary choice of venue so as to prevent him from lodging a motion for removal under § 1-83, par. 2. *Pushman v. Dameron*, 208 N. C. 336, 180 S. E. 578 (1935).

Hence the trial judge in the exercise of a sound discretion has the power to remove the cause to another county for trial since the wording of this section does not necessarily mean that the cause should be actually tried in the county where the cause was instituted. *Pushman v. Dame-ron*, 208 N. C. 336, 180 S. E. 578 (1935).

The fact that an individual is joined as a defendant with an executor or adminis-

trator, and that the individual defendant is a resident of the county in which the cause of action is brought was held not to affect the executor or administrator's right to removal to the county in which it qualified. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

Quoted in *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390 (1936).

§ 1-79. Domestic corporations.—For the purpose of suing and being sued, the principal office of a domestic corporation, as shown by its certificate of incorporation pursuant to G. S. 55-2, is its residence. (1903, c. 806; Rev., s. 422; C. S., s. 466; 1951, c. 837, s. 5.)

Cross Reference.—As to actions against railroads, see § 1-81.

Editor's Note.—The 1951 amendment rewrote this section, making the principal office of a domestic corporation, rather than its principal place of business, its residence.

Prior to the passage of this section, there was no express statute regulating the venue in actions against domestic corporations and such actions were controlled by § 1-82. *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785 (1896). See *Cline v. Bryson, etc., Co.*, 116 N. C. 837, 21 S. E. 791 (1895).

The purpose of this section was not to change the provisions of § 1-81 or to deny plaintiff's right to sue a domestic corporation in the county of his residence; but to remedy the defect of § 1-81 so that a domestic corporation can be sued in the same venue as an individual, excepting railroads in certain specified instances, and where the venue is fixed by §§ 1-76, 1-77 and 1-78. *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064 (1910).

This section is for the purpose of determining the residence of domestic corporations, and does not affect the question of the venue of an action in the nature of a creditors' bill to set aside a husband's deed to his wife alleged to be in fraud of the creditors' rights. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612 (1917).

"Principal Office."—The words "principal place of business," as formerly used in this section were regarded as synonymous with the words "principal office," as used in §§ 55-2, 55-34, 55-105, and other sections of the General Statutes. *Roberson v. Greenleaf Johnson Lumber Co.*, 153 N. C. 120, 68 S. E. 1064 (1910).

Same—Fixed by Charter. — The residence of a corporation for the purpose of suing and being sued is where the governing power is exercised, and is fixed by the

charter, without power on the part of the corporation to affect it by a change of its principal place of business. *Garrett & Co. v. Bear*, 144 N. C. 23, 56 S. E. 479 (1907).

The residence of a corporate executor or administrator for the purpose of determining venue of an action instituted by it, like that of other domestic corporations, is the county in which it maintains its principal office and not the county of its qualification. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377 (1950).

The fact that the principal place of business of a corporate executor or administrator is a county other than the one in which the letters testamentary were issued does not affect the question of venue of an action against such executor or administrator in its official capacity. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

A corporate administrator instituted suit in the county of its qualification and in which it maintained a branch office, against a defendant who was a resident of another county in which the corporate administrator maintained its principal office. It was held that the action was properly removed upon motion to the county in which the corporate administrator maintains its principal office and in which defendant resides. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377 (1950).

Domesticated foreign corporations are residents of the State for purposes of venue of the State courts. *Hill v. Atlantic Greyhound Corp.*, 229 N. C. 728, 51 S. E. (2d) 183 (1949).

A foreign corporation domesticated under § 55-118 may sue and be sued under the rules and regulations which apply to domestic corporations, and is entitled to have an action against it, instituted by a nonresident, removed to the county of its main place of business in this State. In such case § 1-80 does not apply. *Hill v.*

Atlantic Greyhound Corp., 229 N. C. 728, 51 S. E. (2d) 183 (1949).

Applied in *Eastern Cotton Oil Co. v. New Bern Oil, etc., Co.*, 204 N. C. 362, 168 S. E. 411 (1933).

Cited in *McCue v. Times-News Co.*, 199 N. C. 802, 156 S. E. 129 (1930); *Occidental Life Ins. Co. v. Lawrence*, 204 N. C. 707, 169 S. E. 636 (1933).

§ 1-80. Foreign corporations.—An action against a corporation created by or under the law of any other state or government may be brought in the superior court of any county in which the cause of action arose, or in which the corporation usually did business, or has property, or in which the plaintiffs, or either of them, reside, in the following cases:

1. By a resident of this State, for any cause of action.

2. By a nonresident of this State in any county where he or they are regularly engaged in carrying on business.

3. By a plaintiff, not a resident of this State, when the cause of action arose or the subject of the action is situated in this State. (C. C. P., s. 361; 1876-7, c. 170; Code, s. 194; Rev., s. 423; 1907, c. 460; C. S., s. 467.)

Cross References.—As to actions against railroads, see § 1-81. As to requisites for permission of foreign corporations to do business in State, see § 55-118. As to domesticated foreign corporations, see note to § 1-79.

See notes to §§ 1-81 and 1-82.

Does Not Affect Jurisdiction. — This section is under the subject of venue and not jurisdiction, and, though it enumerates certain cases, it does not purport to restrict the jurisdiction of the court or to prevent the exercise of such jurisdiction as theretofore existed; and under our own decisions and those of New York, from which the statute was adopted, it does not interfere with the jurisdiction of our courts of transitory causes of actions. *Ledford v. Western Union Tel. Co.*, 179 N. C. 63, 101 S. E. 533 (1919).

In *Robinson v. The Oceanic Steam Co.*, 112 N. Y. 322, construing the prototype of this section, it is said: "This section did not assume to define all the cases in which actions could be brought against foreign corporations, and did not absolutely limit the power and jurisdiction of the courts mentioned. It specified the cases in which foreign corporations could compulsorily, by service or process in the mode prescribed by law, be subjected to the jurisdiction of the courts. It did not deprive the courts of any of their general jurisdiction." See *Ledford v. Western Union Tel. Co.*, 179 N. C. 63, 101 S. E. 533 (1919).

Section 1-81 an Exception.—The enactment of § 1-81 does not repeal this section, but the latter will be confined to corporations, other than railway companies, which have been chartered by any other state, government or country. *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920 (1905).

Applicability to Justices Court.—This section refers only to actions of which the superior court has jurisdiction, and was not intended to give such courts jurisdiction of civil actions founded on contract wherein the sum demanded shall not exceed \$200. *Howard v. Mutual Reserve Fund Life Ass'n*, 125 N. C. 49, 34 S. E. 199 (1899).

Cutting Timber.—Where a nonresident plaintiff sues to recover from a nonresident defendant the value of timber alleged to have been cut and removed by the defendant to a different county from that wherein the lands are situated, and brings his action in the county where the conversion is alleged to have occurred, to maintain his action in the latter county he must show that the defendant conducted business or had property therein, or the cause is removable to the county where the land is situated that being the county wherein the cause of action arose. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

An action for a penalty can be brought against a foreign defendant before a justice of the peace in any county in which the defendant does business or has property, or where plaintiff resides. *Allen-Fleming Co. v. Southern R. Co.*, 145 N. C. 37, 58 S. E. 793 (1907).

Fraternal Lodge. — Where defendant, the head lodge, had a local lodge in the county of the venue, in which members were received, the usual business of such lodges transacted, and membership fees collected and remitted to it: Held, the transactions of the local lodge were such usual or continuous business as contemplated by the statute, and the cause was improperly transferred to the county in which the plaintiff resided and the injury was alleged to have been received. *Ange*

v. Sovereign Camp, W. O. W., 171 N. C. 40, 87 S. E. 955 (1916).

Claim of State.—Where a receiver of an insolvent foreign corporation was appointed under the corporation act of 1901, a claim by the state which chartered the corporation, for annual license fees, was provable; this section, as to actions against foreign corporations, not applying to this proceeding. *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650 (1905).

Garnishment against Salesmen.—The courts of this State have jurisdiction to proceed against a foreign corporation in garnishment proceedings in an action

brought in the State against its salesmen; the cause of action against it and in favor of the salesmen having arisen here, and the subject of the action being situated here. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

Action by Administrator for Death by Wrongful Act.—A foreign corporation may be sued by an administrator for the wrongful death of his intestate either in the county wherein the cause of action arose or that of the personal representative of the deceased. *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353 (1917).

§ 1-81. Actions against railroads.—In all actions against railroads the action must be tried either in the county where the cause of action arose or where the plaintiff resided at that time, or in some county adjoining that in which the cause of action arose, subject to the power of the court to change the place of trial as provided by statute. (Rev., s. 424; C. S., s. 468.)

Editor's Note.—This section was first enacted as a proviso to § 424 of the Revisal. Section 424 of the Revisal is now § 1-82; it contains the language "in all other cases." It was held that this language modified the proviso, this section, and that the proviso did not operate as a repeal or modification of § 1-76. In view of this pronouncement of the legislative intent, it is to be presumed that the language of § 1-82 still applies to this section, although the two sections are now apparently independent.

The acts of 1905, c. 367, amending the Code, § 192 (Revisal, § 424) [now §§ 1-81, 1-82], expressly included actions for injury to lands by making it apply to other cases than those specified in the previous sections, and does not repeal or modify § 1-76, in regard to the venue of actions of this character, since it is for damages for personal injuries. *Propst v. Railroad*, 139 N. C. 397, 51 S. E. 920 (1905); *Perry v. Seaboard Air Line R. Co.*, 153 N. C. 117, 68 S. E. 1060 (1910).

Effect of Section in General.—This section does not affect the bringing of an action in the county where the plaintiff resides, but only prohibits the selection at will of any county for that purpose where the defendant had a track, unless the injury occurred, or plaintiff resided, therein. *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502 (1910).

Section Pertains to Venue Not Jurisdiction.—This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a non-resident plaintiff, against a railroad company, incorporated in North Carolina. Mc-

Govern & Co. v. Atlantic Coast Line R. Co., 180 N. C. 219, 104 S. E. 534 (1920).

Applies to All Railroads.—This section applies to all railroad companies, both domestic and foreign. *Forney v. Black Mountain R. Co.*, 159 N. C. 157, 74 S. E. 884 (1912).

Actions against Railroads under Federal Control.—It was within the power of the director general to prescribe the venue of suits against railroads under federal control. Federal Control Act, March 21, 1918, § 10; *Alabama, etc., R. Co. v. Journey*, 257 U. S. 111, 66 L. Ed. 15, 42 S. Ct. 6 (1921).

Same—That Are Sole Defendants.—This section should be construed and held to apply to cases where a railroad company alone is defendant, and the venue in actions where there are other parties defendant is not controlled by the section. *Smith v. Patterson*, 159 N. C. 138, 74 S. E. 923 (1912).

Where both plaintiff and defendant are corporations, nonresident of the State, an action concerning land brought in a different county from the situs of the property, wherein neither has property, nor conducts its business, the case falls within the intent and meaning of § 1-80 and this section. *Henrico Lumber Co. v. Dare Lumber Co.*, 180 N. C. 12, 103 S. E. 915 (1920).

Suits by Administrators.—Authoritative interpretations of this and legislation of similar import elsewhere would seem to favor the position that in respect to actions instituted by an administrator and coming within the effect of the section, the terms appearing therein, "where plaintiff resided at the time the cause of action

arose," have reference to the residence of the individual holding the office and not to the official residence or place where he may have qualified. *Roberson v. Greenleaf, etc., Co.*, 153 N. C. 120, 68 S. E. 1064 (1910); *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911); *Smith*

v. Patterson, etc., R. Co., 159 N. C. 138, 74 S. E. 923 (1912). Dictum.

Applied in *Nutt Corp. v. Southern Ry. Co.*, 214 N. C. 19, 197 S. E. 534 (1938).

Cited in *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

§ 1-82. **Venue in all other cases.**—In all other cases the action must be tried in the county in which the plaintiffs or the defendants, or any of them, reside at its commencement; or if none of the defendants reside in the State, then in the county in which the plaintiffs, or any of them, reside; and if none of the parties reside in the State, then the action may be tried in any county which the plaintiff designates in his summons and complaint, subject to the power of the court to change the place of trial, in the cases provided by statute. (C. C. P., s. 68; 1868-9, cc. 59, 277; Code, s. 192; 1905, c. 367; Rev., s. 424; C. S., s. 469.)

Cross References.—See note under § 1-76. As to domesticated foreign corporations, see note to § 1-79.

Editor's Note.—The Rev. c. 31, § 37, (prior to the enactment of this section) appointing the venue for transitory actions, made no provision for the case of a resident plaintiff and a nonresident defendant, and it was held, therefore, that the case remains as at common law, which allows the plaintiff to sue in any county, subject to the power of the court to change the venue according to certain rules governing its course. *Covill v. Moffitt*, 52 N. C. 381 (1860).

The purpose of this section as originally enacted and as amended was primarily to serve the convenience of resident parties. *Palmer v. Lowe*, 194 N. C. 703, 140 S. E. 718 (1927).

Construed with Other Provisions for Venue.—This section is general in its terms and subject to the provisions of § 1-76. *Wofford-Fain & Co. v. Hampton*, 173 N. C. 686, 92 S. E. 612 (1917).

Section 1-77 relates to particular cases, and this section is intended to cover all cases for which provision is not otherwise made. Hence, in the event of conflict, the former section expressing a particular intention will be taken as an exception to the general provision. *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27 (1944). But see *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353 (1917), wherein it was held that this section should be construed as an exception to § 1-77.

Section Pertains to Venue Not Jurisdiction.—This section relates solely to venue and has no application to taking jurisdiction of an action brought here by a nonresident plaintiff, against a railroad company, incorporated in North Carolina. *McGovern & Co. v. Atlantic Coast Line R. Co.*, 180 N. C. 219, 104 S. E. 534 (1920).

The word "parties" as used in this sec-

tion means parties to the record. *Rankin v. Allison*, 64 N. C. 673 (1870).

Fiduciaries.—In determining the residence of fiduciaries for the purpose of venue or citizenship, the personal residence of the fiduciary controls, in the absence of statute. This is true as to receivers, trustees, executors and administrators, including statutory receivers of banks. *Hartford Acci., etc., Co. v. Hood*, 225 N. C. 361, 34 S. E. (2d) 204 (1945).

This section governs the venue of actions instituted by an executor or administrator in his official capacity. *Branch Bkg., etc., Co. v. Finch*, 232 N. C. 485, 61 S. E. (2d) 377 (1950).

Action for Personal Services to Administrator.—An action brought to recover for services rendered personally to an administrator, is a personal action against the administrator, etc., and can be brought at the election of the plaintiff in the county where either he or the defendant resides. *Craven v. Munger*, 170 N. C. 424, 87 S. E. 216 (1915).

Action by Administrator.—An action by an administrator upon a life insurance policy of his intestate is properly brought in the county where the administrator resides, not necessarily where the bond is filed, the addition of the words, "administrator, etc.," being descriptive of his title or the capacity in which he sues. *Whitford v. North State Life Ins. Co.*, 156 N. C. 42, 72 S. E. 85 (1911). See notes of this case under § 1-78.

Personal Action against Administrator.—Where judgment was rendered against the estate of plaintiff's deceased guardian for money due the guardianship estate, and after reaching his majority plaintiff instituted this action alleging that defendant as executrix of the deceased guardian had paid over to herself, as sole devisee and legatee, money sufficient to discharge plaintiff's claim, the action is not against defendant as executrix but against her in-

dividually on a liability imposed upon her as legatee and devisee, and defendant's motion to remove from the county of plaintiff's residence to the county in which she qualified as executrix, was properly denied. *Rose v. Patterson*, 218 N. C. 212, 10 S. E. (2d) 678 (1940).

Action by Nonresidents on Foreign Judgment.—In an action on a judgment of another state, plaintiff's attachment of lands of defendant situate in a county in this State was rendered immaterial by defendant's general appearance. The court found that both parties are nonresidents. Plaintiff was entitled to maintain the action in any court of this State she might designate, the defendant's motion to remove to the county in which the real estate attached is situate and of which he asserted he is a resident, was properly denied. *Clement v. Clement*, 216 N. C. 240, 4 S. E. (2d) 434 (1939).

Action by Receiver.—Where a receiver of a corporation resides in a different county from the concern he represents, the venue of the action brought by him for breach of contract is determined by the place of residence of the receiver and not necessarily by that of insolvent corporation. *Biggs v. Bowen*, 170 N. C. 34, 86 S. E. 692 (1915).

Action by Unemancipated Illegitimate Child.—Such a child sues in county of mother even though living in different county with grandparents. *Thayer v. Thayer*, 187 N. C. 573, 122 S. E. 307 (1924).

Suit for Alimony without Divorce.—Where a husband forced his wife to leave his home at night and she was compelled to take refuge in the home of a neighbor she could acquire a separate domicile, and may sue the husband for alimony without divorce in the county of her residence and he cannot remove the case to the county of his residence. *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934).

In an action for alimony without divorce, although § 50-16 provides that "the wife may institute an action in the superior court of the county in which the cause of action arose," the venue, thus prescribed, is not exclusive, if either plaintiff or defendant reside in another county at the commencement of the action. *Dudley v. Dudley*, 219 N. C. 765, 14 S. E. (2d) 787 (1941).

Where Bank and Its Officer Sued Jointly.—Where in good faith a citizen and resident of one county, sues jointly in tort a national bank located in another county, and its officer, the defendants may not as of right have the cause removed

for trial to the county wherein the bank conducts its business. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E. 194 (1924).

An action on a note by the Commissioner of Banks, etc., is properly brought in the county in which the insolvent bank is situate and of which the liquidating agent is a resident, and defendants' motion for change of venue to the county of their residence is properly refused. *Hood v. Progressive Stores*, 209 N. C. 36, 182 S. E. 694 (1935).

Nonresident Plaintiffs.—The county of the residence of the defendant, in an action upon alleged breach of contract, by a nonresident plaintiff, is the proper venue. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

The venue of an action brought by a nonresident of the State in a different county herein from that where the defendant resides or does business, and wherein the defendant has no property, is an improper one. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

An action to enforce a lien for materials furnished and used in a building is not specifically required to be brought in the county wherein the building is situated, but comes within the provisions of this section. *Sugg v. Pollard*, 184 N. C. 494, 115 S. E. 153 (1922).

Where Principal Office of Corporation Is in County Other than Residence of Defendants.—Where the plaintiff is a corporation, organized and doing business under the laws of the United States, with its principal office in the city of Durham, in Durham County, North Carolina, and the defendants are citizens of this State, and residents of Sampson County, Durham County is the proper venue for the trial of the action. *North Carolina Joint Stock Land Bank v. Kerr*, 206 N. C. 610, 175 S. E. 102 (1934).

Action against Foreign Corporation and Resident Defendant.—Where a nonresident plaintiff brings action against a foreign corporation, with the joinder of a resident defendant, and the venue in the action is laid here in a different county from that of the resident defendant, to recover damages alleged to have been caused by a negligent act, the venue is in the county of the resident defendant, and the action is removable thereto upon his motion duly made. Sections 1-76, 1-80 and 1-81 do not apply. *Palmer v. Lowe*, 194 N. C. 703, 140 S. E. 718 (1927); *Brown v. Brevard Auto Service Co.*, 195 N. C. 647, 143 S. E. 258 (1928).

Effect of Change of Residence.—The defendant by a mere change of residence

cannot change the venue as fixed by this section. *Taylor v. Sharp*, 108 N. C. 377, 13 S. E. 138 (1891); *Hannon v. Southern Power Co.*, 173 N. C. 520, 92 S. E. 353 (1917).

Applied in *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 172 S. E. 209 (1934); *Atlantic Coast Line R. Co. v. Thrower*,

213 N. C. 637, 197 S. E. 197 (1938).

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229 (1937).

Cited in *McCue v. Times-News Co.*, 199 N. C. 802, 156 S. E. 129 (1930); *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138 (1937).

§ 1-83. Change of venue.—If the county designated for that purpose in the summons and complaint is not the proper one, the action may, however, be tried therein, unless the defendant, before the time of answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties, or by order of the court.

The court may change the place of trial in the following cases:

1. When the county designated for that purpose is not the proper one.
2. When the convenience of witnesses and the ends of justice would be promoted by the change.
3. When the judge has, at any time, been interested as party or counsel.
4. When motion is made by the plaintiff and the action is for divorce and the defendant has not been personally served with summons. (R. C., c. 31, ss. 115, 118; C. C. P., s. 69; 1870-1, c. 20; Code, s. 195; Rev., s. 425; C. S., s. 470; 1945, c. 141.)

- I. In General.
- II. The Application for Removal.
 - A. Time of Demand.
 - B. Jurisdiction of Application.
- III. Waiver of Right to Change.
- IV. Appeal.
 - A. Where County Designated Not Proper.
 - B. Convenience of Witnesses and Ends of Justice Promoted.

Cross References.

As to motions, when and where made, etc., see §§ 1-577 et seq. See also, § 1-76.

I. IN GENERAL.

Editor's Note.—The 1945 amendment added subsection 4.

Section Relates to Venue Not Jurisdiction.—It has been held repeatedly that these statutes, §§ 1-76 to 1-83, relate to venue and not jurisdiction, and that if an action is brought in the wrong county it should be removed to the right county, and not dismissed, if the motion is made in apt time, and if not so made, that the objection is waived. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270 (1920).

Under the present practice, venue may be waived because it is not jurisdictional, and is available to the objecting party, not by demurrer, but by motion in the cause. *Shaffer v. Morris Bank*, 201 N. C. 415, 160 S. E. 481 (1931).

Where an action is brought in the wrong county, defendant is not entitled to abatement or dismissal, since venue is not jurisdictional, but is entitled only to removal to the proper county if motion

therefor is made in apt time, since otherwise the question of venue is waived. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

All Inclusive.—This section indiscriminately embraces all the previously enumerated actions of this sub-chapter as well as those for the recovery of real estate, which under the former system of pleading were called local actions, as those which were transitory or personal actions; all are embraced in the sweeping enactment. *Lafoon v. Shearin*, 91 N. C. 370 (1884).

Motion to Remove Cause Back to Original County.—The fact that a motion for change of venue is allowed as a matter of right does not preclude plaintiff from thereafter moving that the cause be removed back to the original county for the convenience of witnesses and the promotion of the ends of justice. *Wiggins v. Finch*, 232 N. C. 391, 61 S. E. (2d) 72 (1950).

Costs of Transporting Witnesses of Adverse Party.—While in the exercise of its discretionary power to remove a cause for the convenience of witnesses and to promote the ends of justice, the trial judge has no authority to impose upon movant an obligation for which he is not legally liable, the court may incorporate in the order of removal, with movant's consent, provision that movant pay the reasonable costs of transporting the witnesses of the adverse party when the court is of opinion that removal, even though required for the convenience of witnesses, would not promote the ends of justice un-

less movant should pay such expense. *Nichols v. Goldston*, 231 N. C. 581, 58 S. E. (2d) 348 (1950).

An action for wrongful conversion of severed timber is not removable as a matter of right to the county in which the land from which the trees were severed is situated. *Foreman-Blades Lumber Co. v. Tunis Heading, etc., Co.*, 196 N. C. 38, 144 S. E. 297 (1928).

Power of Clerk.—See note under § 1-583.

Stated in *Lawson v. Langley*, 211 N. C. 526, 191 S. E. 229 (1937).

Cited in *Murchison Nat. Bank v. Broadhurst*, 197 N. C. 365, 148 S. E. 452 (1929); *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934); *Cox v. Oakdale Cotton Mills*, 211 N. C. 473, 190 S. E. 750 (1937); *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138 (1937); *Guilford County v. Estates Administration*, 212 N. C. 653, 194 S. E. 295 (1937); *Atlantic Coast Line R. Co. v. Thrower*, 213 N. C. 637, 197 S. E. 197 (1938); *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222 (1947).

II. THE APPLICATION FOR REMOVAL.

A. Time of Demand.

This section is explicit and the cases are uniform in holding that the demand to remove to the proper county must be made before the time for answering expires. See *Lafoon v. Shearin*, 91 N. C. 370 (1884); *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734 (1904); *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479 (1907); *Calcagno v. Overby*, 217 N. C. 323, 7 S. E. (2d) 557 (1940).

The objection must be taken not only "before the time of answering expires," as required by this section, but it must be taken in limine and before answering to the merits. *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002 (1890), and cases there cited; *Shaver v. Huntley*, 107 N. C. 623, 12 S. E. 316 (1890).

But if the motion is based on clause 2 of this section, i. e., when the convenience of witnesses and the ends of justice demand, the motion may be made at any time in the progress of the cause. *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734 (1904).

"While this language is slightly different from the federal statute regulating motions to remove to the federal court, which specifies that said motion must be made 'at the time or any time before the defendant is required by the laws of the State or the rule of the State court in

which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff,' we think the tenor and object of the two statutes are the same, i. e., to require the defendant to object to the jurisdiction in limine by moving to remove as soon as he is afforded opportunity from filing the complaint to know definitely the scope of the action." *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734 (1904).

If the application for removal of an action to the proper county be made before time for answering expires, it matters not when the motion is heard. *Farmers State Alliance v. Murrell*, 119 N. C. 124, 25 S. E. 785 (1896).

A motion for change of venue, under this section, must be made before a demurrer to the action may be filed for misjoinder of the parties. *Cedar Works v. Lumber Co.*, 161 N. C. 604, 77 S. E. 770 (1913).

Before Time for Filing Answer.—A motion for removal made before the time for the filing of an answer to the complaint had expired, was made in apt time. *Carolina Mtg. Co. v. Long*, 205 N. C. 533, 172 S. E. 209 (1934).

During Term.—"Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson*, 191 N. C. 366, 131 S. E. 748 (1926)." *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928).

Instituting Action under § 1-78 Does Not Prevent Motion for Change.—Where the plaintiff under § 1-78 is bound to institute the action in the county in which defendant gave bond, his act in so doing cannot be imputed to him as a voluntary choice of venue, so as to prevent the lodging of a motion under this section. *Pushman v. Dameron*, 208 N. C. 336, 180 S. E. 578 (1935).

Right of Defendant after Complaint Filed.—Where an order for the examination of an adverse party is granted before the filing of the complaint, a motion for change of venue as a matter of right may be denied without prejudice to defendant's right to move for change of venue after the filing of the complaint, the right of defendant to object to venue, applying after complaint is filed. *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390 (1936).

B. Jurisdiction of Application.

Editor's Note.—It was formerly held that the filing of an affidavit and motion for change of venue in vacation before the

clerk was invalid. *Riley v. Pelletier*, 134 N. C. 316, 46 S. E. 734 (1904). The motion was required to be made in the district and during the term of court. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479 (1907).

By P. L. 1919, c. 304 and P. L. 1920, c. 96 it was provided that the defendant could file in motion with the clerk instead of applying to the court, the clerk could not, however, order the removal—as he may under the most recent legislation, which is discussed in the next paragraph. See *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

Power of Clerk under § 1-583.—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of this section, is now conferred by a recent statute (§ 1-583) upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon *de novo*. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922); *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Appeal to Judge.—Where the clerk of the superior court orders the action upon contract removed to the county of the defendant's residence, and the plaintiff, a nonresident, has appealed therefrom to the judge, who in term orders the cause transferred and the defendant has complied with the requisites of the statute in filing a written motion in apt time, the action of the trial judge is a valid exercise of his jurisdictional authority. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

III. WAIVER OF RIGHT TO CHANGE.

Effect of Failure to Comply with Section.—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of this section, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Venue cannot be jurisdiction and it

may always be waived. *Clark v. Carolina Homes*, 189 N. C. 703, 128 S. E. 20 (1925). See also, *Wynne v. Conrad*, 220 N. C. 355, 17 S. E. (2d) 514 (1941).

Waiver occurs when motion was neither "made in writing" nor "before the time of answering expired." *McMinn v. Hamilton*, 7 N. C. 300 (1819); *Lafoon v. Shearin*, 91 N. C. 370 (1884) (which was an action of ejectment); *Morgan v. Bank*, 93 N. C. 352 (1885); *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002 (1890); *Baruch v. Long*, 117 N. C. 509, 23 S. E. 447 (1895); *Lucas v. Carolina Central R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897).

Where a defendant moves to transfer a cause to another county, and he is allowed to a certain day of the term to file affidavits, which he failed to do, and his motion for removal is denied, without his excepting or appealing, his conduct will waive all of his rights thereto. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957 (1915).

Filing Answer to Merits.—The defendant who files a formal answer to the merits within the time allowed, thereby waives his privilege of amendment. *Trustees v. Fetzer*, 162 N. C. 245, 78 S. E. 152 (1913); *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409 (1920).

An agreement between counsel for time to file answer is an acceptance of jurisdiction and a waiver of any right to remove. *Garrett v. Bear*, 144 N. C. 23, 56 S. E. 479 (1907), and cases cited.

Withdrawing Answer.—Where answer has been filed and withdrawn for the purpose of the motion, to remove at the proper term, the right to remove will be taken as waived. *Trustees v. Fetzer*, 162 N. C. 245, 78 S. E. 152 (1913).

Accepting Continuances.—A defendant who has moved to transfer a cause to another county waives his right to the same by accepting continuances from time to time. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957 (1915).

Entry of Default.—Where a defendant has waived his rights to transfer a cause to another county or the same has been refused in the discretion of the trial court, and he has permitted the time to file his answer to expire, it is within the discretion of the trial judge to refuse his motion to file an answer later, and a judgment final by default thereof may be entered in proper instances. *Oettinger v. Hill Live Stock Co.*, 170 N. C. 152, 86 S. E. 957 (1915).

When Judgment by Default Vacated.—When a judgment by default final has

been entered against a defendant for the want of an answer, and it appeared that the defendant had lodged his motion in apt time, for a change of venue in accordance with the provisions of this section, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days' notice of his motion, § 1-581, before time for answering has expired, will not affect his right to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

IV. APPEAL.

A. Where County Designated Not Proper.

No Discretion in Court.—The question of removal, when the action is not brought in the proper county, is not one of discretion, but "may" means shall or must, as it is construed in every act imposing a duty. *Pelletier v. Saunders*, 67 N. C. 262 (1872); *Jones v. Statesville*, 97 N. C. 86, 2 S. E. 346 (1887), and cases there cited; *Neuse Mfg. Co. v. Brower*, 105 N. C. 440, 11 S. E. 313 (1890). See also, *Lewis v. Sanger*, 216 N. C. 724, 6 S. E. (2d) 494 (1940).

Appeal Lies.—Consequently, that an appeal lies from an order denying a motion for the removal of a case to the proper county for trial has been thoroughly settled by repeated decisions of the Supreme Court. *Neuse Manufacturing Co. v. Brower*, 105 N. C. 440, 11 S. E. 313 (1890); *Connor v. Dillard*, 129 N. C. 50, 39 S. E. 641 (1901); *Brown v. Cogdell*, 136 N. C. 32, 48 S. E. 515 (1904); *Perry v. R. R.*, 153 N. C. 117, 68 S. E. 1060 (1910); *Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

Not Premature.—An appeal from the refusal of the superior court judge to remove a case to the proper county is not premature. *Dixon v. Haar*, 158 N. C. 341, 74 S. E. 1 (1912).

Appeal for Delay.—A party to an action cannot be permitted to move repeat-

edly at each succeeding term for a change of venue and then appeal from each successive refusal for purposes of delay. *Ludwick v. Uwarra Mining Co.*, 171 N. C. 60, 87 S. E. 949 (1916).

B. Convenience of Witnesses and Ends of Justice Promoted.

Discretion of Court.—The removal of a case from one county to another for the convenience of witnesses is discretionary with the trial judge. *Belding v. Archer*, 131 N. C. 287, 42 S. E. 800 (1902); *Eames v. Armstrong*, 136 N. C. 392, 48 S. E. 789 (1904); *Oettinger v. Stock Co.*, 170 N. C. 152, 86 S. E. 957 (1915).

In *Craven v. Munger Lumber Co.*, 170 N. C. 424, 87 S. E. 216 (1915), it is said: "The statute is explicit that the judge may remove the cause to another county when it appears that the convenience of witnesses or the ends of justice may be served thereby. The language of itself makes it a matter of discretion in the court, and in the only four cases in which the matter has ever been contested by appeal this court has sustained the plain meaning of the words as giving the judge a discretionary power * * * *"

A motion for the removal of a cause from one county to another for convenience of witnesses and to promote the ends of justice under this section is addressed to the sound discretion of the trial judge, and is not subject to review in the Supreme Court. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928); *Western Carolina Power Co. v. Klutz*, 196 N. C. 358, 145 S. E. 681 (1928). Except upon abuse of this discretion. *Grimes v. Fulton*, 197 N. C. 84, 147 S. E. 680 (1929).

Matters Not Presented on Appeal.—Where, on appeal from the clerk's order removing the action on this ground and on the ground of movant's legal right, the court sustains the order on the latter ground alone, the clerk's right to issue the discretionary order is not presented on appeal to the Supreme Court, but the correctness of the order based on movant's legal right is left to be determined. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928).

When the trial judge in the proper exercise of his discretion under this section, has transferred a cause from one county to another for trial, the question of his ultimate purpose to consolidate the cause with other like cases does not arise on appeal to the Supreme Court. *Western Carolina Power Co. v. Klutz*, 196 N. C. 358, 145 S. E. 681 (1928).

No Appeal Lies.—Consequently, refusal

of superior court judge to order removal of cause for convenience of witnesses and in the interest of justice, is not reviewable in the Supreme Court. *Garrett v. Baar*, 144 N. C. 23, 56 S. E. 479 (1907); *Byrd v. Carolina Spruce Co.*, 170 N. C. 429, 87 S. E. 241 (1915); *Perry v. Perry*, 172 N. C. 62, 89 S. E. 999 (1916). Except upon evidence of abuse of discretion. *Craven v. Munger Lumber Co.*, 170 N. C. 424, 87 S. E. 216 (1915); *Ludwick v. Mining Co.*, 171 N. C. 60, 87 S. E. 949 (1916).

What Constitutes Abuse of Discretion—Illustrated.—Under the provisions of §§ 1-82, 1-83, it is within the sound discretion of the trial judge to change the venue of an action sounding in tort, to another, when in his judgment the county in which the action was brought does not best subserve the ends of justice, or when justice would be promoted by the change requested, and upon his findings upon the evidence in this case, it is held, that his discretion in refusing to remove the cause was not such an abuse thereof as to reverse his judgment on appeal. *Curlee v. National Bank*, 187 N. C. 119, 121 S. E.

194 (1924).

In *Craven v. Munger Lumber Co.*, 170 N. C. 424, 87 S. E. 216 (1915), it is said: "This (an abuse of discretion), we cannot impute to the learned judge who refused this motion, and upon the evidence before him refused to find as a fact that the ends of justice would be served by such removal or to remove the case for the convenience of witnesses."

Second Appeal.—Upon refusal of defendant's motion to transfer a cause for improper venue, the defendant gave notice of appeal which he did not perfect, and at some subsequent term renewed the motion, but upon another ground—for the convenience of witnesses and to promote the ends of justice, etc., and appealed from the refusal of this motion, and perfected it. Held, the granting or refusing of the second motion was in the discretion of the trial judge, and upon the record the appeal will be held frivolous by the Supreme Court and dismissed upon appellee's motion therein properly made. *Ludwick v. Mining Co.*, 171 N. C. 60, 87 S. E. 949 (1916).

§ 1-84. **Removal for fair trial.**—In all civil and criminal actions in the superior and criminal courts, when it is suggested on oath or affirmation, on behalf of the State or the traverser of the bill of indictment, or of the plaintiff or defendant, that there are probable grounds to believe that a fair and impartial trial cannot be obtained in the county in which the action is pending, the judge may order a copy of the record of the action removed to some adjacent county for trial, if he is of the opinion that a fair trial cannot be had in said county, after hearing all the testimony offered on either side by affidavits. The county from which the cause is removed must pay to the county in which the cause has been tried the full amount paid by the trial county for jurors' fees, and the full costs in the cause which are not taxable against or cannot be recovered from a party to the action, and for which the trial county is liable. (1806, c. 693, s. 12, P. R.; 1879, c. 45; Code, s. 196; 1899, cc. 104, 508; Rev., s. 426; 1917, c. 44; C. S., s. 471.)

Reasons for Removal.—An affidavit for the removal of a cause, which does not set forth the reason of affiants' belief that justice cannot be done in the county from which it is removed, is insufficient. *State v. Turtty*, 9 N. C. 248. A statement that a fair and impartial trial cannot be had will not suffice. *Id.* p. 259.

Discretion of Trial Judge.—Change of venue on ground of local prejudice is addressed to the discretion of the trial judge. *Stroud v. United States*, 251 U. S. 15, 64 L. Ed. 103, 40 S. Ct. 50 (1919). See also, *State v. Davis*, 203 N. C. 13, 164 S. E. 736 (1932); *State v. Godwin*, 216 N. C. 49, 3 S. E. (2d) 347 (1939).

Counter Affidavit.—When the judge is not satisfied by the affidavits offered, it is immaterial that counter affidavits were not presented. *Benton v. R. R.*, 122 N. C. 1009, 30 S. E. 333 (1898).

Appeal.—The findings of fact by the court that the defendants could secure a fair trial is conclusive, and the granting or refusal of a motion to remove under this section is not reviewable. *State v. Johnson*, 104 N. C. 780, 10 S. E. 257 (1889); *Albertson v. Terry*, 109 N. C. 9, 13 S. E. 713 (1891), and cases cited; *State v. Smarr*, 121 N. C. 669, 28 S. E. 549 (1897); *State v. Turner*, 143 N. C. 641, 57 S. E. 158 (1907).

This is true, even though the judge further states in his order that his findings were based on his personal observation. *Gilliken v. Norcom*, 193 N. C. 352, 137 S. E. 136 (1927).

The rule of law governing motions for removal for the causes specified, is thus declared in *Phillips v. Lentz*, 83 N. C. 240 (1880): "The distinction seems to be where there are no facts stated in the

affidavit as grounds for removal, the ruling of the court below may be reviewed; but where there are facts set forth, their sufficiency rests in the discretion of the judge and his decision upon them is final." See *Gilliken v. Norcom*, 193 N. C. 352, 137 S. E. 136 (1927).

Admission of Facts.—The affidavit is required to make the facts appear to the court, but if they are admitted, or agreed on by the parties, this is sufficient, and it is not necessary that they should appear in the record or order of removal. *Emry v. Hardee*, 94 N. C. 787 (1886).

§ 1-85. Affidavits on hearing for removal; when removal ordered.—No action, civil or criminal, shall be removed, unless the affidavit sets forth particularly and in detail the ground of the application. It is competent for the other side to controvert the allegations of fact in the application, and to offer counter affidavits to that end. The judge shall order the removal of the action, if he is satisfied after thorough examination of the evidence as aforesaid that the ends of justice demand it. (1879, c. 45; Code, s. 197; 1899, c. 104, s. 2; Rev., s. 427; C. S., s. 472.)

Cross Reference.—See note to preceding section.

§ 1-86. Additional jurors from other counties instead of removal.—Upon suggestion made as provided by § 1-84 or on his own motion, the presiding judge, instead of making order of removal may cause as many jurors as he deems necessary to be summoned from any county in the same judicial district or in an adjoining district by the sheriff or other proper officer thereof, to attend, at such time as the judge designates, and serve as jurors in said action. The judge may direct the required number of names to be drawn from the jury box in said county in such manner as he may direct, and a list of the same to be delivered to the sheriff or other proper officer of the county, who shall at once summon the jurors so drawn to appear at the time and place specified in the order. In case a jury is not obtained from those so summoned the judge may, in like manner, from time to time, order additional jurors summoned from any county in the same judicial district or in an adjoining district, or from the county where the trial is being held, until a jury is obtained. These jurors are subject to challenge for cause as other jurors, but not for nonresidence in the county of trial, or service within two years, or not being freeholders, and all jurors so summoned are entitled to compensation for mileage and time, to be paid by the county to which they are summoned, at the rate now provided by law for regular jurors in the county of their residence. Provided, that when the judge shall determine that it is necessary to have a special venire drawn from an adjoining county, instead of directing the jurors to appear at the courthouse in the county where the trial is pending, he may order them to appear at the courthouse of their own county and in lieu of their receiving mileage in going from their own county to the county in which the trial is held, it shall be optional with the county where the trial is held to provide transportation to said jurors from their own county seat to the place of trial and return instead of paying mileage to the jurors in going from their county seat to the place of trial. (1913, c. 4, ss. 1, 2; C. S., s. 473; 1931, c. 308; 1933, c. 248.)

Local Modification.—*Ashe, Durham*: 1933, c. 248.

Cross Reference.—As to jurors generally, see §§ 9-1 et seq.

Editor's Note.—The Act of 1931 amended

It is within the power of counsel to consent that the court might hear and consider the facts as if stated in an affidavit. *Emry v. Hardee*, 94 N. C. 787 (1886).

When it is stated in the order, that the motion is heard "as on affidavit," the implication is, nothing else appearing, that all the parties consented to accept the facts as if stated under oath. *Emry v. Hardee*, 94 N. C. 787 (1886).

Applied in *State v. Bell*, 228 N. C. 659, 46 S. E. (2d) 834 (1948).

Cited in *McFadden v. Maxwell*, 198 N. C. 223, 151 S. E. 250 (1930).

this section to allow the presiding judge "on his own motion" to cause additional jurors to be summoned from any county in "an adjoining district" to try a case in the county where it is pending and

from which removal of the cause was sought because of the possibility of an unfair trial by a local jury. He was restricted to "any adjoining county or any county in the same judicial district" by the former law. See 9 N. C. Law Rev. 379.

The proviso at the end of this section relating to special venires to save mileage allowance, was added by Public Laws 1933, c. 248.

Discretion of Judge.—The trial judge, when refusing defendant's motion to remove an action for homicide to another county, may, in the exercise of his sound discretion, have the jurors summoned

from any adjoining county, or from any county in the same judicial district, or have jurors drawn from the jury box of such county. *State v. Kincaid*, 183 N. C. 709, 110 S. E. 612 (1922); *State v. Baxter*, 208 N. C. 90, 179 S. E. 450 (1935).

Under this section the granting of a solicitor's motion that the jury be drawn from the body of another county is within the court's discretion. *State v. Shipman*, 202 N. C. 518, 163 S. E. 657 (1932).

Applied in *State v. Beard*, 207 N. C. 673, 178 S. E. 242 (1935); *State v. Speller*, 230 N. C. 345, 53 S. E. (2d) 294 (1949).

Cited in *State v. Green*, 207 N. C. 369, 177 S. E. 120 (1934).

§ 1-87. **Transcript of removal; subsequent proceedings.**—When a cause is directed to be removed, the clerk shall transmit to the court to which it is removed a transcript of the record of the case, with the prosecution bond, bail bond, and the depositions, and all other written evidences filed therein; and all other proceedings shall be had in the county to which the place of trial is changed, unless otherwise provided by the consent of the parties in writing duly filed, or by order of court. (1806, c. 694, s. 12, P. R.; 1810, c. 787, P. R.; R. C., c. 31, s. 118; C. C. P., s. 69; Code, ss. 195, 198; Rev., s. 428; C. S., s. 474.)

Time to Deposit.—When an action is ordered removed to another county, it is error in the judge presiding in the superior court of the county from which the cause is removed, at the next term thereof, and before the term of the court in the county to which it was removed, to direct that the action be dismissed if the cost of the transcript be not paid in

a time specified. The party procuring the order of removal has until the term of the court to which the cause is removed to deposit his transcript. *Fisher v. Cid. Copper Mining Co.*, 105 N. C. 123, 10 S. E. 1055 (1890).

Quoted in *Clark v. Peebles*, 100 N. C. 352, 6 S. E. 798 (1888).

§ 1-87.1. **Dismissal of action arising out of State when parties are nonresidents.**—For the convenience of parties and witnesses and in the interest of justice, any judge of any court in this State may dismiss without prejudice any civil action over which such court has jurisdiction if the court shall find that:

- (1) The cause of action arose out of the State, and
- (2) The defendant is a nonresident of this State, and
- (3) The plaintiff is a nonresident of this State or the deceased person in behalf of whose estate the action has been instituted was at the time of his death a nonresident of this State. (1949, c. 676.)

Editor's Note.—For brief comment on this section, see 27 N. C. Law Rev. 438.

SUBCHAPTER V. COMMENCEMENT OF ACTIONS.

ARTICLE 8.

Summons.

§ 1-88. **Civil actions; how commenced.**—A civil action is commenced by the issuance of summons or, when service is to be had pursuant to G. S. 1-98 or 1-104, by the filing of the affidavit therein required. No summons need issue in a controversy without action or in case of a confession of judgment without action. (C. C. P., s. 70; Code, s. 199; Rev., s. 429; C. S., s. 475; 1951, c. 892, s. 1.)

Cross References.—As to submission of As to confessions of judgments, see § 1-controversy without action, see § 1-250. 247. As to summons in special proceed-

ings, see § 1-394. As to action commenced when summons is issued, see § 1-14.

Editor's Note.—The 1951 amendment rewrote this section, adding the provision in regard to service pursuant to §§ 1-98 or 1-104.

Necessity for Service of Process.—While an action is commenced by the issuance of summons, defendant's rights are unaffected by the pendency of the actions until he is brought into court by proper service of process or acceptance of service or general appearance. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819 (1951).

Service of process or notice to appear is essential to the jurisdiction of all courts, as sufficiently appears from the well known legal maxim, that no one shall be condemned in his person without notice, and an opportunity to be heard in his defense. *Smith v. Woolfolk*, 115 U. S. 143, 5 S. Ct. 1177, 29 L. Ed. 357 (1885); *Renaud v. Abbott*, 116 U. S. 277, 6 S. Ct. 1194, 29 L. Ed. 629 (1886).

If jurisdiction is taken where there has been no service of process, or notice, or a statutory substitute for it, the proceeding is not only voidable but absolutely void, and may be collaterally attacked. *Windsor v. McVeigh*, 93 U. S. 274, 23 L. Ed. 914 (1876); *Cox v. United States*, 131 U. S. Appx. c., 19 L. Ed. 500 (1870).

The object of the summons is to advise the defendant of the plaintiff's action, and that he must appear at the time and place named and make his defense. *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447 (1902); *Scott v. Jarrell*, 167 N. C. 364, 83 S. E. 563 (1914); *Rector v. Laurel River Logging Co.*, 179 N. C. 59, 101 S. E. 502 (1919). Its office is to bring the parties into court. *Barney-castle v. Walker*, 92 N. C. 198 (1885).

Distinguished from Complaint.—The summons in no way indicates the cause of action which is to be learned from the complaint. In this respect it differs from the writ, under the old practice, which did to some extent indicate the plaintiff's cause of action. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

When Necessary.—A civil action shall be commenced by issuing a summons, except, in cases where the defendant is not within reach of the process of the court and cannot be personally served, when it shall be commenced by the filing of the affidavit to be followed by publication. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902), overruled. *Grocery Co. v.*

Bag Co., 142 N. C. 174, 55 S. E. 90 (1906).

Same—Injunction Prior to Summons.—An injunction ordered by the judge upon reading the complaint, coupled with an order at the same time to issue a copy of the complaint and a summons to the defendant, was irregular and premature, and therefore should be dissolved. *Patrick v. Jeyner*, 63 N. C. 573 (1869). But this irregularity, if waived by the defendant, will not be noticed by the court sua sponte. *Heilig v. Stokes*, 63 N. C. 612 (1869).

Where no process was issued the injunction cannot be sustained. *Horne v. Board*, 122 N. C. 466, 29 S. E. 581 (1898); *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235 (1913).

A summons is "issued" within the meaning of this section when it passes from the clerk's office, or the office of a justice of the peace, under the sanction and authority of such officer, for the purpose of being served. *Morrison v. Lewis*, 197 N. C. 79, 147 S. E. 729 (1929).

An action is pending from the issuance of summons until final determination by judgment. *McFetters v. McFetters*, 219 N. C. 731, 14 S. E. (2d) 833 (1941).

Suit Pending from Issuance of Summons.—A civil action is commenced when the summons is issued and, as this section fixes the inception of the action, suit is pending from that time and not exclusively from the time when the summons is served. *Morrison v. Lewis*, 197 N. C. 79, 147 S. E. 729 (1929); *Atkinson v. Greene*, 197 N. C. 118, 147 S. E. 811 (1929).

Delivery to Sheriff.—A summons is issued when it is delivered to the sheriff, or some one for him; this is the consummation and it then relates back to the time of filling out and dating by the clerk. *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902); *Smith v. Cashie, etc.*, *Lumber Co.*, 142 N. C. 26, 54 S. E. 788 (1906).

A summons simply filled in and lying in the office of an attorney, while he waited for the prosecution bond would not constitute an issuance. *Webster v. Sharpe*, 116 N. C. 466, 21 S. E. 912 (1895).

As to officer's notation of delivery as controlling issuance, see § 1-94 and note thereto.

Same—Fixes Beginning of Action.—In a civil action, the delivery of summons and copy of complaint to the sheriff for service fixes the beginning of the action as of that date. *Raleigh v. Mechanics and Farmers Bank*, 223 N. C. 286, 26 S. E. (2d) 573 (1943).

How Jurisdiction in Actions in Personam Acquired.—In *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529 (1922), it was said:—"An action is commenced as to each defendant when the summons is issued against him (§ 1-14, and this section), but in actions in personam jurisdiction of a cause of parties litigant can be acquired only by personal service of process within the territorial jurisdiction of the court, unless there is an acceptance of service or a general appearance, actual or constructive. *Bernhardt v. Brown*, 118 N. C. 700, 24 S. E. 527 (1896); *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908); *Warlick v. Reynolds & Co.*, 151 N. C. 606, 66 S. E. 657 (1910); 21 R. C. L., 1315." The various forms of service are prescribed by the following sections of this article.—Ed. Note.

Effect of Nonsuit.—Where certain named individuals, directors of a corporation, are served with summons as trustees, and as

to them the plaintiff takes a voluntary nonsuit and moves that the corporation be made the defendant in the action, and the complaint amended, the effect of the motion is to commence a new action against the corporation, and not to amend the original complaint. *Jones v. Van-story*, 200 N. C. 582, 157 S. E. 867 (1931).

Quoted in *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

Stated in *In re Will of Winborne*, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

Cited in *Western Carolina Power Co. v. Yount*, 208 N. C. 182, 179 S. E. 804 (1935); *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336 (1938); *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942) (dis. op.); *Moore v. Moore*, 224 N. C. 552, 31 S. E. (2d) 690 (1944); *Seawell v. Purvis*, 232 N. C. 194, 59 S. E. (2d) 572 (1950).

§ 1-88.1. When summons issued.—A summons is issued when, after being filled out and dated, it is signed by the officer having authority so to do. The date the summons bears is prima facie evidence of the date of issuance. (1951, c. 892, s. 2.)

§ 1-89. Contents, return, seal.—The summons must run in the name of the State, be signed by the clerk of the superior court having jurisdiction to try the action, and be directed to the sheriff or other proper officers of the county or counties in which the defendants or any of them reside or may be found. It must be returnable before the clerk and must command the sheriff or other proper officer to summon the defendant, or defendants, to appear and answer the complaint of the plaintiff within thirty (30) days after its service upon defendant, or defendants; and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint within the time specified the plaintiff will apply to the court for the relief demanded in the complaint; and must be dated on the date of its issue. Every summons addressed to the sheriff or other officer of a county, other than that from which it issued, must be attested by the seal of the court; but when addressed to the sheriff or other officer of the county in which it issued, such seal is unnecessary. Summons must be served by the sheriff to whom it is addressed for service within ten (10) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within ten (10) days after the date of its issue upon every defendant, must be returned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. In all cases where service of summons is made by publication, such service by publication shall be completed within fifty days from the order of publication. Provided, that in all actions for tax foreclosures, street assessment foreclosures and sidewalk assessment foreclosures, summons must be served by the sheriff to whom it is addressed for service within sixty (60) days after the date of its issue; and upon serving the same, the officer shall note in writing upon the copy thereof, delivered to the defendant, the date of service, but failure to comply with this requirement shall not invalidate the service, and, if not served within sixty (60) days after the date of its issue upon every defendant, must be re-

turned by the officer holding the same for service, to the clerk of the court issuing the summons, with notation thereon of its non-service and the reasons therefor as to every defendant not served. Whenever a summons is issued for service under the provisions of § 1-104 it may be served by the sheriff or other process officer of the county and state where the defendant resides at any time within thirty (30) days after the date of its issue. (C. C. P., s. 74; 1876-7, cc. 85, 241; Code, ss. 200, 203, 213; Rev., ss. 430, 431; 1919, c. 304, s. 1; C. S., s. 476; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; 1927, c. 66, s. 1; 1927, c. 132; 1929, c. 237, s. 1; 1935, c. 343; 1939, c. 15; 1945, c. 664.)

Local Modification.—Beaufort: 1937, c. 65.

Cross References.—As to amendments in the discretion of the court, see § 1-163. As to summons in courts of justices of the peace, see §§ 7-135 et seq. As to issuance of summons on Sunday, see § 103-3. As to duty of sheriff to execute summons, see § 162-16.

Editor's Note.—Prior to the amendment of 1935 service was required to be completed within fifty days from the commencement of the action instead of from the order of publication. The 1939 amendment added the proviso preceding the last sentence, and the 1945 amendment added the last sentence.

For analysis of this section, see 13 N. C. Law Rev., No. 4, p. 371.

Same—Under the Original Code of Civil Procedure.—"The original Code of Civil Procedure required the defendant to appear and answer within a certain number of days after service of summons, in no case to be less than twenty days, thus making the day of service fix the time within which answer was to be filed. When summons was made returnable to the term, if issued less than ten days before the next term, the second term thereafter became the return term, the case was placed on the summons docket for that term and if issued more than ten days before the next term, and the pleadings were made up at the next succeeding term." 1 N. C. Law Rev. 281.

One of the striking features of the new procedure, effective with the adoption of the original Code of Civil Procedure in 1868, was that all summonses should be returnable before the clerk, and that all pleadings should be made up and perfected before him; and when an issue of law is raised an appeal should lie to the judge at chambers, and be promptly acted on by him and returned. And further, that when an issue of fact arose upon the pleadings, and in such cases only, the cause should be transferred to be tried before the judge at term. This eliminated very much delay and expense in legal proceedings, for no cases could be on the docket before the judge at term for trial except those in which the

issues of fact had been formulated before the clerk by the pleadings. See *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920).

In *Campbell v. Campbell*, 179 N. C. 413, 102 S. E. 737 (1920), it was said: "This system has been continued in all the states, unchanged, in which the new procedure had been adopted, it is believed, except in this State. In this State, at that time, our people were much embarrassed by the results of the war, and instead of desiring expedition in the determination of actions there was a desire to put off as long as possible the rendition of judgments for debt. Accordingly, what was commonly known as the 'Bachelor Act,' entitled, 'An act suspending the Code of Civil Procedure in certain cases,' c. 76, Laws 1868-9, ratified 22 March, 1869, was enacted, which provided that summonses should be made returnable to the term instead of before the clerk. This act provided, § 13, that the suspending act should be temporary and in force only 'until 1 January, 1871,' but, owing to the financial conditions of the time, it was later continued indefinitely, and then by oversight, though contradictory to concept and intent of the Code of Civil Procedure (which required all process to be issued returnable before the clerk), it has endured to this time though such anomaly has not obtained, it is believed, in any other state."

Same—Under the Consolidated Statutes.—By the Public Laws of 1919 what is commonly known as the "Crisp Act" was passed, and this law was written into the Consolidated Statutes, § 476. According to the provision of the "Crisp Act" the summons was required to be returnable before the clerk at a date named therein, not less than ten nor more than twenty days from its issue, and the defendant was required to answer within twenty days of its return.

Same—The Extra Session of 1920.—"In *Campbell v. Campbell* (179 N. C. 413, 102 S. E. 727 (1920)) the summons was issued on July 21, returnable before the clerk on August 8; but since the defendant was a nonresident, and service was to be made by publication, the time of publication did

not expire until August 23. It was held that the time was necessarily extended by operation of law, so that the return day for the defendant was August 23." See 1 N. C. Law Rev. 9.

To meet this case, c. 96, Public Laws, Extra Session 1920 enacted a proviso that the summons was to be returnable within forty days. This proviso was amended by the act of 1927, and the time is extended from forty to fifty days.

Same—The Extra Session of 1921.—This act provided that the "summons must be served as now provided by law." This provision was omitted in the 1927 amendment, as the method of service is there specifically mentioned.

Same—Under Public Laws of 1923.—The Public Laws of 1923, c. 53, § 2, read as follows:

"When any summons issued by any clerk of the superior court in North Carolina is not served upon any one or more of the defendants therein named ten days before the return day thereof, but is served before the return day thereof, such failure to serve the said summons shall not affect the pendency of the action, and as touching the defendant or defendants therein named upon whom service has not been made ten days before the return day named in the summons, the return day as to such defendants shall be the tenth day after the service of the summons on the said defendant or defendants."

The original return day under this act was the same as that pointed out in discussing the law under the Consolidated Statutes; but if the sheriff did not serve the summons within ten days of the original return day then the return day was postponed automatically to ten days from the date of service. For example if a summons issued on June 1 and the return day was named as June 20 and the service was not perfected until June 15 the return day was extended to June 25.

This act was repealed by the act of 1927 which amended this section (as explained in a succeeding paragraph). The act was subjected to the following criticism in 1 N. C. Law Rev. 281: "The present change introduces again the element of uncertainty, since the plaintiff cannot know when the summons will be served, and his right to proceed at a definite time depends upon the diligence of the officer or other circumstances not within his control. It would seem desirable that the definite return day named in the summons should still control, not only for the sake of definiteness and uniformity in procedure, but because it enables the plaintiff to know

when to look after his case, and at the same time gives reasonable protection to the defendant by giving him twenty days in all cases to answer, with the power in the clerk to extend the time for good cause shown." 1 N. C. Law Rev. 281.

This criticism probably prompted the passage of the 1927 act.

Same—Public Laws of 1927.—This section as amended in 1927 constitutes more or less a reversion to the procedure extant before the passage of the "Crisp Act." There is now no specified return day; appearance and answer are always thirty days after service (in conformance with the criticism cited above); service must be ten days after issuance; if not served within ten days it must be returned with reasons for nonservice. If the reason was lack of time the issuing officer executed (within three days) an alias or pluries summons, as the case required; but this provision was struck out by the act of 1929, as noted in a succeeding paragraph. The directory provision that the officer shall note the date of service is also new.

Same—Public Laws of 1929.—This act amended this section by striking out the following: "Upon the return of a summons unserved for want of time to make service, as to any defendant or defendants not served, the clerk shall, within three (3) days thereafter issue an alias or pluries summons, as the case may require."

Previous to this amendment the clerk was required to issue such summons if the process officer has not had time to serve the original within the time prescribed by statute, without the necessity of the plaintiff in the action applying therefor. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928). See note under § 1-95.

Notice that Relief Will Be Demanded.—Whether the omission of notice that "the plaintiff will apply to the court for the relief demanded in the complaint" would be futile seems. *Davis v. Ely*, 100 N. C. 283, 5 S. E. 239 (1888). The court stated that this has become a material part of the pleading.

Excuse for Failure to Answer or Demur in Time.—See note of *Helderman v. Hartsell Mills Co.*, 192 N. C. 626, 135 S. E. 627 (1926), in 5 N. C. Law Rev. 269.

Summons Loses Vitality if Not Served within Prescribed Time.—In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue, and if not served within that time the summons must be returned by the of-

ficer to the clerk with proper notation. Then, if plaintiff wishes to keep his case alive, he must have an alias summons issued. In the event of failure of service within the time prescribed, the original summons loses its vitality. It becomes *functus officio*. There is no authority in the statute for the service of that summons on defendant after the date therein fixed for its return, and if plaintiff desires the original action continued, he must cause alias summons to be issued and served. *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215 (1943). See *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

The sheriff's authority to serve a summons is derived from this section and this section limits the exercise of this authority to the ten-day period after the date of the issue of the summons. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

Ordinarily a sheriff's return that he has served the summons implies that he has discharged his official duty in that respect. But where he specifies the date of service, and it appears that the date was more than ten days after the date of issue of the summons, the force of such implication is entirely destroyed. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

Ten Days after Issuance.—The construction given § 200 of the Code of 1883, providing that personal service should be "ten days before the beginning of the term," was that service before midnight of Friday, the tenth day before court, was a sufficient compliance. See *Taylor v. Harris*, 82 N. C. 25 (1880); *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861 (1891). It would seem, then by analogy, that a service before midnight of the tenth day after issuance would constitute a sufficient compliance with the requirement of this section that service must be ten days after issuance. Ed. Note.

Summons in Quo Warranto Proceedings Must Meet Requisites of Section.—In order for a valid service of summons in quo warranto proceedings under the provisions of § 1-526, it is necessary that the true copy of the summons provided for in that section meet the requisites of this section. *McLeod v. Pearson*, 208 N. C. 539, 181 S. E. 753 (1935).

Substantial Compliance.—There is a substantial compliance with this section where the summons commanded the plaintiff to appear and show cause why a trustee should not be appointed in the place of the original trustee. The plaintiff could readily understand what the summons

meant. *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210 (1937).

Effect of Summons Calling for Premature Appearance.—The rights of the defendant cannot be abridged by irregularity in making the summons require an appearance within less than the twenty days (now thirty after service) allowed by this section. Such summons is not necessarily on that account void, and the probate judge is not bound to dismiss it but he should allow the defendants the time allowed by this section for an appearance. *Guion v. Melvin*, 69 N. C. 242 (1873).

Meaning of Return.—The Code of 1883, § 200, expressly required a sheriff to whom a summons was directed to execute the same and return it to the superior court of the county from which it was issued. The term return implies that the process is taken back to the place from which it was issued. It is the bringing of a process into court with such endorsements as the law requires, whether they in fact be true or false. As the statute requires the officer to make his return to the Superior Court of Northampton County, and as the return could not be made elsewhere, it must follow that the cause of action arose in the said county. *Watson v. Mitchell*, 108 N. C. 364, 12 S. E. 836 (1891).

When Summons Returnable.—Public Laws 1927 made material changes in the law theretofore existing. Formerly a summons was returnable before the clerk "at a date named therein not less than ten nor more than twenty days from its issuance." The law now in force provides that a summons must be returnable before the clerk and must notify the defendant to appear and answer the complaint within thirty days after service thereof. It is further provided, however, that the sheriff to whom the summons is addressed, must serve the same within ten days after the date of issuance, and if not served within ten days, it must be returned by the officer holding the same for service to the clerk of the court issuing the summons, "with notation thereon of its nonservice and the reasons therefor as to every defendant not served." By implication only, it would appear that a summons in a civil action is now returnable within ten days. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928).

This Section and § 1-209 Construed Together.—In *Young v. Davis*, 182 N. C. 200, 108 S. E. 630 (1921), it was said that this section and § 1-209 providing for default judgment are not necessarily repugnant, but on the contrary it is clear, that the one is an exception to the other, or rather the first affords an additional and more speedy

method of relief in the stated class of suits.

The similarity of this section and § 7-136 is striking and it follows that the two should be interpreted the same. *Johnson v. Chambers*, 219 N. C. 769, 14 S. E. (2d) 789 (1941).

Signature of Sheriff. — Where a summons was properly served and the sheriff's return was unsigned, though endorsed in proper form, the judge at the trial did not exceed his powers in permitting the sheriff to sign the return *nunc pro tunc*. *Luttrell & Co. v. Martin*, 112 N. C. 593, 17 S. E. 573 (1893).

Seal. — A writ issuing to one county from the superior court of another county must have the seal of the court from which it issues impressed on it. *Shackelford v. M'Rea*, 10 N. C. 226 (1824). The rule is that when the process is to be executed within the county where it issued, no seal is required, but if it goes beyond such county the seal is required, and without it the process is void. This difference applies to all precepts or process, such as summons, execution and the like. This distinction has been sustained by numerous decisions of the Supreme Court. *Shackelford v. M'Rea*, 10 N. C. 226 (1824); *Seawell v. Bank*, 14 N. C. 279 (1831); *Finley v. Smith*, 15 N. C. 95 (1833); *Freeman v. Lewis*, 27 N. C. 91 (1844); *Taylor v. Taylor*, 83 N. C. 116 (1880); *McArter v. Rhae*, 122 N. C. 614, 30 S. E. 128 (1898); *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908).

While this section requires that a summons directed to the sheriff of a county other than that from which it is issued shall be attested by the seal of the court, the absence of a seal would not invalidate a judgment where service has been ac-

cepted and the defendant has voluntarily appeared. *Moseley v. Deans*, 222 N. C. 731, 24 S. E. (2d) 630 (1943).

Same—Omission from Copy. — Where the original summons bore the proper seal and the copy purported to have been attested in like manner, and the copy included every material part of the original except the seal, the omission of the seal, not affecting the substance of the writ did not impair the efficacy of the service or in any way mislead or prejudice the defendant. In affixing the seal the object is to evidence the authenticity of the summons, but the seal is not a part of the summons in the sense that its impress upon the copy is essential to the validity of the original. *Elramy v. Abeyounis*, 189 N. C. 278, 126 S. E. 743 (1925).

The Insurance Commissioner is not authorized to accept service for foreign insurance companies under the provisions of § 58-150, the passive agency under this section being solely for the purpose of constituting him an agent upon whom service on foreign insurance companies may be made in the statutory manner. *Hodges v. Home Ins. Co.*, 232 N. C. 475, 61 S. E. (2d) 372 (1950).

Questions for Court.—What constitutes service of process, and whether upon a given state of facts service has been made are questions for the court. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

Applied, as to service after expiration of more than ten days, in *In re Walters*, 229 N. C. 111, 47 S. E. (2d) 709 (1948).

Cited in *Washington County v. Blount*, 224 N. C. 438, 31 S. E. (2d) 374 (1944); *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945).

§ 1-90. Issued to several counties.—The plaintiff may issue a summons, directed to the sheriff of any county where a defendant is most likely to be found, noting on each summons that it is issued in the same action. When the summons is returned, it shall be docketed as if only one had issued, and if any defendant is not served with such process, the same proceeding shall be had as in other cases of similar process not executed. (1789, c. 314, ss. 1, 2, P. R.; 1831, c. 14, s. 2; R. C., c. 31, s. 44; Code, s. 204; Rev., s. 432; C. S., s. 477.)

§ 1-91. When directed to officer of adjoining county.—If at any time there is not in the county a proper officer to whom summons or other process of a court of record is or ought to be directed, who can lawfully execute it; or if such officer refuses or neglects to execute the same, the clerk of the court from which it has issued or shall issue, upon the facts being verified before him by written affidavit, subscribed by the plaintiff or his agent, shall issue such summons or process to the sheriff of any adjoining county, who has power to and shall execute the same in like manner as if he were sheriff of the county. In all cases where the sheriff of any county is interested, if there is no coroner in the county, process may be issued to and shall be executed by the sheriff of any adjoining

county. (1779, c. 156, P. R.; 1821, c. 1080, P. R.; 1846, c. 61: R. C., c. 31, s. 55; 1869-70, c. 175; 1882, c. 1132; Code, ss. 929, 930; Rev., ss. 1530, 1531; C. S., s. 478.)

Applied in an anonymous case in 2 N. C. 422 (1796).

§ 1-92. Uniform pleading and practice in inferior courts where summons issued to run outside of county.—In all cases in which any court in North Carolina inferior to the superior court, except courts of justices of the peace, shall issue any summons to run outside the county of such inferior court, the case in which such summons is issued shall, as to the summons and the filing of all pleadings, be subject to, and governed by, the laws and rules applicable to actions in the superior court of North Carolina. (1931, c. 420.)

Cross References.—As to when coroner acts as sheriff, see § 152-8. As to rules of pleading generally, see § 1-143.

The issuance of a summons to another

county addressed to the sheriff of that county is authorized by this section. *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484 (1943).

§ 1-93. Amount requisite for summons to run outside of county.—No summons in civil suits or civil proceedings shall run outside the county where issued, unless the amount involved in the litigation is more than two hundred dollars in matters arising out of contract and more than fifty dollars in matters arising in tort: Provided, that this section shall not affect or limit the provisions of §§ 7-138, 7-140 to 7-143. (1939, c. 81.)

Cross Reference.—See §§ 7-121, 7-122.

Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than \$200.00,

is bad as a speaking demurrer, since the defect does not appear upon the face of the complaint. *Four County Agricultural Credit Corp. v. Satterfield*, 218 N. C. 298, 10 S. E. (2d) 914 (1940).

§ 1-94. When officer must execute and return.—The officer to whom the summons is addressed must note on it the day of its delivery to him and serve it by delivering a copy thereof to each of the defendants. In all cases when a summons is issued by any court of this State, and the officer to whom said summons is directed shall find that the person or persons against whom said summons is issued cannot be served without danger of injury to said person or persons on account of the condition of said person or persons arising from illness, accident or otherwise, the officer shall file with his returns a certificate from a reputable physician certifying to this fact, and said returns shall relieve the said officer from any liability by reason of failure to actually serve the summons. The said officer shall as soon as possible make actual service of said summons, and when actually served the cause of action shall be deemed to have been commenced as of the date of the original summons, and the defendant shall have thirty days from the date of actual service within which to demur, answer or otherwise plead. (1876-7, c. 85; Code, s. 200; Rev., s. 433; 1919, c. 304, s. 1; C. S., s. 479; Ex. Sess. 1921, c. 92, s. 1; 1923, c. 62; 1943, c. 543.)

Cross Reference.—As to action commenced when summons is issued, see § 1-14.

Editor's Note.—The 1923 amendment added the provision relating to service in case of danger of injury to the person. This applies to all courts, since the words used are "when the summons is issued by any court of this State." The first purpose is to relieve the officer from liability to a penalty for failure to serve the summons in proper time (§§ 162-14, 162-16.) It may be that such facts stated in his return, as an excuse for failure to serve the sum-

mons, would exonerate the officer in any case (21 R. C. L. 1318), but this places it beyond question. 1 N. C. Law Rev. 279.

The 1943 amendment substituted "thirty" for "twenty" in the last sentence of this section.

The requirement that an officer having process in hand for service must note on the process the date received by him under this section and make due return thereof under § 162-14 are affirmative requirements of these sections. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177 (1949).

Effect of Officer's Notation. — A summons is issued when the clerk delivers it to the sheriff to be served, and where there is no intermediary, but the process is delivered by the clerk himself to the officer, the notation of the officer on it as to the date of its receipt by him must be controlling evidence as to when it was issued. *Smith v. Cashie, etc., Lumber Co.*, 142 N. C. 26, 54 S. E. 788 (1906).

A civil action is commenced when the summons is issued, and the presumption when nothing else appears is that the summons passed from the control of the clerk and was delivered to the sheriff, and therefore issued at the time when the sheriff received it; and this is generally determined by the entry on the process of the date it was received by the sheriff, as he is required by statute to make such an entry. *Smith v. Cashie, etc., Lumber Co.*, 142 N. C. 26, 54 S. E. 788 (1906), explaining *Houston v. Thornton*, 122 N. C. 365, 29 S. E. 827 (1898).

Failure to Make Notation.—The sheriff

§ 1-95. **Alias and pluries.**—When the defendant in a civil action or special proceeding is not served with summons within ten days, the plaintiff may sue out an alias or pluries summons, returnable in the same manner as original process. An alias or pluries summons may be sued out at any time within ninety (90) days after the date of issue of the next preceding summons in the chain of summonses. Provided, however, that in case of tax suits and special assessment foreclosure suits brought under the provisions of § 105-391 and § 105-414, as amended, an alias or pluries summons may be sued out at any time within two years after the issuance of the original summons, whether any intervening alias or pluries summons has heretofore been issued or not, and after the issuance of such alias or pluries summons, the chain of summonses may be kept up as in any other action. (1777, c. 115, ss. 23, 71, P. R.; R. C., c. 31, s. 52; Code, s. 205; Rev., s. 437; C. S., s. 480; 1929, c. 237, s. 2; 1931, c. 264; 1945, c. 163.)

Editor's Note.—The second sentence of this section was added by the 1929 amendment and the 1931 amendment added the proviso.

The 1945 amendment made the proviso applicable to special assessment foreclosure suits and inserted the reference to § 105-414.

It was held in *McGuire v. Montvale Lumber Co.*, 190 N. C. 806, 131 S. E. 274 (1925), that the word "may" as herein used means "must." The case further states that "the true office of an alias summons is to continue the action referable to its original date of institution, when the first summons issued had not been served," and cites *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596 (1907); *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194 (1916).

Alias summons must be sued out within ninety days next after the date of the original summons. *Mintz v. Frink*, 217 N. C.

ought regularly to note on the summons the day of its delivery to him, as required by the statute but his failure to do so does not vitiate or render the summons void. Such a notation is not of the essence of the summons, or the service of it by the sheriff. Its purpose is to provide evidence convenient to fix the day the summons passed into the hands of the sheriff for any proper purpose. *Strayhorn v. Blalock*, 92 N. C. 293 (1885).

Summons Issued from Justice's Court.—Construing § 7-149, sub-sec. 16, and this section together, it is clear that a summons issued from a court of a justice of the peace must be served in the same manner as a summons issued from the superior court. *Pass v. Elias*, 192 N. C. 497, 135 S. E. 291 (1926).

Return of Sheriff Generally. — See §§ 162-14 et seq. and the notes thereto.

Cited in *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802 (1936); *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458 (1946).

101, 6 S. E. (2d) 804 (1940).

An alias or pluries summons must be served within ninety days after the date of issue of the next preceding summons in the chain of summonses, if the plaintiff wishes to avoid a discontinuance. The word "may" in this statute means "must." *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215 (1943).

Suing Out Alias or Pluries Summons to Prevent Discontinuance.—Where plaintiff, who has commenced his action prior to the bar of the statute of limitations, fails to obtain valid service upon defendant, he is required to sue out alias or pluries summons if he desires to prevent a discontinuance. *Hodges v. Home Ins. Co.*, 233 N. C. 289, 63 S. E. (2d) 819 (1951).

The duty is now imposed upon the plaintiff to sue out an alias summons if the original writ failed of its purpose or proved ineffectual; and likewise to sue out a pluries

summons when the preceding writs have proved ineffectual, or there will be a discontinuance of the action. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586 (1950).

To "sue out" means "to obtain by application; to petition for and take out." *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586 (1950).

A plaintiff may apply orally or in writing to the clerk of the superior court for an alias or pluries summons and upon such application it is the duty of the clerk of the superior court to issue the writ. No order of court is necessary to authorize the clerk to issue an alias or pluries summons. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586 (1950).

An ordinary summons cannot be effective as an alias or pluries summons by the mere endorsement of the words "alias" or "pluries" thereon. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586 (1950).

Service Effective from Date of Original Process.—If the alias or pluries summons contains sufficient information in the body thereof to show its relation to the original summons, the legal service of such writ will be effective from the date of the original process. *McIntyre v. Austin*, 232

N. C. 189, 59 S. E. (2d) 586 (1950).

Return Sufficient Evidence of Nonservice.—Where the sheriff has served summons more than ten days after its issuance, his return is sufficient evidence of nonservice to enable plaintiff to sue out an alias summons. *Atwood v. Atwood*, 233 N. C. 208, 63 S. E. (2d) 103 (1951).

Denial of Plea in Abatement in Second Action.—Where the original process is kept alive by the proper issuance of alias and pluries summonses, a plea in abatement in a second action instituted subsequent to the issuance of the original process in the first is properly denied notwithstanding that process in the subsequent action is actually served prior to the service of pluries summons in the first. *McIntyre v. Austin*, 232 N. C. 189, 59 S. E. (2d) 586 (1950).

Motion to Abate.—If there has been a discontinuance of the action by failure to duly issue alias summons, defendant must take advantage thereof by motion to abate before he files answer. *Asheboro v. Miller*, 220 N. C. 298, 17 S. E. (2d) 105 (1941).

Cited in *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928); *Gomer v. Clayton*, 214 N. C. 309, 199 S. E. 77 (1938).

§ 1-96. **Discontinuance.**—A failure to keep up the chain of summonses issued against a party, but not served, by means of an alias or pluries summons, is a discontinuance as to such party; and if a summons is served after a break in the chain, it is a new action as to such party, begun when the summons was issued. (Rev., s. 438; C. S., s. 481.)

When Discontinuance Occurs.—A discontinuance under this section occurs only when the summons has not been served. *Rogerson v. Leggett*, 145 N. C. 7, 58 S. E. 596 (1907); *Gomer v. Clayton*, 214 N. C. 309, 199 S. E. 77 (1938).

In order to bring a defendant into court and hold him bound by its decree, in the absence of waiver or voluntary appearance, a summons must be issued by the clerk and served upon him by the officer within ten days after date of issue; and if not served within that time, the summons must be returned, with proper notation, and alias or pluries summons issued and served in accordance with the statute, otherwise the original summons loses its vitality and becomes functus officio and void. *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215 (1943).

The failure of service of the original summons in an action must be followed by an alias or pluries writ or a summons successively and properly issued in order to preserve a continuous single action ref-

erable to the date of its issue, for otherwise it is a discontinuance as to the defendant. And another summons served after the break in the chain is a new action. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529 (1922).

Under this section where in a civil action alias or pluries summonses are issued in the event of nonservice of the original, a break in the chain of summonses works a discontinuance, and where a summons is thereafter served it commences a new action. *Neely v. Minus*, 196 N. C. 345, 145 S. E. 771 (1928).

Where service of the original summons in this action was void because made on a Sunday and an "alias" summons thereafter issued was ineffective because not in the form prescribed by statute, upon the expiration of 90 days from the date of the original summons there was a discontinuance, and the court was without authority thereafter to order the issuance of an alias summons. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

§ 1-97. **Service by copy.**—The manner of delivering summons in the following cases shall be as hereinafter stated:

1. If the action is against a corporation, to the president or other head of the corporation, secretary, cashier, treasurer, director, managing or local agent thereof. Any person receiving or collecting money in this State for a corporation of this or any other state or government is a local agent for the purpose of this section. Such service can be made in respect to a foreign corporation only when it has property, or the cause of action arose, or the plaintiff resides, in this State, or when it can be made personally within the State upon the president, treasurer or secretary thereof.

2. If against a minor under the age of fourteen years, to the minor personally, and also to his father, mother or guardian, or if there are none within the State, to any person having the care and control of the minor, or with whom he resides, or in whose service he is employed.

3. If against a person judicially declared of unsound mind, or incapable of conducting his own affairs in consequence of habitual drunkenness, and for whom a committee or guardian has been appointed, to such committee or guardian, and to the defendant personally. If the superintendent or acting superintendent of an insane asylum informs the sheriff or other officer who is charged with the duty of serving a summons or other judicial process, or notice, on an insane person confined in such asylum, that the summons, or process, or notice, cannot be served without danger of injury to the insane person, it is sufficient for the officer to return the same without actual service, but with an endorsement that it was not personally served because of such information; and when an insane person is confined in a common jail it is sufficient for an officer charged with service of a notice, summons, or other judicial process, to return the same with the endorsement that it was not served because of similar information as to the danger of service on such insane person given by the physician of the county in which the jail is situated.

4. Every unincorporated, fraternal, beneficial organization, fraternal benefit order, association and/or society issuing certificates and/or policies of insurance, whether foreign or domestic, now or hereafter doing business in this State, shall be subject to service of process, in the same manner as is now or hereafter provided for service of process on corporations: Provided, this paragraph shall only apply in actions concerning such certificates and/or policies of insurance.

5. Every nonresident individual who is engaged in business in this State and who conducts such business through an agent, employee, trustee, or other representative in this State, or who is a member of a partnership, firm, or unincorporated organization or association, or beneficiary or shareholder in a business trust doing business in this State, shall be subject to process in any action or proceeding in any court of competent jurisdiction in this State arising out of or connected with such business in this State, and such process may be served upon such agent, employee, trustee, or other representative or upon any person in this State receiving or collecting money with respect to such business, or upon any member of such partnership, firm, organization or association residing in this State or upon any person residing in this State who is authorized to act or contract for or collect or receive money on behalf of such partnership, firm, organization, association, or business trust with respect to its business in this State. Within five days after such service the plaintiff or petitioner or his attorney shall send by registered mail to said nonresident individual at his last address, if known, a copy of the summons and a copy of the complaint or petition with a statement calling attention to the provisions hereof and of the expiration of the time to answer or demur. Such service shall bind such individual as fully and effectually as if it had been made upon him personally. But no final decree shall be entered unless the presiding judge at the trial shall find as a fact that the plaintiff mailed by registered mail with the return receipt request to the last known address of the defendant a copy

of the summons and complaint in the action. The return postal receipt shall be evidence of the mailing of said summons and complaint as herein provided for.

6. Any unincorporated association or organization, whether resident or non-resident, desiring to do business in this State by performing any of the acts for which it was formed, shall, before any such acts are performed, appoint an agent in this State upon whom all processes and precepts may be served, and certify to the clerk of the superior court of each county in which said association or organization desires to perform any of the acts for which it was organized the name and address of such process agent. If said unincorporated association or organization shall fail to appoint the process agent pursuant to this subsection, all precepts and processes may be served upon the Secretary of State of the State of North Carolina. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. Service upon the process agent appointed pursuant to this subsection or upon the Secretary of State, if no process agent is appointed, shall be legal and binding on said association or organization, and any judgment recovered in any action commenced by service of process, as provided in this subsection, shall be valid and may be collected out of any real or personal property belonging to the association or organization.

Any such unincorporated association or organization, now performing any of the acts for which it was formed, shall, within thirty days from the ratification of this subsection, appoint an agent upon whom processes and precepts may be served, as provided in this subsection, and in the absence of such appointment, processes and precepts may be served upon the Secretary of State, as provided in this subsection. Upon such service, the Secretary of State shall forward a copy of the process or precept to the last known address of such unincorporated association or organization. (C. C. P., s. 82; 1874-5, c. 168; Code, s. 217; 1889, c. 89; Rev., s. 440; C. S., s. 483; 1933, c. 24; 1941, c. 256; 1943, c. 478; 1945, c. 123.)

I. In General.

II. Service on Corporations.

A. Corporations Generally.

B. Foreign Corporations.

III. Service on Minors.

IV. Service on Insane Persons.

V. Service on Unincorporated Association or Organization.

Cross References.

As to resident process agent and service through Secretary of State, see §§ 55-58, 55-59. As to service of process on Insurance Commissioner for foreign insurance company, see § 58-153. As to infants, idiots, etc., to defend by guardians ad litem, see § 1-65. As to privilege from service of process in certain civil actions of persons brought into State by extradition, see § 15-79.

I. IN GENERAL.

Editor's Note. — The 1933 amendment added subsection 4, the 1941 amendment added subsection 5, the 1943 amendment added subsection 6, and the 1945 amendment added the last two sentences of subsection 5.

For comment on the 1941 amendment, see 19 N. C. Law Rev. 460. For comment

on the 1943 amendment, see 25 N. C. Law Rev. 319.

Applicability to Criminal Actions.—This section though primarily intended as a regulation in the institution of a civil action, is equally appropriate in a criminal action, and its terms are sufficiently comprehensive to embrace both. *State v. Western*, etc., R. Co., 89 N. C. 584 (1883).

Applicability in Justices' Courts. — This section does not embrace a process returnable before a magistrate, *Kirkland v. Hogan*, 65 N. C. 144 (1871); but those provisions, in regard to the service of process upon corporations, apply to justices' courts. *Katzenstein v. Raleigh*, etc., R. Co., 78 N. C. 286 (1878).

What Constitutes Delivery. — It would seem that the use of the word "delivery" in this section contemplates a delivery to the defendant in person, or his qualified agent as specified in the section. It has been held that leaving a copy of the summons with the wife of the person named in the summons will not suffice, *First Nat. Bank v. Wilson*, 80 N. C. 200 (1879); nor does leaving a copy at the dwelling house constitute a delivery. *State v. Jacobs*, 47 N. C. 52 (1854).

Same—Delivery of Original.—The service is void where the original summons only is delivered to an officer of the corporation, who after reading it, returned the same to the officer making the service. *Aaron v. Pioneer Lumber Co.*, 112 N. C. 189, 16 S. E. 1010 (1893).

Cited in *Welch v. Welch*, 194 N. C. 633, 140 S. E. 436 (1927); *Tinker v. Rice Motors*, 198 N. C. 73, 150 S. E. 701 (1929); *Smith v. Finance Co. of America*, 207 N. C. 367, 177 S. E. 183 (1934); *Manney v. Luzier's, Inc.*, 212 N. C. 634, 194 S. E. 323 (1937); *Cox v. Cox*, 221 N. C. 19, 18 S. E. (2d) 713 (1942); *Washington County v. Blount*, 224 N. C. 438, 31 S. E. (2d) 374 (1944).

II. SERVICE ON CORPORATIONS.

A. Corporations Generally.

Requirement Mandatory.—This requirement as to the mode of service on corporations must be strictly observed. *Hatch v. Alamance R. Co.*, 183 N. C. 617, 112 S. E. 529 (1922), quoting *Amy v. Watertown*, 130 U. S. 301, 32 L. Ed. 946, 9 S. Ct. 530 (1889).

The provisions of this section must be strictly followed, and a separate copy of the summons must be served on and left with the agent for each corporate defendant. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 203 N. C. 184, 165 S. E. 550 (1932).

The provisions of this section as to service of summons on private corporations must be observed, and where individuals, directors of a corporation, are served with process as trustees, it will not be effectual as service on the corporation, but only on the individuals named. *Jones v. Vanstory*, 200 N. C. 582, 157 S. E. 867 (1931).

Subsection 1 of this section was intended to facilitate service on a corporation, and to resolve any doubt as to who might be validly served. *Townsend v. Carolina Coach Co.*, 229 N. C. 523, 50 S. E. (2d) 567 (1948).

The primary purpose of the second sentence of subsection 1 was to provide a method of service on a domestic or foreign corporation when the officers of the corporation reside at a great distance. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

And a person who receives money for a corporation need not be its employee or agent in order for service of process on such person to be effective. *Townsend v. Carolina Coach Co.*, 229 N. C. 523, 50 S. E. (2d) 567 (1948).

Summons against defendant bus com-

pany was served on a bus station employee who sold tickets for defendant as well as for others, and who was employed by third parties operating the bus station. Money collected for the tickets was received by the ticket seller as the employee of the operators and turned over by them to the defendant. It was held that the service of the summons on the ticket seller was sufficient. *Townsend v. Carolina Coach Co.*, 229 N. C. 523, 50 S. E. (2d) 567 (1948).

Local Agent.—The term local pertains to place, and a local agent to receive and collect money, *ex vi termini*, means an agent residing either permanently or temporarily for the purpose of his agency, and was not intended to embrace a mere transient agent. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590 (1885).

But the authority to receive money is not the exclusive test of a local agent upon whom service of process may be made. *Copeland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501 (1904); *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917).

This language was not intended to limit the service to such a class of agents, but rather to extend the word "agent" to embrace them. The authority to receive money, of itself, makes one a local agent for the purpose of the statute, but this is not the exclusive test of agency. *Cape Fear Rys. v. Cobb*, 190 N. C. 375, 129 S. E. 828 (1925).

A local agent receiving premiums or commissions for a bonding company doing business in this State is within the contemplation of this section. *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917).

Neglect of Local Agent Not Imputed to Defendant.—Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station in compliance with § 1-97(1) but the ticket saleswoman failed to notify defendant, and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

Service on Bank Director.—The service of process authorized to be made on a director of a corporation, under this section, as applied to a bank, means one of the eleven principal directors, annually elected by the stockholders, and not a

director appointed by the authorities of the bank for its branches or agencies. *Webb v. President and Directors*, 50 N. C. 288 (1858).

Service on Receiver.—An action against the receivers of a corporation is in fact an action against the corporation; hence, under this section, service of summons on a local agent is service on the receivers. *Farris v. Richmond, etc., R. Co.*, 115 N. C. 600, 20 S. E. 167 (1894).

Service of a summons upon the receivers of a corporation is service upon the corporation itself as fully as if made upon the president and superintendent, and service upon the local agent of the receivers has the same legal effect as if made upon the receivers personally. *Grady v. Richmond, etc., R. Co.*, 116 N. C. 952, 21 S. E. 304 (1895).

A person acting for a corporation as a caretaker as a matter of friendship, without compensation, is not an agent of such company for receiving and paying out moneys upon whom process may be served under this section. *Kelly v. LeFaiver & Co.*, 144 N. C. 4, 56 S. E. 510 (1907).

President before Court in Individual Capacity.—Where a bill was amended so as to make a corporation a party, it was held to be proper to serve the president of the corporation with a copy of the bill, although he was already before the court in his individual capacity. *McRae v. Guion*, 58 N. C. 129 (1859).

Agent of Telephone Company as Agents of Telegraph Company. — In *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290 (1915), it was held that the fact that an agent of a telephone company received messages for a telegraph company and telephoned them to a nearby town, collected for telegrams, etc., was sufficient to be submitted to the jury on the question of whether the agent of the telephone company was such an agent of the telegraph company as is contemplated by this section.

Service of scire facias on local agent of bonding company executing bond in behalf of corporate surety is service upon the corporation. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177 (1949).

For other cases applying the agency doctrine of this section to foreign corporations, see post, this note, the next analysis line.

B. Foreign Corporations.

In General.—"The several cases respecting a foreign corporation, it will be observed, are put disjunctively; and the meaning is, that in either of the first three

cases service may be made by delivery of a copy of the summons to one of the officers named in the first clause of the section, among which is the managing agent. In the last case, that is, when the foreign corporation has no property within the State, and the cause of action did not arise therein, and the plaintiff does not reside therein then service may be made on the president, treasurer or secretary, if he can be found within the State, but it may not be made on a management agent found here. A reason for the difference may be discovered. The first three classes of cases embraced all of which would usually occur, and in them every reasonable facility for the service of process is provided. But there was a fourth class of cases, not likely; but still possible, and therefore needing to be provided for, viz.; where a nonresident might be allowed to sue in this State a foreign corporation having no property here, on a cause of action arising elsewhere. The necessity of suing here, might arise out of the fact, that the chief officers were to be found here, and not elsewhere. In such a case, either because the corporation could not well have a managing agent here, or for other reasons, which may be imagined, it was provided that service should be made on some one of the principal officers." *Cunningham v. Southern Exp. Co.*, 67 N. C. 425 (1872).

The construction of this statute, which has been uniformly followed, in *Cunningham v. Southern Exp. Co.*, 67 N. C. 425 (1872), and all cases since, is thus clearly stated by Hoke, J., in *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913 (1910): "Constructing a statute of similar import, it has been held that the first clause enumerates the persons on whom service of process can be made, to wit, on the president or other head of the corporation, secretary, treasurer, director, managing or local agent thereof, and in that respect applies to all corporations, both domestic and foreign. Then follows the proviso as to who shall be considered local agents for the purpose of the section, and the last clause establishes certain conditions, restrictive in their nature, which are required and necessary to a proper and valid service on foreign corporations. That is, service on the persons designated in the first clause, shall only be good as to foreign corporations: (1) when they have property in the State, or (2) when the cause of action arose therein, or (3) when the plaintiff resides in the State. And then a fourth method is established, (4) when service can be

made within this State personally on the president, treasurer, or secretary thereof."

This construction has been held also in *Jones v. Hartford Ins. Co.*, 88 N. C. 499 (1883); *Clinard v. White*, 129 N. C. 250, 39 S. E. 960 (1901); *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447 (1902); *Greenleaf v. People's Bank*, 133 N. C. 292, 45 S. E. 638 (1903); *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020 (1905); *McDonald v. McArthur Bros. Co.*, 154 N. C. 122, 69 S. E. 832 (1910); *Menefee v. Riverside, etc., Cotton Mills*, 161 N. C. 164, 76 S. E. 741 (1912).

An attorney for a foreign corporation, who has claims to collect for it in this State, is not a local agent upon whom process can be served. *Moore v. Freeman's Nat. Bank*, 92 N. C. 590 (1885).

Superintendent.—The agent of a foreign corporation who superintends all its work in this State and has general charge of its employees is its "managing agent" within the meaning of this section. *Clinard v. White*, 129 N. C. 250, 39 S. E. 960 (1901).

President.—Service of summons on the president of a foreign corporation is valid, if made within the State, whether the president is in the State on private or official business. *Jester v. Baltimore Steam Packet Co.*, 131 N. C. 54, 42 S. E. 447 (1902).

Where a foreign corporation does not do business within the State, does not maintain a process agent or any other agent here, and has not domesticated, and owns no property in the State, service of process on its president while he is within the State on personal business in no wise connected with the business of the corporation, is not a valid service of process under this section. *Langley v. Planters Tobacco Warehouse*, 215 N. C. 237, 1 S. E. (2d) 558 (1939), following *Riverside, etc., Cotton Mills v. Menefee*, 237 U. S. 189, 35 S. Ct. 579, 59 L. Ed. 910 (1915), the effect of which was to overrule former decisions of the North Carolina Supreme Court to the contrary.

A traveling auditor of a foreign corporation, who presented an account to the plaintiff and requested payment to himself, but presented the account without authority and received no money, is not a "local agent" (under this section) for the purpose of service of summons. *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020 (1905).

See *Blades Lbr. Co. v. Finance Co.*, 204 N. C. 285, 168 S. E. 219 (1933), following *Higgs & Co. v. Sperry, etc., Co.*, 139 N. C. 299, 51 S. E. 1020 (1905), and

holding also that the fact that such agent received money for the corporation on a single instance does not alter this result.

A local agency for a foreign corporation acting as its general sales agent, and collecting and receiving money in such capacity, is of such character as to make it an agency upon which service of summons for the foreign corporation can be made under our statute. *Cape Fear Rys. v. Cobb*, 190 N. C. 375, 129 S. E. 828 (1925).

Where service of process was had on a nonresident defendant corporation by service on its traveling soliciting agent in this State, which agent was not authorized to, and actually did not, receive or collect money for the corporate defendant, and exercised no control or management over the corporate functions, it was held that the agent was not a "local agent" for the purpose of service of summons within the meaning of this section, and service upon him as agent of the corporate defendant was properly stricken out. *Plott v. Michael*, 214 N. C. 665, 200 S. E. 429 (1939).

A foreign corporation may be sued on a transitory cause of action in any jurisdiction where it can be found in the sense that service may be perfected upon an agent or officer transacting business for the corporation within that jurisdiction, and the residence of the plaintiff and the place at which the cause of action arose are not material questions to be determined to maintain jurisdiction if the corporation can be found and served. *Steele v. Western Union Tel. Co.*, 206 N. C. 220, 173 S. E. 583 (1934).

When a foreign corporation has property in this State and is here present transacting its corporate business through local agents, such corporation is amenable to service of process according to the provisions of this section in a transitory cause of action arising in another state and brought by a nonresident of this State and this statute neither offends against the commerce clause of the federal Constitution nor runs counter to the Fourteenth Amendment. *Steele v. Western Union Tel. Co.*, 206 N. C. 220, 173 S. E. 583 (1934).

A "local" agent of a foreign corporation for the purpose of service of summons under this section is a person or corporation residing in this State permanently or temporarily for the purpose of the agency. *McDonald Service Co. v. People's Nat. Bank*, 218 N. C. 533, 11 S. E. (2d) 556 (1940).

In the absence of any express authority, the question of whether a person or cor-

poration residing in this State is the local agent of a foreign corporation for the purpose of service of summons under this section, depends upon the surrounding facts and the inferences which the court may properly draw from them. *McDonald Service Co. v. People's Nat. Bank*, 218 N. C. 533, 11 S. E. (2d) 556 (1940).

An "agent" of a foreign corporation for the purpose of service of summons under this section is a person or corporation given power to act in a representative capacity with some discretionary supervision and control over the principal's business committed to his care, and who may be reasonably expected to notify his principal that process had been served on him. *McDonald Service Co. v. People's Nat. Bank*, 218 N. C. 533, 11 S. E. (2d) 556 (1940).

The facts found by the court below upon the uncontroverted evidence appearing by affidavit and by stipulation of the parties, were to the effect that the bank, chartered by this State, upon which process was served, acted as a depository for the non-resident defendant bank, received money of the defendant for deposit, honored checks of the defendant drawn on it, charged currency to defendant as and when requested, and discounted notes of defendant's customers for defendant. Held: The depository bank was engaged in the discharge of the very functions for which it was organized, and it was conducting its own business and not that of the defendant, and the relation existing between the banks was that of creditor and debtor and not that of principal and agent, and therefore the depository bank was not the local agent of the nonresident bank for the purpose of service of summons under this section. Further, it would seem that the nonresident bank was not doing business in North Carolina, since the business transacted here was the business of the depository bank. *McDonald Service Co. v. People's Nat. Bank*, 218 N. C. 533, 11 S. E. (2d) 556 (1940).

A foreign express company, while a member of the Federal Government Control Act, a war measure, does not fall within the provision of this section as to local process agent. *McAlister v. American Ry. Exp. Co.*, 179 N. C. 556, 103 S. E. 129 (1920).

A foreman, acting under the direction of the superintendent of a corporation, is neither an "officer" nor "a managing or local agent," within the meaning of this section. *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435 (1908).

An operator of a wireless telegraph in sole charge of defendant's property, and in control of its business, is a local agent within the meaning of this section. *Copeland v. American De Forest Wireless Tel. Co.*, 136 N. C. 11, 48 S. E. 501 (1904).

Service of process on the bookkeeper of a foreign corporation who was apparently the only financial agent of the corporation in the State will suffice under this section. *Whitehurst v. Kerr*, 153 N. C. 76, 68 S. E. 913 (1910).

A buyer for the defendant foreign corporation, who made the contract with plaintiff on which the action is based, was held a "managing agent." *Royal Furniture Co. v. Wichita Furniture Co.*, 180 N. C. 531, 105 S. E. 176 (1920).

In action by domestic corporation against defendant foreign corporation, which had removed all property from State except intrastate franchise, service of process upon one time lessee of franchise was invalid, and mere fact that lessee was process agent of his own corporation did not make him process agent of defendant nor was he a "local" agent within the meaning of this section. *Central Motor Lines v. Brooks Transp. Co.*, 225 N. C. 733, 36 S. E. (2d) 271, 162 A. L. R. 1419 (1945).

III. SERVICE ON MINORS.

Service upon Minor over Fourteen.—"Service of the summons by reading it to a minor is good unless he is under the age of 14 years, and, as to a purchaser, it so appears on the face of the record or he has actual knowledge of the fact." *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763 (1909).

Service upon Minor under Fourteen.—"Formerly an infant was brought into court just as any other defendant was. If he had a general guardian, process was served upon the guardian, if there was no general guardian, the court acquired jurisdiction by service of process upon the infant, and appointed some suitable person—frequently some officer of the court—as guardian ad litem, who accepted service and defendant for him; but since the Code of Civil Procedure (this section), the service upon a minor under the age of fourteen must be upon him personally, and also his father, mother or guardian, or, if there be none in the State, then upon any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed." *White v. Morris*, 107 N. C. 92, 12 S. E. 80

(1890). See also, *Ward v. Lowndes*, 96 N. C. 637, 2 S. E. 591 (1887).

Process on Infant Personally.—In *Matthews v. Joyce*, 85 N. C. 258 (1881), the court said, "while according to recent decisions jurisdiction over the person of infants is acquired only as in the other cases by the service of process on them, and then it is competent to appoint, in case there is no general guardian, a guardian ad litem, to act in their behalf and to protect their interests, so as to bind them by judicial action, a different practice has long and almost universally prevailed in this State, and this power of appointment has been generally exercised without the issue of process, for the reason that no practical benefit would result to the infant from such service on him, and the court always assumed to protect the interests of such party, and to this end committed them to the defense on this special guardian." *Groves v. Ware*, 182 N. C. 553, 109 S. E. 568 (1921).

Process Served on General Guardian.—The general guardian is the proper person on whom process against infant defendants should be served, and it is his duty to protect their interest in the suit. *Chambers v. Penland*, 78 N. C. 53 (1878).

Service on Guardian Ad Litem.—As to failure to serve summons on guardian ad litem, see Editor's Note under § 1-65.

Appearing by Guardian Ad Litem.—Where an infant appears by guardian ad litem, a copy of the summons having been left with him, and served on his guardian, the fact that no copy of summons was left with his "father, mother or guardian," is immaterial. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518 (1900).

Slight Irregularity Does Not Vitiolate.—A judgment will not be vacated because some of a number of infant defendants, united in interest, appeared only by a guardian ad litem, appointed without process previously served on such infants. *Matthews v. Joyce*, 85 N. C. 258 (1881).

In an action for the recovery of the possession of land, the defendant, in support of his title, offered in evidence a special proceeding and order for sale of land for assets and deed thereunder, to which plaintiff objected because it did not appear that the guardian ad litem appointed for the feme plaintiff, who was a party to the proceeding, was served with summons, or appeared or filed any answer. Summons was served upon the infant according to law: Held, there was not such irregularities as made the proceeding void. *Coffin*

v. Cook, 106 N. C. 376, 11 S. E. 371 (1890).

It has been held that where a judgment has been rendered against an infant on whom summons was not served as required by this section, but for whom a guardian ad litem was appointed by the court, and an answer was filed by such guardian ad litem in good faith, the judgment is conclusive on the infant, notwithstanding the irregularity, until set aside on motion in the cause. But such judgment is not conclusive and binding on the infant, where it appears upon the face of the record that the interests of the infant in the subject matter of the action were not presented to the court in good faith by the guardian ad litem, and passed upon by the court. *Wyatt v. Berry*, 205 N. C. 118, 170 S. E. 131 (1933).

Nonresident Infant.—A court cannot obtain jurisdiction of a bill against a nonresident infant, as the statute gives no provision for any other than personal service. *Jones v. Mason*, 4 N. C. 561 (1817).

Applied in *Graham v. Floyd*, 214 N. C. 77, 197 S. E. 873 (1938).

IV. SERVICE ON INSANE PERSONS.

Section Not Applicable to Summary Proceeding.—A proceeding to have declared sane and competent a person theretofore declared incompetent is a summary proceeding not requiring service of notice on the guardian nor service of summons on the incompetent under this section, it being necessary only that the incompetent be given notice. In re *Dry*, 216 N. C. 427, 5 S. E. (2d) 142 (1939).

Process in Divorce Action.—This section provides the method of service of process on insane persons generally in all classes of actions against them, and process in an action for divorce may be served under its provisions. *Smith v. Smith*, 226 N. C. 544, 39 S. E. (2d) 458 (1946).

Delivery of Summons to Committee of Insane Person Is Necessary.—Where an action is brought against a person judicially declared to be of unsound mind or incapable of conducting his own affairs for whom a committee or guardian has been appointed a copy of the summons must be delivered to the committee or guardian and to the defendant personally. *Hood v. Holding*, 205 N. C. 451, 171 S. E. 633 (1933).

Or Final Judgment Cannot Be Entered.—If the declared incompetent has no committee or guardian, service of notice

may be made upon him personally or the notice may be returned without actual service with the endorsement required by the statute when service cannot be made without the danger of injury to him; but in no event should final judgment be rendered against him without adequate notice to his committee, or to his general or testamentary guardian, or to a guardian ad litem duly appointed by the court. *Hood v. Holding*, 205 N. C. 451, 171 S. E. 633 (1933).

Ex parte proceedings brought by a husband to have his wife declared sane, without any notice or service upon the guardian to whom the law had confided the protection of her rights, were a nullity under this section. *Sims v. Sims*, 121 N. C. 297, 28 S. E. 407 (1897).

V. SERVICE ON UNINCORPORATED ASSOCIATION OR ORGANIZATION.

Right to Sue in Common Name.—Since an unincorporated fraternal association is given power to acquire and hold prop-

erty in its common name by virtue of §§ 39-24 and 39-25 and may be served with summons and sued in the manner provided by subsection (6) of this section, such association has capacity to sue in its common name. It can hardly be questioned that if the association might be sued in its common name by service upon the process agent or the Secretary of State, it follows as a corollary conclusion that it has also the capacity to sue. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 252, 59 S. E. (2d) 829 (1950).

Prior to the 1943 amendment, attempted service of process upon an unincorporated labor union was held void, since such association had no legal entity and could not sue or be sued in the name of the association. *Hallman v. Wood, Wire, etc., Union*, 219 N. C. 798, 15 S. E. (2d) 361 (1941).

Quoted in *Venus Lodge v. Acme Benevolent Ass'n*, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446 (1950).

Cited in *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 648, 62 S. E. (2d) 73 (1950).

§ 1-98. Service by publication.—Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the State, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an adoption proceeding instituted in this State, or that he is a proper party to an action relating to real property in this State, such court or judge may grant an order that the service be made by publication of a notice in either of the following cases:

1. Where the defendant is a foreign corporation and has property, or the cause of action arose, in the State.

2. Where the defendant, a resident of this State, has departed therefrom or keeps himself concealed therein with intent to defraud his creditors or to avoid the service of a summons.

3. Where he is not a resident, but has property in this State, and the court has jurisdiction of the subject of the action.

4. Where the subject of the action is real or personal property in this State, and the defendant has, or claims, or the relief demanded consists wholly or partly in excluding him from any actual or contingent lien or interest therein.

5. Where the action is for divorce.

6. Where the stockholders of a corporation are deemed to be necessary parties to an action and their names or residences are unknown; or where the names or residences of parties interested in real estate the subject of an action are unknown, if the name of at least one of the parties to the action and interested in the subject matter thereof is known, and he is a resident of the State, the court having jurisdiction may, upon affidavit that after due diligence the names or residences of such parties cannot be ascertained, authorize service by publication.

7. Where in actions for the foreclosure of mortgages on real estate, if any party having any interest in, or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit.

8. Where no officer or agent of a domestic corporation upon whom service can

be made can, after due diligence, be found in the State, and such facts are made to appear by affidavit. This subsection also applies to all summonses, orders to show cause, orders and notices issued by any board of aldermen, board of town or county commissioners, or by individuals.

9. Where the action or proceeding is for the adoption of a minor child or children, residents of the State, whose parent or parents are necessary parties to the action or proceeding, and the said parent or parents are nonresidents of the State or cannot, after due and diligent search, be found within the State.

10. Where the action is for annulment of marriage. (Code, ss. 218, 221; 1885, c. 380; 1889, cc. 108, 263; 1895, c. 334; Rev., s. 442; C. S., s. 484; 1947, c. 838; 1949, c. 85.)

I. In General.

II. Service by Publication on Foreign Corporation.

III. Service by Publication on Nonresident with Property within State.

IV. Service by Publication Where Lien Is Subject of Litigation.

V. Service by Publication in Actions for Divorce.

VI. Service by Publication on Domestic Corporation.

Cross References.

As to personal service on nonresident, see § 1-104. As to service of summons by publication on parties in proceeding to sell land for assets, see § 28-87. As to defense after judgment has been rendered by defendant served by publication, see § 1-108. As to publication of notice to nonresident parties of taking of deposition in action or proceeding, see § 8-73. As to service of summons on executor without bond by publication, see § 28-179. As to manner of publication, see § 1-588.

See note to § 1-104.

I. IN GENERAL.

Editor's Note.—The 1947 amendment inserted in the preliminary paragraph the words "or that he is a proper party to an adoption proceeding instituted in this State." It also added subsection 9. The 1949 amendment added subsection 10.

For brief comments on the 1947 and 1949 amendments, see 25 N. C. Law Rev. 392; 27 N. C. Law Rev. 452. For article criticising certain aspects of the procedural divorce law and recommending changes thereof, see 25 N. C. Law Rev. 192.

Statute Strictly Construed.—The service of process by publication is in derogation of the common law and the statute making provision therefor must be strictly construed. The court must see that every prerequisite prescribed exists in the particular case before it grants the order of publication. Board of Com'rs v. Bumpass, 233 N. C. 190, 63 S. E. (2d)

144 (1951).

The service of the summons or notice, as an original process in the action by publication, must be made strictly in accordance with the requirements of the statute. This method of service of process and giving the court jurisdiction is peculiar, and out of the usual course of procedure. The statute prescribes, with particularity and caution, the cases and causes that must exist and appear by affidavit to the court in order that it may be allowed. The court must see that every prerequisite prescribed exists in any particular case before it grants the order of publication. Otherwise the publication will be unauthorized, irregular and fatally defective, unless in some way such irregularity shall be waived or cured. *Spiers v. Halstead, etc., Co.*, 71 N. C. 209 (1874); *Wheeler v. Cobb*, 75 N. C. 21 (1876); *Windley v. Bradway*, 77 N. C. 333 (1877); *Faulk v. Smith*, 84 N. C. 501 (1881); *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892).

Unless the provisions of this section are observed the service of a summons by publication in such cases will be ineffective. *Martin v. Martin*, 205 N. C. 157, 170 S. E. 651 (1933).

Not only must it be shown that the defendant has property in this State; the cause of action must be stated with such clearness and comprehension as may enable the court to determine its sufficiency. *Martin v. Martin*, 205 N. C. 157, 170 S. E. 651 (1933).

The Affidavit—Is Jurisdictional.—The affidavit on which the order of service by publication is made is jurisdictional. *Simmons v. Simmons*, 228 N. C. 233, 45 S. E. (2d) 124 (1947).

The affidavit sufficient in form to support an order for service by publication is jurisdictional, and the affidavit must state the cause of action with sufficient particularity to disclose its nature and to enable the court to determine its sufficiency. *Board of Com'rs v. Bumpass*, 233 N. C. 190, 63 S. E. (2d) 144 (1951).

Same—By Whom Made.—The affidavit required by this section may be made by an agent or attorney. *Weaver v. Roberts*, 84 N. C. 494 (1881).

Same—When Made.—It seems that the affidavit may be made after the order, provided the order remains in abeyance until the affidavit is filed. *Bank v. Blossom*, 92 N. C. 695 (1885).

Same—Allegations.—Everything necessary to dispense with personal service must appear by affidavit. *Wheeler v. Cobb*, 75 N. C. 21 (1876).

Same—Proper Party and Cause of Action Must Be Shown.—A brief summary of the facts constituting the cause of action, or of the facts showing that the parties are necessary parties to the action, should be stated so that the court can see and determine that there exists a cause of action, or that the parties are necessary for some appropriate purpose. The party demanding the order shall not be the judge to determine that a cause of action exists, or that the parties sought to be made parties are necessary parties. It is the province and duty of the court to see the facts and determine the legal question as to whether there is a cause of action or not. Nor is it sufficient to state that the party is a necessary party to an action to compel specific performance of a contract to convey land in a particular locality. The facts must be stated with sufficient fullness to develop the contract and the relation of the parties to it. Otherwise the party demanding the order will determine that he has a cause of action, while the statute requires the court to do so upon facts appearing by affidavit. *Clafin v. Harrison*, 108 N. C. 157, 12 S. E. 895 (1891); *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892).

Where, upon the facts alleged, no judgment can be rendered affecting lands, it must follow that the defendant is not a proper or necessary party, such as is contemplated by this section. *Clafin v. Harrison*, 108 N. C. 157, 12 S. E. 895 (1891).

It is always best to use the form of affidavit suggested in the statute. The omission from the affidavit of those averments on which service of notice by publication is substituted for personal service would be fatal to the proceeding. But the statement in the affidavit that the applicant has a "good" cause of action, of a certain character, is not so classed. Neither this section nor § 1-99 requires the applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. *Simmons v.*

Simmons, 228 N. C. 233, 45 S. E. (2d) 124 (1947).

Same—Necessity for Averment of Due Diligence.—The authorities seem to be decisive that, under this section as now framed, the allegation that a defendant cannot be found in the State, after diligent search, is an essential averment to a service of original process by publication. *Wheeler v. Cobb*, 75 N. C. 21 (1876); *Faulk v. Smith*, 84 N. C. 501 (1881); *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906); *Sawyer v. Camden Run Drainage Dist.*, 179 N. C. 182, 102 S. E. 273 (1920); *Denton v. Vassilades*, 212 N. C. 513, 193 S. E. 737 (1937).

The jurisdiction of the court, where substituted service is sought, depends upon the factual representations made to it under statutory procedure. Since this method of giving notice is out of the ordinary, a strict compliance with this section has always been deemed to be necessary. Averment as to due diligence is jurisdictional and its absence is a fatal defect. *Rodriguez v. Rodriguez*, 224 N. C. 275, 29 S. E. (2d) 901 (1944).

This allegation as to diligence is the very cornerstone to obtain jurisdiction by publication. *Fowler v. Fowler*, 190 N. C. 526, 130 S. E. 315 (1925).

An averment, by affidavit or otherwise, that the defendants "cannot, after due diligence, be found in the State," is an essential requirement to obtain service of summons by publication, under this section, and it must be made to appear "to the satisfaction of the court." *Groce v. Groce*, 214 N. C. 398, 199 S. E. 388 (1938).

And the fact that the defendant is a nonresident, is not a sufficient averment in the affidavit, it being necessary to show that after due diligence he cannot be found within the State. *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270 (1920). A publication based upon the mere allegation that the defendant is a nonresident does not give the court jurisdiction under the section. *Flint v. Coffin*, 176 F. 872 (1910).

An averment in an affidavit that "defendant . . . after diligent inquiry cannot be found in the State of North Carolina" is in substantial compliance with this section and supports an order for service by publication. *Simmons v. Simmons*, 228 N. C. 233, 45 S. E. (2d) 124 (1947).

Same—What Constitutes Due Diligence.—When the affidavit for publication sets out the return of the sheriff and

avers that the defendants cannot be found "after due search," this is tantamount to "due diligence." *Rose v. Davis*, 140 N. C. 266, 52 S. E. 780 (1905).

But, as will be seen from a later paragraph, this section does not require the issuance and return of summons not served. The preceding paragraph is only an illustration of the diligence that will suffice.—Ed. Note.

Same—Specific Allegation of Jurisdiction.—There is no requirement in this section that an allegation as to the court's jurisdiction shall be made specifically in the affidavit. If the jurisdiction of the court, as to the subject of the action, appears from the facts alleged in the affidavits, and in the complaint, which was on file at the time the orders were made, this was sufficient. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892); *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912); *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270 (1920); *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 558 (1926).

Same—Other Allegations.—Specific allegations necessary to obtain the order under the particular subdivisions of the section will be found under the following analysis line of this note.—Ed. Note.

Same—Amendment.—Where the affidavit for the publication of a summons was defective, it was proper for the judge to permit an amendment and grant an alias order of publication instead of dismissing the action. *Mullen v. Norfolk*, etc., Canal Co., 112 N. C. 109, 16 S. E. 901 (1893).

While an affidavit, upon which substituted service is based, may be amended, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is void for want of jurisdiction. *Rodriguez v. Rodriguez*, 224 N. C. 275, 29 S. E. (2d) 901 (1944).

Affidavit Not Required in Proceedings to Foreclose Tax Certificate.—Where the summons in proceedings to foreclose a tax certificate of the sale of lands in the action against the listed owner of the lands has been returned the defendant "not to be found," it is not required as under the provisions of this section, that this fact be made to appear by affidavit to the satisfaction of the court in order for valid service by publication. *Orange County v. Jenkins*, 200 N. C. 202, 156 S. E. 774 (1931).

Process Must Name Parties Correctly.—In actions for foreclosure of mortgages on real estate, in the nature of which are tax foreclosure proceedings, under § 105-414, "if any party having an interest in,

or lien upon, such mortgaged premises, is unknown to the plaintiff, and his residence cannot, with reasonable diligence, be ascertained, and such fact is made to appear by affidavit," the court may order that service be made by publication of a notice of the action. But, in accordance with the rule that notice to a party defendant is required in order to give the court jurisdiction, the process must correctly name the parties. This requirement is mandatory. *Board of Com'rs v. Gaines*, 221 N. C. 324, 20 S. E. (2d) 377 (1942).

Issuance and Return of Summons Not a Prerequisite.—This section does not require the issuance and return of summons not served as the basis of or condition precedent to the publication. *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906), overruling *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902), and reinstating *Best v. British*, etc., Mortg. Co., 128 N. C. 351, 38 S. E. 923 (1901).

Rights of Heirs May Be Determined Where Service Is by Publication.—A judgment entered in an action to determine the heirs at law of intestate for the purpose of distributing funds in the hands of his administrator, in which the court has jurisdiction of the administrator and the funds in his hands, and some of the heirs appear in court and the other heirs are duly served by publication, is not void, the judgment being one in rem, and service valid under this section. *Ferguson v. Price*, 206 N. C. 37, 173 S. E. 1 (1934).

Where the suit is merely in personam to determine the personal rights and obligations of the defendants, constructive service upon a resident is ineffectual for any purpose. *Hinton v. Penn. Mut. Life Ins. Co.*, 126 N. C. 18, 35 S. E. 182 (1900).

Necessity That Minors Be Represented by Guardian.—In a suit to enforce a tax lien by foreclosure, where the affidavit, orders and notices appear sufficient in form to constitute service by publication upon all persons named therein, both adult and minors, their heirs and assigns, known and unknown, under this section, yet, minors, if any, must be represented by guardian, or guardian ad litem, otherwise such minors are not bound by the judgments in the action. *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

An action for specific performance under this section is in the nature of an action in rem, and a contract for the conveyance of real property may be enforced against a nonresident. In such cases the

court has the power to determine who is entitled to the property and to vest title by decree in the party entitled to the same. *Voehringer v. Pollock*, 224 N. C. 409, 30 S. E. (2d) 374 (1944).

Cited in *Cutter v. American Trust Co.*, 213 N. C. 686, 197 S. E. 542 (1938); *Perkins v. Perkins*, 232 N. C. 91, 59 S. E. (2d) 356 (1950).

II. SERVICE BY PUBLICATION ON FOREIGN CORPORATION.

Editor's Note.—Section 55-38, providing for service on a statutory agent of a foreign corporation, would seem to apply in nearly all the instances in which the circumstances prescribed by this subsection would occur. In view of the holding in *Pardue v. Absher*, 174 N. C. 676, 94 S. E. 414 (1917), it is probable that the two sections would be construed as cumulative, one of the other, and that the plaintiff might exercise an option as to the method of procedure.

Under this subsection, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State are property of such corporation. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348 (1898).

III. SERVICE BY PUBLICATION ON NONRESIDENT WITH PROPERTY WITHIN STATE.

In General.—A valid service by publication cannot be made on a nonresident unless he has property within the State. *Everitt v. Austin Bros.*, 169 N. C. 622, 86 S. E. 523 (1915), and it is necessary to set forth this fact in the affidavit. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892).

A chose in action is property, and embraced in the terms of this subsection. *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198 (1889).

Where the summons has been duly returned "defendant not to be found in the State," and at the time of its issuance it was alleged in a verified complaint and in supporting affidavits that the cause of action was for money had and received, and that the defendant was beyond the limits of the State, and was a resident of another state, this section has been substantially complied with and the validity of the service is upheld. *Bethell v. Lee*, 200 N. C. 755, 158 S. E. 493 (1931).

Attachment Necessary.—In an action in personam, in which no attachment has been or can be issued, service by publication on a nonresident is ineffectual for any purpose. *Winfree v. Bagley*, 102 N. C.

515, 9 S. E. 198 (1889). See also, *Price v. Cox*, 83 N. C. 261 (1880); *Wilson v. St. Louis Cook Mfg. Co.*, 88 N. C. 5 (1883).

To make valid substituted service under this section, the nonresident defendant not only must have property in the State, but the subject of the suit must be within the jurisdiction, or under the control of the court by attachment, restraining order, or otherwise. *Southern Mills v. Armstrong*, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248 (1943).

Where an action is for the recovery of a debt and there is no attachment of the property to confer jurisdiction there can be no service by publication of the summons, or hence, actual service in another state "in lieu of publication" would be invalid. *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347 (1894); *Bernhardt v. Brown*, 118 N. C. 700, 701, 24 S. E. 527 (1896).

General Judgment Cannot Be Taken.—A plaintiff cannot take a general and personal judgment against a defendant, who is a nonresident, upon a service by publication and not even when an attachment has been levied on his property, the court having jurisdiction to adjudge against him only to the extent of the property seized. *May v. Getty*, 140 N. C. 310, 53 S. E. 75 (1905).

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident for the purpose of service of summons by publication within subsection 3 of this section even though he may have retained his domicile in this State. And the cause of his absence from the State is immaterial if such absence prevents personal service for an indefinite period of time. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

IV. SERVICE BY PUBLICATION WHERE LIEN IS SUBJECT OF LITIGATION.

In General.—In *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565 (1877), it is said: "Such service (by publication) may also be sufficient in cases where the object of the action is to reach and dispose of property in the State, or of some interest therein, by enforcing a contract or lien respecting the same, or to partition it among different owners, or, where the public is a party, to condemn and appropriate it for a public purpose." This is cited and approved in *Winfree v. Bagley*, 102 N. C. 515, 9 S. E. 198 (1889); and *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347 (1894);

Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, 715 (1896).

A judgment to enforce a mechanic's lien is a proceeding in rem, and service by publication is authorized by this subsection. Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, 715 (1896).

V. SERVICE BY PUBLICATION IN ACTIONS FOR DIVORCE.

For article on "North Carolina and Jurisdiction for Divorce," mentioning this section, see 1 N. C. Law Rev. 95 et seq.

The Affidavit.—The requirements of this section are mandatory, and must be followed in good faith in actions of divorce to obtain an order of publication of service of summons, and where the plaintiff in divorce fails to make affidavit that the defendant cannot after due diligence be found in the State, knowing that she was residing in another county therein, subject to personal service, and the summons has been returned endorsed that defendant cannot be found within the county of its issuance, etc., the judgment rendered therein by the superior court is void, and may be vacated by the court granting it within its inherent powers. Fowler v. Fowler, 190 N. C. 536, 130 S. E. 315 (1925). For cases pertaining to the affidavit generally, see ante, this note, "In General" I.

Order of publication of service of summons in an action by the wife for divorce is not objectionable as irregular, for the failure of the affidavit to set forth a good cause of action, when there are therein allegations that the husband abandoned his wife, had left the State after having wrongfully appropriated her separate property to his own use, leaving her without support, and had subjected her to an inquisition of lunacy, and is now professionally engaged in another state upon a good salary, etc.; and this principle also applies to a suit of the wife to recover lands purchased by the husband with her separate money, and the title taken in himself without her consent, and in either case publica-

tion may be made. White v. White, 179 N. C. 592, 103 S. E. 216 (1920).

The Supreme Court has the power to permit an amendment therein to an affidavit made for the publication of a summons; but where the action is for divorce a vinculo, and the defect is in omitting the averment that the defendant cannot after due diligence be found in this State, and it is admitted that the defendant is a non-resident and at the time embraced by the publication, was absent from the State, the Supreme Court may remand the case to the superior court to hear and consider the evidence, and the superior court judge, for the purpose of being advised may submit the question to a jury. Davis v. Davis, 179 N. C. 185, 102 S. E. 270 (1920).

Applied in King v. King, 84 N. C. 32 (1881); Burrowes v. Burrowes, 210 N. C. 788, 188 S. E. 648 (1936).

VI. SERVICE BY PUBLICATION ON DOMESTIC CORPORATION.

Editor's Note.—As in the case of service of process by publication on a foreign corporation, discussed ante this note under the analysis line, "Service by Publication on a Foreign Corporation," II, it would appear that this subsection has been radically affected by the provisions of § 55-38 which were taken from the Public Laws of 1901. The exact effect of this latter act is conjectural as the point has not been adjudicated by the cases.

In General.—Until the passage of this section there was no means provided for service of process against a domestic corporation whose officers and agents could not be found. It was simply a casus omisus. Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, 715 (1896).

"Certainly it is competent for the legislature to provide that, as to a corporation created by it, if no officer or agent of such corporation can be found in the State, then service can be had by publication." Bernhardt v. Brown, 118 N. C. 701, 24 S. E. 527, 715 (1896).

§ 1-99. Manner of publication.—The order must direct the publication in one or two newspapers to be designated as most likely to give notice to the person to be served, and for such length of time as is deemed reasonable, not less than once a week for four successive weeks, of a notice, giving the title and purpose of the action, and requiring the defendant to appear and answer, or demur to the complaint at a time and place therein mentioned; and no publication of the summons, or mailing of the summons and complaint, is necessary. The cost of publishing a summons in a newspaper shall be in accordance with the provisions of § 1-596 of the General Statutes of North Carolina. (C. C. P., c. 84; 1876-7, c. 241, s. 3; Code, s. 219; 1903, c. 134; Rev., s. 443; C. S., s. 485; 1949, c. 205, s. 1.)

Cross Reference.—As to cost of legal advertising, see § 1-596.

Editor's Note.—The 1949 amendment rewrote the second sentence.

For article criticising certain aspects of the procedural divorce law, see 25 N. C. Law Rev. 192.

The statutory provisions as to time and method of giving notice by publication are mandatory. And service of process by publication upon an individual nonresident is valid only when the provisions of the statutes authorizing constructive service have been strictly complied with. *Southern Mills v. Armstrong*, 223 N. C. 495, 27 S. E. (2d) 281, 148 A. L. R. 1248 (1943). The primary purpose of the requirements as to publication is to give notice to the defendant, and publication in a newspaper of general circulation in the county is permitted as the most likely means available for that purpose. Hence, the minimum time prescribed is essential for establishing constructive notice. Publication for a period, or in a manner, less than that prescribed would be insufficient in law to bring the defendant constructively into court or justify a judgment based thereon. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

The expression "not less than once a week for four successive weeks" contemplates a publication once each week for four consecutive weeks, and this requires that the publications be spaced substantially at intervals of 7 days for four successive weeks. The four publications need not occupy the full period of 28 days and may be deemed completed with less than that number of days intervening between first and last publication when considered in connection with the statutory provision (§ 1-100) that service shall be deemed complete 7 days after last publication. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

Sufficiency of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861 (1891).

Order of service of summons by publication held to conform to the requirements of this section. *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138 (1951).

A publication on the 1st, 8th, 15th and 22nd will be sufficient, though there be less than 28 days between the first and last publication. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

A publication on Saturday of one week and on Monday of each of the following three weeks, is insufficient to meet the requirements of the statute. *Scott & Co. v.*

Jones, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

Service of summons made by publication from 3 of August to 31 of August, the term of the court to which the process was returnable beginning on the latter day, is a sufficient publication of "once a week for four weeks," and a compliance with the statutes in that respect. *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861 (1891).

The order for publication need not state that the newspaper is the one most likely to give notice to the person to be served. *Smith v. Smith*, 226 N. C. 506, 39 S. E. (2d) 391 (1946).

There being no specific requirement of statute that an order for the publication of summons state that the paper in which the publication is ordered to be printed is the one "most likely to give notice to the person to be served," a judgment that the clerk be restrained from ordering publication in a certain paper without such finding in the order is beyond the terms of the statute and would seem to be discriminatory, and on appeal the judgment will be modified. *Elias v. Commissioners of Buncombe County*, 198 N. C. 733, 153 S. E. 323 (1930).

Presumption in Favor of Sufficient Publication.—An order for publication of notice of summons being made by a court of record there is a presumption in favor of the rightfulness of its decrees, and it will be presumed that the statutory findings and determination had been made without specific adjudication in the order to that effect. *Elias v. Commissioners of Buncombe County*, 198 N. C. 733, 153 S. E. 323 (1930); *Smith v. Smith*, 226 N. C. 506, 39 S. E. (2d) 391 (1946).

This section does not require applicant to swear to the merits of his cause of action—only to say that he has one and the purpose thereof. *Simmons v. Simmons*, 228 N. C. 233, 45 S. E. (2d) 124 (1947).

A judgment rendered upon an insufficient publication of notice of summons and attachment is void and does not constitute a lien upon the lands of the judgment debtor. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

Warrant of Attachment Insufficient.—The publication of the warrant of attachment does not serve the purpose of this section, as the section specifies that the publication of notice must be in a newspaper. *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61 (1901).

Cited in *In re Estate of Smith*, 226 N. C. 169, 37 S. E. (2d) 127 (1946).

§ 1-100. When service by publication complete; time for pleading.—In the cases in which service by publication is allowed, the summons is deemed served at the expiration of seven days from the date of the last publication and the party so served is then in court. Such party shall have twenty days thereafter in civil actions and ten days in special proceedings in which to answer or demur. (C. C. P., s. 88; Code, s. 227; Rev., s. 444; C. S., s. 487; 1939, c. 49, s. 1; 1945, c. 158.)

Editor's Note.—The 1939 amendment added the part of this section appearing in the second sentence.

The 1945 amendment substituted the words "seven days from the date of the last publication" for the words "the time prescribed by the order of publication." It also inserted near the end of the first sentence the words "so served", and substituted at the beginning of the second sentence the words "such party" for the words "and the defendant".

For comment on the 1939 and 1945

amendments, see 17 N. C. Law Rev. 345 and 23 N. C. Law Rev. 331.

Validation of Certain Judgments.—For act validating certain judgments, orders, etc., in actions in which summons was served by publication without complying with § 1-100, as amended in 1945, see Session Laws 1947, c. 666. See also, 25 N. C. Law Rev. 394.

Cited in *In re Estate of Smith*, 226 N. C. 169, 37 S. E. (2d) 127 (1946); *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

§ 1-101. Jurisdiction acquired from service.—From the time of service of the summons, in a civil action, or the allowance of a provisional remedy, the court is deemed to have acquired jurisdiction, and to have control of all subsequent proceedings. (C. C. P., s. 90; Code, s. 229; Rev., s. 445; C. S., s. 488.)

Cross Reference.—As to when action is commenced, see § 1-14.

Service Confers Jurisdiction.—It is the service of summons and not the return of the officer that confers jurisdiction. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177

(1949).

Stated in *In re Will of Winborne*, 231 N. C. 463, 37 S. E. (2d) 795 (1950).

Cited in *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336 (1938).

§ 1-102. Proof of service.—Proof of service of summons or service by publication must be—

- (1) By the return of the sheriff or other proper officer; or
- (2) By affidavit of publication, as provided by G. S. 1-600; or
- (3) By the written admission of the party to be served; or
- (4) By the written acceptance of service, which acceptance may be made in or outside the State, and such acceptance of service signed and acknowledged before some person authorized to take acknowledgments, shall constitute entry of appearance for all purposes. (C. C. P., s. 89; Code, s. 228; Rev., s. 446; C. S., s. 489; 1951, c. 1005, s. 1.)

Editor's Note.—The 1951 amendment rewrote this section and added subsection 4.

This section is exhaustive and proof of the service of a notice must be such as is required by this section. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780 (1888).

Necessity for Proof.—Where service of process on nonresidents was necessary it is error for the judge of probate (or clerk) to make an order for the sale of lands without adjudging by the proofs required by this section that the defendants had been regularly served with process by publication. *Hyman v. Jarnigan*, 65 N. C. 96 (1871).

Return Is Proof of Service.—The return merely perfects the record and furnishes

proof of service for the guidance of the court. *State v. Moore*, 230 N. C. 648, 55 S. E. (2d) 177 (1949).

Written Admission.—Where service is accepted in writing, it will be treated as "the written admission of" service as contemplated by this section. *First Nat. Bank v. Wilson*, 80 N. C. 200 (1879); *Nicholson v. Cox*, 83 N. C. 44 (1880); *Godwin v. Monds*, 106 N. C. 448, 10 S. E. 1044 (1890).

It is manifest that no verbal admission of service or assent to the service as made will be a service within the provision of this section. *First Nat. Bank v. Wilson*, 80 N. C. 200 (1879).

Personal service of a copy of the sum-

mons on a defendant, or his written admission thereof, is necessary to constitute a case in court. A copy left with defendant's wife is not a legal service, and proof of its delivery to him by her, or of his recognition of or verbal assent thereto,

will not make it sufficient. *First Nat. Bank v. Wilson*, 80 N. C. 200 (1879).

Cited in *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927); *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802 (1936).

§ 1-103. Voluntary appearance by defendant.—A voluntary appearance of a defendant is equivalent to personal service of the summons upon him. (C. C. P., s. 90; Code, s. 229; Rev., s. 447; C. S., s. 490.)

Effect of General Appearance.—A general appearance waives all defects and irregularities, and is sufficient even if there has been no service at all of the summons shown. *Harris v. Bennett*, 160 N. C. 339, 76 S. E. 217 (1912); *Ashford v. Davis*, 185 N. C. 89, 116 S. E. 162 (1923); *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605 (1926); *Asheboro v. Miller*, 220 N. C. 298, 17 S. E. (2d) 105 (1941); *Moseley v. Deans*, 222 N. C. 731, 24 S. E. (2d) 630 (1943).

v. Boyd, 195 N. C. 273, 141 S. E. 891 (1928).

Obtaining Time to Answer.—A defendant who makes a general appearance thereby waives irregularities in the service of summons and subjects himself to the jurisdiction of the court. The same result follows when defendant obtains time within which to answer. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140 (1945).

By making a general appearance and filing an answer upon the merits the defendant waived any defect in the service of the summons. *Moody v. Moody*, 118 N. C. 926, 23 S. E. 933 (1896); *McCollum v. Stack*, 188 N. C. 462, 124 S. E. 864 (1924).

The giving of a replevy bond is equivalent to a general appearance entered by a defendant in attachment, and is a waiver of the irregularities, if any, in the service of summons, or the necessity of such service, and estops the defendant from denying ownership of the property levied on, but it does not estop defendant from traversing the truth of the allegation on which the attachment is based. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

Where the controverted matter of custody of his two children was originally presented to the juvenile court by appellant, it was held that he may not be heard to complain of irregularity, since the proceeding was instituted at his instance, and he was personally present in court for the hearing which he had invoked. *In re Prevatt*, 223 N. C. 833, 28 S. E. (2d) 564 (1944).

A motion to dismiss for failure of plaintiff to file security for costs, pertains to a procedural question apart from the merits of the action, and an appearance for the purpose of making this motion, and a motion to dismiss for want of jurisdiction, does not constitute a general appearance. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

An appearance for the purpose of filing a demurrer or answer to the complaint is a general appearance to its merits and confers jurisdiction by waiving a proper service of summons. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928); *Reel*

Cited in *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

§ 1-104. Personal service on nonresident.—When the place of residence of a person out of the State is known and the same is made to appear by affidavit or in a verified complaint, in lieu of publication in a newspaper it is sufficient to mail a copy of the summons, notice or other process, accompanied by a statement as to the nature of the action or proceeding, to the sheriff or other process officer of the county and state where the defendant resides, who shall serve same according to its tenor. The process officer who serves the paper shall, in making his return, use a form of certificate substantially as follows:

State of
County of

Affidavit of
Service of Summons;
Clerk's Certificate

I, [Sheriff or other process officer] of the county [or city] of

....., State of, being duly sworn, do certify that on the day of, 19.., I served the summons and accompanying statement hereto attached by delivering a copy of the same to, the defendant(s) therein named.

..... [Sheriff or other process officer]

I,, Clerk of the Court of the County [or City] of, State of, do certify that said court is a court of record having the seal hereto attached; that is well known to me as [Sheriff or other process officer] of said county [or city] of, and that he has full power and authority to serve any and all legal processes issuing from courts of this State; that said personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on

This the day of, 19...

[L. S.]

Clerk of the Court of the County [or City] of, State of

Provided, that in all cases where service of process has been made upon a non-resident based upon a verified complaint in conformity with the amendment set forth in this section, all such service of process is hereby declared to be lawful, legal and valid, and all orders, judgments and decrees based thereon are declared to be legal and valid and binding upon all of the parties thereto, and all proceedings based upon the same are hereby validated, except that this proviso shall not apply to pending litigation. (1891, c. 120; Rev., s. 448; C. S., s. 491; 1943, c. 543; 1945, c. 139.)

Editor's Note.—The 1943 amendment inserted the form of affidavit of service of summons, and changed the form of the clerk's certificate.

The 1945 amendment inserted in the first sentence the words "or in a verified complaint," and added the proviso at the end of the section. The amendment mentioned in the proviso refers to the insertion of the quoted words.

When Service by Mail Permitted.—The service of summons and other process authorized by this section is "in lieu of publication in a newspaper," and can only be made in those cases where publication could be made, to wit, in actions which are virtually proceedings in rem or quasi in rem, and in which the jurisdiction as to nonresidents only authorizes a judgment acting upon the property. *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347 (1894).

Cumulative Method.—The method of mailing the process is optional and not exclusive of service by publication in cases in which this last is proper. *Mullen v. Norfolk, etc., Canal Co.*, 114 N. C. 8, 19 S. E. 106 (1894).

Jurisdiction Acquired. — The courts of this State have jurisdiction of the persons of nonresident defendants to the extent required in proceedings in rem or quasi in rem, when personal service is made by complying with the requirements of this

section and the property is situated here. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908).

Omission of Clerk's Seal.—A summons issued without the seal of the clerk of the court, personally served upon nonresident defendants under this section, is an irregularity. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908).

Objection made to the summons, which was issued under this section without the seal of the clerk of the court to nonresident defendants, cannot be sustained when it appears that the defendants have been actually notified of the time and place of the trial and informed of the nature and purpose of the action. Such defect may now be cured by the act of the clerk in supplying the seal pursuant to an order properly made in the cause. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908).

Application.—A motion, by special appearance of the nonresident defendants, to dismiss the action for want of jurisdiction of the person will not be granted in a suit to redeem lands and to enforce a contract solely in respect of the same, when the locus in quo is situated within the State and personal service was made in compliance with this section. *Vick v. Flournoy*, 147 N. C. 209, 60 S. E. 978 (1908).

Where from the verified pleadings of a party the location of the defendant is determined and personal service has been

made, an exception to the validity of the service on the ground that the place of residence of defendant in another state was not made to appear by affidavit to the clerk prior to the mailing of the summons cannot be sustained, the provisions of this section having been substantially complied with. *Fidelity, etc., Co. v. Green*, 200 N. C. 535, 157 S. E. 797 (1931). But a different rule applies to § 1-98, relating to service by publication where the defendant's rights may be lost through lack of knowledge and lapse of time.

This section has no application to service of subpoenas in criminal actions. There is no statute which authorizes service on witnesses beyond the State in such cases. *State v. Means*, 175 N. C. 820, 95 S. E. 912 (1918).

Applied in *Vestal v. Moseley Vending Machine Exch.*, 219 N. C. 468, 14 S. E. (2d) 427 (1941).

Cited in *Cutter v. American Trust Co.*, 213 N. C. 686, 197 S. E. 542 (1938); *McLean v. McLean*, 233 N. C. 139, 63 S. E. (2d) 138 (1951).

§ 1-105. Service upon nonresident drivers of motor vehicles.—The acceptance by a nonresident of the rights and privileges conferred by the laws now or hereafter in force in this State permitting the operation of motor vehicles, as evidenced by the operation of a motor vehicle by such nonresident on the public highways of this State, or the operation by such nonresident of a motor vehicle on the public highways of the State other than as so permitted or regulated, shall be deemed equivalent to the appointment by such nonresident of the Commissioner of Motor Vehicles, or of his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against him, growing out of any accident or collision in which said nonresident may be involved by reason of the operation by him, for him, or under his control or direction, express or implied, of a motor vehicle on such public highway of this State, and said acceptance or operation shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally. Service of such process shall be made by leaving a copy thereof, with a fee of one dollar, in the hands of said Commissioner of Motor Vehicles, or in his office, and such service shall be sufficient service upon the said nonresident: Provided, that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or the Commissioner of Motor Vehicles to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause, and provided that entries on the defendant's return receipt shall be sufficient evidence of the date on which notice of service upon the Commissioner of Motor Vehicles and copy of process were delivered to the defendant, on which date service on said nonresident shall be deemed completed. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action. (1929, c. 75, s. 1; 1941, c. 36, s. 4; 1951, c. 646.)

Editor's Note.—The 1951 amendment inserted the second proviso to the next to last sentence.

This section is constitutional and valid. *Bigham v. Foor*, 201 N. C. 14, 158 S. E. 548 (1931); *Wynn v. Robinson*, 216 N. C. 347, 4 S. E. (2d) 884 (1939).

Section Not Retroactive.—This section providing that a nonresident by using the highways of the State, will be deemed to have appointed the Commissioner of Revenue as his agent for the service of process is not remedial or curative, but affects a substantial right, and the appointment of the Commissioner thereunder is contractual, and the statute is not to be given retroactive effect, and service of process

thereunder in an action accruing before the effective force of the statute is void. *Ashley v. Brown*, 198 N. C. 369, 151 S. E. 725 (1930).

Car Must Be under Control of Nonresident Defendant.—In order to hold an attempted service upon a nonresident valid under this section there must be sufficient evidence to support a finding that the automobile was operated under the "control or direction, express or implied" of the nonresident defendant. *Smith v. Haughton*, 206 N. C. 587, 174 S. E. 506 (1934).

An affidavit of a salesman that the details of his schedule and the control of his automobile were determined by him, subject to the approval of his corporate em-

ployer, supports the finding of the court that the automobile was being operated for the corporate employer and under its control and direction, express or implied, within the meaning of this section and, in an action to recover for alleged negligent operation of the car, service of process on the corporate employer through the Commissioner of Revenue is valid. *Wynn v. Robinson*, 216 N. C. 347, 4 S. E. (2d) 884 (1939). See also, *Queen City Coach Co. v. Chattanooga Medicine Co.*, 220 N. C. 442, 17 S. E. (2d) 478 (1941).

Averments in affidavits that the automobile causing the injury in suit, admittedly owned by the nonresident corporate defendant and driven in this State by its salesman, was being driven here with the corporation's permission for the purpose of effecting a sale, is sufficient evidence to support the court's finding that the automobile was being driven at the time of the injury for the corporation or was under its implied control and direction so as to support service of process on it by service on the Commissioner of Revenue. *Crabtree v. Burroughs-White Chevrolet Sales Co.*, 217 N. C. 587, 9 S. E. (2d) 23 (1940).

Where a deputy sheriff of the state of South Carolina was traveling through this State to return a prisoner to that state in his own car, which was driven by another whom he engaged to drive the car and to assist in returning the prisoner, it was held that the deputy sheriff was without authority to designate another to act for the sheriff, and the driver of the car was not operating same for the sheriff and under the sheriff's direction and control within the purview of this section, and therefore service of process on the sheriff by service on the Commissioner of Revenue was void. *Blake v. Allen*, 221 N. C. 445, 20 S. E. (2d) 552 (1942).

Nonresident wife living with her husband in another state may serve summons on him by service on Commissioner of Revenue in her action instituted in a county in this State, to recover for injuries sustained in an automobile accident which occurred in this State and which resulted from his alleged negligence. *Alberts v. Alberts*, 217 N. C. 443, 8 S. E. (2d) 523 (1940).

Where plaintiff is the wife of defendant, both are nonresidents, and the action was instituted to recover for injuries sustained by plaintiff in an automobile accident which occurred in this State, service of process on defendant by service on the Commissioner of Revenue under the provisions of this section is valid. *Bogen v.*

Bogen, 219 N. C. 51, 12 S. E. (2d) 649 (1941).

Findings by Trial Court That Defendant Was a Nonresident Is Conclusive on Appeal.—Upon motion to dismiss an action on the ground that the defendant was a resident of this State and was served with summons under a statute authorizing service on nonresidents, the finding of fact by the superior court judge that the defendant was a nonresident, based upon competent evidence, is conclusive on appeal. *Bigham v. Foor*, 201 N. C. 14, 158 S. E. 548 (1931).

This section makes no provision for service on the personal representative of a deceased automobile owner who dies after an accident occurring in this State and before service of process, and service under the statute upon such personal representative confers no jurisdiction on our courts, since an agency, unless coupled with an interest, is terminated by the death of the principal. *Dowling v. Winters*, 208 N. C. 521, 181 S. E. 751 (1935).

This section does not warrant service upon a nonresident owner in an action for abuse of process based upon such owner's arrest of plaintiff after a collision between their cars in this State, since the action for abuse of process does not arise out of a collision in which defendant was involved by reason of the operation of his automobile in this State. *Lindsay v. Short*, 210 N. C. 287, 186 S. E. 239 (1936).

What Sheriff's Return Must Show.—When service of process on a nonresident, through the Commissioner of Motor Vehicles, as provided in this section, is sought, it is essential that the sheriff's return show that such service was made as specifically required, and that a copy of the process be sent defendant by registered mail and return receipt therefor and plaintiff's affidavit of compliance be attached to summons and filed. *Propst v. Hughes Trucking Co.*, 223 N. C. 490, 27 S. E. (2d) 152 (1943).

Amendment.—Where service of process on a nonresident motorist is had in strict accordance with the procedural requirements of this section, such process and the pleading is subject to amendment in accordance with the general rules. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

Service Held Sufficient. — Where the person sought to be sued, personally receives notice by registered mail of summons and complaint giving him unmistakable notice that it was he that was intended to be sued, although the process ran against a nonexistent corporation of

the same name as the firm operated by him, it was held that the service in strict accord with this section is sufficient to meet the requirements of due process of law. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

Applied in *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742

(1948).

Quoted in *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

Cited in *Howard v. Queen City Coach Co.*, 212 N. C. 201, 193 S. E. 138 (1937); *Hodges v. Home Ins. Co.*, 232 N. C. 475, 61 S. E. (2d) 372 (1950).

§ 1-106. Record of such processes; delivery of return.—The Commissioner of Motor Vehicles shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the Commissioner of Motor Vehicles, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff. (1929, c. 75, s. 2; 1941, c. 36, s. 4.)

§ 1-107. Alternative method of service upon nonresident defendants.—In addition to the method provided in §§ 1-105 and 1-106, the plaintiff may adopt the following method of giving notice to a nonresident defendant or defendants:

When the place of residence of the defendant or defendants in the action described in §§ 1-105 and 1-106 is made to appear by affidavit filed with the Commissioner of Motor Vehicles and the plaintiff files with the Commissioner of Motor Vehicles at least five (\$5.00) dollars to pay the costs of the service herein-after provided for, then it shall be sufficient for the Commissioner of Motor Vehicles to mail a copy of the summons, together with a statement sufficient to show the nature of the action or proceedings, accompanied by his certificate that the summons and complaint had been served on him, to the sheriff or other process officer of the county and state where the defendant or defendants reside. This sheriff or other process officer, authorized to serve process in the state to which it is sent, shall serve the same according to its tenor. This sheriff or process officer, who serves the papers, shall, in making his return, use a form of certificate substantially as follows; and this form of certificate shall accompany the other papers in the case:

State of } Affidavit of Service of Summons;
County of } Clerk's Certificate

I, [Sheriff or other process officer] of the County [or city] of State of, being duly sworn, do certify that on the day of, 19.., I served the summons and accompanying statement hereto attached by delivering a copy of the same to, the defendant(s) therein named.

..... [Sheriff or other process officer]

I,, Clerk of the Court of the County [or City] of, State of, do certify that said court is a court of record having the seal hereto attached; that is well known to me as [Sheriff or other process officer] of said county [or city] of, and that he has full power and authority to serve any and all legal processes issuing from courts of this state; that said personally appeared before me this day and made and subscribed the above affidavit relative to service of summons on

This the day of, 19...

[L. S.]
Clerk of the Court of the County
[or City] of, State of

Said sheriff or process officer shall immediately upon the execution of this evidence of service, return the same with the original papers in the cause to the Com-

missioner of Motor Vehicles, Raleigh, North Carolina. When the Commissioner of Motor Vehicles shall receive these papers, thus served, he shall deliver the same to the plaintiff on request, and keep a record showing the date of their receipt by him and their delivery to the plaintiff. Upon the filing of these papers in the court where the action is pending, accompanied by evidence of service upon the Commissioner of Motor Vehicles, as required by § 1-105, that shall constitute presumptive evidence of actual notice to the defendant or defendants of the pendency of the action and of its nature and effect. (1931, c. 33, s. 1; 1941, c. 36; 1943, c. 543.)

Editor's Note.—The 1943 amendment made changes in the return form prescribed by this section. Co., 223 N. C. 490, 27 S. E. (2d) 152 (1943); *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

Cited in *Propst v. Hughes Trucking*

§ 1-107.1. Service upon motor vehicle dealers not found within the State.—(a) The application for and obtaining of a license from the Commissioner of Revenue to engage in any business activity under the provisions of subsection (4) of § 105-89, relating to motor vehicle dealers, shall be deemed equivalent to the appointment by such licensee of the Commissioner of Revenue, or his successor in office, to be his true and lawful attorney upon whom may be served all summonses or other lawful process in any action or proceeding against such licensee resulting from any claim arising out of any business carried on or conducted pursuant to or authorized by said license, and said application for and obtaining of said license shall be a signification of his agreement that any such process against him shall be of the same legal force and validity as if served on him personally.

(b) Service of such process shall be made by leaving a copy thereof, with a fee of one dollar (\$1.00), in the hands of said Commissioner of Revenue, or in his office, and such service shall be sufficient service upon the said licensee provided that notice of such service and a copy of the process are forthwith sent by registered mail by the plaintiff or Commissioner of Revenue to the defendant and the defendant's return receipt and the plaintiff's affidavit of compliance herewith are appended to the summons or other process and filed with said summons, complaint and other papers in the cause. The court in which the action is pending shall order such continuance as may be necessary to afford the defendant reasonable opportunity to defend the action.

(c) The Commissioner of Revenue shall keep a record of all such processes, which shall show the day and hour of service upon him. When the registry return receipt shall be returned to the Commissioner of Revenue, he shall deliver it to the plaintiff on request and keep a record showing the date of its receipt by him and its delivery to the plaintiff.

(d) Service of process may not be made by the method provided in this section unless the person on whom the service is to be made cannot, after due diligence, be found in this State, and that fact is established by affidavit to the satisfaction of the court or a judge thereof. (1947, c. 817, s. 1.)

Editor's Note.—For a brief discussion of this section, see 25 N. C. Law Rev. 392.

§ 1-108. Defense after judgment on substituted service.—The defendant against whom publication is ordered, or who is served under the provisions of §§ 1-104 through 1-107.1, or his representatives, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action; and, except in an action for divorce or annulment or in an action for the foreclosure of county or municipal taxes, the defendant against whom publication is ordered, or his representatives, may in like manner, upon good cause shown, be allowed to defend after judgment, or at any time within one year after notice thereof, and within five years after its rendition, on such terms as

are just; and if the defense is successful and the judgment or any part thereof has been collected or otherwise enforced, such restitution may be compelled as the court directs. Title to property sold under such judgment to a purchaser in good faith is not thereby affected. No fiduciary officer or trustee who has made distribution of a fund under such judgment in good faith is personally liable if the judgment is changed by reason of such defense made after its rendition; nor in case the judgment was rendered for the partition of land, and any persons receiving any of the land in such partition sell it to a third person; the title of such third person is not affected if such defense is successful, but the redress of the person so defending after judgment shall be had by proper judgment against the parties to the original judgment and their heirs and personal representatives, and in no case affects persons who in good faith have dealt with such parties or their heirs or personal representatives on the basis of such judgment being permanent. (C. C. P., s. 85; Code, s. 220; Rev., s. 449; 1917, c. 68; C. S., s. 492; 1943, cc. 228, 543; 1947, c. 817, s. 2; 1949, c. 256.)

Editor's Note.—The first 1943 amendment, which inserted in the first sentence the words "or in an action for the foreclosure of county or municipal taxes," provided that it should not apply to members of the armed forces during the pending war and for six months thereafter.

The second 1943 amendment substituted in the first sentence "§§ 1-104 through 1-107" for "§ 1-104."

The 1947 amendment substituted "1-107.1" for "1-107" in the first sentence. And the 1949 amendment inserted the words "or annulment" therein.

For a brief comment on the 1949 amendment, see 27 N. C. Law Rev. 452.

This section will be broadly construed to include within the term "representatives" all persons succeeding the rights of such party, in this case a mortgage creditor. *Hood v. Freel*, 206 N. C. 432, 174 S. E. 310 (1934).

Right to Remedy Afforded by Section.—Where the judgment affects the rights of the petitioner's debtor and is based upon substituted service, the petitioner's debtor is entitled to invoke the remedy contained in this section. *Hood v. Freel*, 206 N. C. 432, 174 S. E. 310 (1934).

Not Applicable to Justice's Court.—This section is not applicable to a proceeding in a justice's court. *Thompson v. Lynchburg Notion Co.*, 160 N. C. 519, 76 S. E. 470 (1912).

Effect and Sufficiency of Findings by Clerk—Extension of Time to Plead.—A nonresident defendant served by publication, and failing to file answer within the time prescribed by law, may make application to the clerk before judgment for good cause shown to be allowed to file pleadings and defend the action, as provided by this section, and where upon such application and affidavits filed by him setting forth facts showing prima facie good cause and a meritorious de-

fense, the clerk finds as a fact that he has a meritorious defense and has shown good cause, the clerk's order allowing him to file answer and defend the action will not be held for error for the clerk's failure to more specifically find the facts constituting such meritorious defense, and it is within the discretion of the judge of the superior court on appeal to enter an order allowing an extension of time for filing answer as provided by §§ 1-152, 1-276. *Vann v. Coleman*, 206 N. C. 451, 174 S. E. 301 (1934).

Judgment as Bar to Action against Administrator.—Where an administrator has disbursed the funds in his hand in accordance with the judgment and filed his final account, the judgment will bar an action against the administrator by those heirs unknown at the time of the institution of the action and who did not see the notice by publication and did not appear in the action, this section providing that no fiduciary officer acting in good faith shall be personally liable for such disbursement. *Ferguson v. Price*, 206 N. C. 37, 173 S. E. 1 (1934).

Vacation of Judgment.—Under this section the defendant, where his affidavit fully justifies the findings of fact made by the court and brings him within the terms of the section, has a legal right to have the judgment vacated. Such a right is absolute and not within the discretion of the presiding judge. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271 (1899); *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912); *Moore v. Rankin*, 172 N. C. 599, 90 S. E. 759 (1916).

The allegations of the complaint particularly describing the lands situate here of the nonresident husband sought to be subjected to the wife's claim for alimony in her suit for divorce, and the judgment therein directing it to be sold accordingly, practically amount to an attachment of the

lands indicated. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

Good Cause.—Allegations by the movant to set aside a judgment, for irregularity, that he has “a good and meritorious defense,” is but his own opinion, and is insufficient; nor is it aided by erroneous statements of matters of law or of conflicting facts that have been judicially found adverse to his contentions. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

No “good cause is shown” to set aside a judgment allowing alimony to the wife pendente lite her action for divorce, or in a suit to declare him her trustee in taking title to lands bought with her money and without her consent, where publication of summons has been regularly made under this section, and in proceedings regular upon their face, when the motion has been made after a lapse of nearly five years, the defendant had actual knowledge of the action, and the death of the wife has caused the loss of the evidence upon which the judgments were rendered. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

The words of this section “upon such terms as are just” ought not to be construed as limiting or modifying the right to defend, which is an absolute, legal right of the defendant. They should be construed as conferring upon the court, by whose order the defendant obtains his legal right to defend, power, by the imposition of just terms, to put plaintiff and defendant, as near as may be, in the same relative position, with reference to the subject matter of the litigation, as they were in at the time the action was begun, or at least at the time the defendant would have been required to answer the complaint if the summons had been personally served upon him. The court has power to do this by orders with reference to the costs that have accrued, or by interlocutory orders, with respect to property within its jurisdiction, or by such orders, designed to protect the plaintiff who had recovered the judgment, set aside and vacated upon the motion of the defendant, upon service of summons on the defendant as provided by the laws of this State, from loss which might result to him from the action of the court. It ought not to be held that the court has power to impose terms upon the defendant which would result in depriving him of a right guaranteed to him by law. The right to defend an action necessarily involves a right to answer or demur to the complaint, in accordance with the provisions of the statute or general rule of

court, and thus to raise issues of fact to be tried by a jury, or issues of law to be tried by the court. It cannot be said that although this right is absolute a defendant can enjoy it only at the discretion of the court. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605 (1926).

Any Exception.—Being a remedial statute, a just construction allows the party against whom a judgment has been taken to set up any exception which would have prevented or modified the judgment, e grege, inequality of partition. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271 (1899).

The defense intended to be allowed, under this section, to one who has not been actually but only constructively in court (by publication), is not confined to matters which if pleaded in apt time would defeat the action. *Rhodes v. Rhodes*, 125 N. C. 191, 34 S. E. 271 (1899).

Facts Must Be Found by Court.—Upon a motion to be allowed to defend under this section, the facts in the case must be found by the court in which the motion is made. *Utley v. Peters*, 72 N. C. 525 (1875).

Judgments by Default.—Where a judgment by default in the State court in an action against a nonresident defendant by a resident plaintiff, in which summons by publication was made, has been set aside upon defendant's motion, the mere fact that the judge has allowed him the statutory time in which to answer or demur, without defendant's objection, does not call for the exercise of the court's discretion, and the defendant may therein aptly file his petition and bond for the removal of the cause to the federal court as a matter of his legal right. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605 (1926).

A judgment by default final in favor of material furnishers, etc., for a building erected on the lands of a nonresident owner, by service of summons by publication, may be set aside upon defendant's motion under this section, made in two days after he had notice of the pendency of the action, upon a finding of a meritorious defense. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605 (1926), and other cases, cited as controlling. *Bassett Lumber Co. v. Rhyne*, 192 N. C. 735, 135 S. E. 926 (1926).

Where service has been made by publication, upon defendant's motion to set aside a judgment by default in plaintiff's favor, within five years from its date, or one year after notice, this section applies to the exclusion of § 1-220. *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648 (1926).

By appearing and moving to set aside a

judgment by default rendered, a nonresident defendant upon whom summons by publication had been made, and who brings himself within the provisions of this section by moving within a reasonable time after notice, has as a matter of right twenty days from the time such judgment had been set aside in which to answer or demur, and only by requesting or acquiescing in a longer time granted by the court is there a waiver of his right to file a petition and bond for the removal of the cause to the United States court, under the federal statute. *Burton v. Smith*, 191 N. C. 599, 132 S. E. 605 (1926).

A nonresident served by publication is entitled to an order setting aside a judgment by default of inquiry, upon good cause shown, within one year after rendition of the judgment or notice thereof, and such notice referred to in this section means actual notice, and therefore evidence disclosing that defendant did not have actual notice of the pendency of the action is sufficient to support the trial court's finding that he had no notice thereof. *Russell v. Edney*, 227 N. C. 203, 41 S. E. (2d) 585 (1947).

Section Not Applicable to Divorce Actions.—This section which permits a nonresident against whom judgment has been rendered on substituted service to come in and defend at any time within five years, does not apply to actions for divorce. *McLean v. McLean*, 233 N. C. 139, 63 S. E.

(2d) 138 (1951).

Exception as to Lands Sold in Divorce Proceedings.—The provisions of this section, as to setting aside judgments against nonresident defendants served by publication, upon motion showing sufficient cause, made within a year after notice, and within five years after its rendition on such terms as may be just, with restitution, etc., does not apply where the lands have been regularly sold under an order of court in divorce proceedings, of which the defendant had notice, to pay the wife alimony which had been allowed her. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

Same—Attachment of Lands—Alimony—Notice.—Attachment of the lands situated here of the nonresident husband, is not necessary to subject it to the payment of alimony regularly allowed the wife pendente lite her suit for divorce, upon publication of summons, or to declare the husband her trustee in his purchase of lands with her separate money, to which he had taken title in himself, without her consent, nor in either case is any notice required beyond publication of summons. *White v. White*, 179 N. C. 592, 103 S. E. 216 (1920).

Record Held to Disclose "Good Cause Shown" and a Meritorious Defense.—See *Blankenship v. DeCasco*, 211 N. C. 290, 189 S. E. 773 (1937).

Applied in *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

ARTICLE 9.

Prosecution Bonds.

§ 1-109. **Plaintiff's, for costs.**—Before issuing the summons the clerk shall require the plaintiff to do one of the following:

1. Give an undertaking with sufficient surety in the sum of two hundred dollars, with the condition that it will be void if the plaintiff pays the defendant all costs which the latter recovers of him in the action.

2. Deposit two hundred dollars with him as security to the defendant for these costs, in which event the clerk must give to the plaintiff and defendant a certificate to that effect.

3. File with him a written authority from a judge or clerk of a superior court, authorizing the plaintiff to sue as a pauper: Provided, however, that the requirements of this section shall not apply to counties, cities and towns; provided, further, that counties, cities and towns may institute civil actions and special proceedings without being required to give a prosecution bond or make deposit in lieu of bond. (R. C., c. 31, s. 40; C. C. P., s. 71; Code, s. 209; Rev., s. 450; C. S., s. 493; 1935, c. 398; 1949, c. 53.)

Cross References.—As to mortgage in lieu of bond, see § 109-29. As to bond executed or guaranteed by surety company, see § 109-17. As to costs generally, see §§ 6-1 et seq.

Editor's Note.—The amendment of 1935

added the two provisos in subsection (3); and the 1949 amendment inserted the word "counties" therein.

The object of the prosecution bond is not to secure the officers but to secure the defendant in the recovery of costs

wrongfully paid out. *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182 (1919).

Who Can Take Bond.—The action of the clerk in taking prosecution bonds was always held to be ministerial. They may be taken by a deputy clerk, and are habitually taken by attorneys, who have authority from the clerks for that purpose, but are not their deputies. *Shepherd v. Lane*, 13 N. C. 148 (1828); *Croom v. Morrissey*, 63 N. C. 591 (1869); *Marsh & Co. v. Cohen*, 68 N. C. 283 (1873).

When Bond Not Given.—When the prosecution bond has not been given, but the plaintiff has been permitted to go on and prepare his case for trial, the court will not, on motion of the defendant, dismiss the action peremptorily for want of the bond, but will permit the plaintiff to prepare and file his bond. *Brittain v. Howell*, 19 N. C. 107 (1836); *Russell v. Saunders*, 48 N. C. 432 (1856); *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713 (1891); *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106 (1891).

A motion to dismiss for the failure of the plaintiff to file a prosecution bond required by this section, made for the first time in the Supreme Court on appeal, will be denied when it has been properly made to appear that plaintiff had filed a proper bond after the issuance of the summons. *Costello v. Parker*, 194 N. C. 221, 139 S. E. 224 (1927).

Undertaking under Seal.—Where an undertaking to secure the costs of the defendant is given in the form of a bond, the seal does not defeat its purpose, and it will be treated as an undertaking under seal. *Holly v. Perry*, 94 N. C. 30 (1886).

Undertaking Written on Summons.—Where an undertaking under seal to secure the defendant's costs, was written on the back of the summons, but did not specify the name of either the plaintiff or defendant, or the surety, it was held to be sufficient. *Holly v. Perry*, 94 N. C. 30 (1886).

Increasing Penalty of Bond.—The court can increase the penalty on the bond, which is not an unusual procedure in the courts. *Jones v. Cox*, 46 N. C. 373 (1854); *Adams v. Reeves*, 76 N. C. 412 (1877); *Rollins v. Henry*, 77 N. C. 467 (1877); *Vaughan v. Vincent*, 88 N. C. 116 (1883); *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

§ 1-110. **Suit as a pauper; counsel.**—Any judge or clerk of the superior court may authorize a person to sue as a pauper in their respective courts when he proves, by one or more witnesses, that he has a good cause of action, and makes affidavit that he is unable to comply with the preceding section. The court to which such summons is returnable may assign to the person suing as a pauper

Same—When Exercised.—Where the defendant has been successful on his appeal to the Supreme Court, and his judgment for costs against the sureties on the prosecution bond of the plaintiff results in making insecure the costs in the superior court, the remedy is by application to increase the penalty of the bond. *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

Same—Court Has Discretion.—Where a plaintiff has given a bond for costs which has become insufficient, the court has the power to allow him to proceed with his case without giving additional security. *Holder v. Jones*, 29 N. C. 191 (1847); *Dale v. Presnell*, 119 N. C. 489, 26 S. E. 27 (1896).

What Undertaking Covers.—The undertaking provided for by this section may cover the defendant's costs on appeal. *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

Same—Does Not Apply to Plaintiff's Costs.—In contemplation of law, the parties pay the cost of the litigation as the action proceeds and this bond is given, it is true, entirely for the benefit of defendants. The surety is not bound for plaintiff's cost. *Hallman v. Dellinger*, 84 N. C. 1 (1881); *Smith v. Arthur*, 116 N. C. 871, 21 S. E. 696 (1895).

No Appeal from Judge's Refusal to Require Bond.—The refusal of the trial judge to require a prosecution bond is not appealable. *Christian v. Atlantic, etc., R. Co.*, 136 N. C. 321, 48 S. E. 743 (1904); *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

Special Appearance.—A motion to dismiss for failure of plaintiff to file security for costs as required by this section pertains to a procedural question, and an appearance to make this motion and a motion to dismiss for want of jurisdiction is not a general appearance. *Mintz v. Frink*, 217 N. C. 101, 6 S. E. (2d) 804 (1940).

Appeal by Surety.—Though a surety on a prosecution bond is not a party to the action, yet, when he is made a party to a proceeding to tax the costs in a case, he may appeal from the order allowing the motion to retax. *Smith v. Arthur*, 116 N. C. 871, 21 S. E. 696 (1895).

Stated in In re Will of Winborne, 231 N. C. 463, 57 S. E. (2d) 795 (1950).

learned counsel, who shall prosecute his action. (C. C. P., s. 72; 1868-9, c. 96, s. 2; Code, ss. 210, 211; Rev., ss. 451, 452; C. S., s. 494.)

Local Modification.—Durham, Forsyth, Nash, Northampton: 1937, c. 381.

Cross References.—As to costs in suits in forma pauperis, see § 6-24. As to appeals in forma pauperis, see § 1-288.

Exception to Preceding Section.—This section is in the nature of an exception to the general rule in § 1-109. *Dale v. Presnell*, 119 N. C. 489, 26 S. E. 27 (1896).

Section Does Not Apply to Appeals.—The leave to sue as a pauper, under this section and § 6-24, does not extend in civil actions, beyond the trial in the superior court, his appeal being governed by § 1-288, which only relieves him from giving security for the costs of the appeal, but he must pay the fees as to the appeal due the officers of both courts for services rendered. *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160 (1896). See *Martin v. Chasteen*, 75 N. C. 96 (1876); *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890).

Court Has Discretion.—The right to sue as a pauper is a favor granted the plaintiff, and is in the power and discretion of the court. *Dale v. Presnell*, 119 N. C. 489, 36 S. E. 27 (1896).

When the action is by the personal representative to recover on a contract or other claim due his testator or intestate, or the action is to recover property belonging to the estate, the court may well refuse leave to sue as a pauper, under its discretion, *Dale v. Presnell*, 119 N. C. 489, 36 S. E. 27 (1896), unless, as said in *McKiel v. Cutler*, 45 N. C. 139 (1853), it appears that the beneficiaries of the estate cannot give bond, for the officers of the court ought not needlessly be deprived of pay for their services. *Christian v. Atlantic, etc.*, R. Co., 136 N. C. 321, 48 S. E. 743 (1904).

Judge, Clerk or Justice May Grant.—A judge or clerk of the superior court may, in cases within the jurisdiction of said court, make an order authorizing any person complying with the provisions of the said act to sue in forma pauperis. A justice of the peace has like power, in cases within the jurisdiction of his county. *Rowark v. Gaston*, 67 N. C. 291 (1872).

Plaintiff's Affidavit Necessary.—Whether the application be to commence the action or to appeal from an adverse determination without security, it must be supported by the affidavit of the party, and no provision is made for any other mode of proving the fact that he is unable to give security. The necessity of such affidavit is held in *Miazza v. Calloway*, 74 N.

C. 31 (1876); *Stell v. Barham*, 85 N. C. 88 (1881).

Sufficiency of Affidavit.—A typewritten statement, purporting to have been signed by plaintiff, that plaintiff was unable to comply with the preceding section, which statement is followed by an unsigned, unsealed and unauthenticated jurat is not an affidavit, and will not support an order allowing plaintiff to prosecute the action as a pauper, but the deficiency does not necessarily require the dismissal of the action, since the court may give plaintiff a reasonable time to supply the deficiency. *Ogburn v. Sterchi Bros. Stores*, 218 N. C. 507, 11 S. E. (2d) 460 (1940).

Proving Good Cause of Action.—In granting an order for a person to sue in forma pauperis, it is sufficient compliance with this section for the presiding judge to be satisfied, by a certificate of counsel or otherwise, that the plaintiff has an honest cause of action on which he may reasonably expect to recover. *Miazza v. Calloway*, 74 N. C. 31 (1876).

Security for Costs.—Under this section the judge may, in his discretion, require a plaintiff who has been allowed to sue in forma pauperis to give security for costs. *Dale v. Presnell*, 119 N. C. 489, 26 S. E. 27 (1896).

Pauper Must Pay Witnesses.—Although this section, allowing a party to sue as a pauper, excuses such party from paying fees to any officer and deprives him of the right to recover costs, it is held, that it does not excuse the pauper from liability for his witnesses. *Morris v. Rippey*, 49 N. C. 533 (1857); *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890).

Who Can Sue in Forma Pauperis.—"A guardian can sue in forma pauperis." *Christian v. Atlantic, etc.*, R. Co., 136 N. C. 321, 48 S. E. 743 (1904).

Same—Nonresident.—The words of this section are broad enough to include any litigant whatever, and hence residents of another state can sue here in forma pauperis. *Porter v. Jones*, 68 N. C. 320 (1873); *Christian v. Atlantic, etc.*, R. Co., 136 N. C. 321, 48 S. E. 743 (1904).

Same—Personal Representative.—It has been the unquestioned practice since the adoption of the Code, that a personal representative could sue as a pauper upon proper affidavit and certificate. *Allison v. Southern R. Co.*, 129 N. C. 336, 40 S. E. 91 (1901); *Christian v. Atlantic, etc.*, R. Co., 136 N. C. 321, 48 S. E. 743 (1904).

No Presumption of Contingent Fee.—

The bringing of a pauper suit does not raise the presumption that the attorney took the case for a contingent fee and was therefore a party in interest. *Allison v. Southern R. Co.*, 129 N. C. 336, 40 S. E. 91 (1901).

Where Plaintiff Assigns Interest Pending Action.—Where a plaintiff, pending an action brought in forma pauperis, as-

signed his interest in the land which was the subject of the action, the court will require the assignee to give security, or it will withdraw the privilege given to the assignor and dismiss the action. *Davis v. Higgins*, 91 N. C. 382 (1884); *Dale v. Presnell*, 119 N. C. 489, 26 S. E. 27 (1896).

Cited in *Costello v. Parker*, 194 N. C. 221, 139 S. E. 224 (1927).

§ 1-111. Defendant's, for costs and damages in actions for land.—

In all actions for the recovery or possession of real property, the defendant, before he is permitted to plead, must execute and file in the office of the clerk of the superior court of the county where the suit is pending an undertaking with sufficient surety, in an amount fixed by the court, not less than two hundred dollars, to be void on condition that the defendant pays to the plaintiff all costs and damages which the latter recovers in the action, including damages for the loss of rents and profits. (1869-70, c. 193; Code, s. 237; Rev., s. 453; C. S., s. 495.)

Cross References.—As to judgment by default final upon failure of defendant to file undertaking or of his sureties to justify, see § 1-211, paragraph 4.

Purpose of Section.—The purpose of the legislature in passing the statute was to indemnify the plaintiff in such actions for costs, in case he should prevail. It was never intended that the requirements should be made an engine of oppression, and that a party having merit should, on technical grounds, forfeit his right to be heard when he is ready to secure costs, and when, in the opinion of the presiding judge, it is proper to give further time to plead, in order to permit the filing of the bond. *Henning v. Warner*, 109 N. C. 406, 14 S. E. 317 (1891).

Relation to Other Sections of Code.—This section and § 1-211, par. 4 are in pari materia with § 1-125, and should be construed together. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4 (1924).

Time in Which to File Bond.—Where the complaint in an action has not been served with the summons, the defendant has twenty days after its return date in which to answer or demur; and when the defendant is in possession of land, and the action is to recover the lands the defendant has also twenty days, under the circumstances, before pleading, in which to file the bond required, by this section, conditioned upon his paying to plaintiff all costs and damages which the latter may recover, including damages for the loss of rents and profits. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370 (1924). As to change in the time of answer after service, see § 1-89 and the note thereto.

Judge May Grant Extension.—Section 1-152 confers on the judge the discretion to extend the time for filing the defense

bond. *Taylor v. Pope*, 106 N. C. 267, 11 S. E. 257 (1890); *White v. Lokey*, 131 N. C. 72, 42 S. E. 445 (1902); *Tennessee River Land Co. v. Butler*, 134 N. C. 50, 45 S. E. 956 (1903).

Same—Effect of Amendments of 1921.—Under the provisions of c. 92, § 1, par. 18, Extra Session, Public Laws of 1921, the power of the superior court judge, to allow amendments to pleadings (given by § 1-163), or to allow answer to be filed (§ 1-152), applying also to the defendant, in possession of lands and claiming an interest therein, giving bond (this section) is not affected. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4 (1924).

Same—No Appeal.—Extension of time to file a defense bond is a matter in the discretion of the judge, for which no appeal will lie. *Dunn v. Marks*, 141 N. C. 332, 53 S. E. 845 (1906).

Failure to File Answer or Give Bond.—Where, in an action to recover possession of land, the defendant failed to file an answer or the bond required by this section and did not ask leave to answer without giving bond until the time for answering had expired, it was proper, under § 1-211 to give judgment against the defendant of the land without damages. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187 (1897); *Junge v. MacKnight*, 135 N. C. 105, 47 S. E. 452 (1904).

Same—Excusable Neglect Immaterial.—Where, in an action to recover land, the defendant fails to file, or is not excused from filing, the bond required by this section, a judgment by default is authorized by § 1-211 even if there has been a failure to file an answer arising from excusable neglect. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64 (1898).

Failure to Give Undertaking.—Where a

defendant in ejectment fails to file the undertaking required by this section, or procure leave to defend without bond, § 1-112, the court, at such term, may strike out the answer and render judgment by default. *Patrick v. Dunn*, 162 N. C. 19, 77 S. E. 995 (1913).

Where the defendant in a petition for partition pleaded sole seizin, it was error to strike out his answer without notice, because no defense bond had been filed, but he should have been given an opportunity to file a bond or obtain leave to defend without it under § 1-112. *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106 (1891).

Same—When No Objection Made.—

When an answer has been filed without any bond, and has remained on file for some time without objection, it is held to be irregular to strike it out and give judgment without notice or rule to show cause, or without giving the defendant opportunity to file a defense bond. *McMillan v. Baker*, 92 N. C. 111 (1885); *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106 (1891); *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905).

Same—Waiver. — The failure for three years to move for judgment by default for failure to file a defense bond waives the right thereto. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956 (1903).

The requirement that the defendant must “execute and file” a defense bond, or in lieu thereof a certificate and affidavit as provided by § 1-112, may be waived unless seasonably insisted upon by the plaintiff. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Formal Order Fixing Amount of Bond Not Required.—Neither formal order fixing the amount of the defense bond required of defendant in actions for the recovery of real property, nor notice to plaintiff, is required. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364 (1947).

Defective Bond May Be Cured.—A failure to file a “justified” defense bond as required by this section and § 1-211, par. 4, and § 1-286 does not necessarily avoid the bond, but it is a defect which may be cured by waiver, and an exception to the filing of the bond entered by the plaintiff on the back thereof, but no action taken by the court in reference to it, does not authorize the court to give judgment by default without notice to the defendant. *McMillan v. Baker*, 92 N. C. 111 (1885); *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905).

When Landlord and Tenant Joint Defendants.—Where a landlord is joined as a defendant with his tenant, the tenant and landlord thus defending must under this section each give bond with good security to pay costs and damages if the plaintiff recovers; or if he be not able to give such bond, he must make affidavit of that fact under § 1-112, and get the certificate of an attorney practicing in the court that, in his opinion, the plaintiff is not entitled to recover. *Harkey v. Houston*, 65 N. C. 137 (1871).

When the tenant fails to give such bond, or to swear to his answer when the plaintiff has sworn to his complaint, the plaintiff may take a judgment against him; but he cannot have an execution against him until the further order of the court, which will not be made until after the trial of the issues between him and the landlord defendant. *Harkey v. Houston*, 65 N. C. 137 (1871).

A tenant in common in possession claiming title holds such possession for his co-tenants by one common title, and in an action to recover the lands, he comes within the meaning of this section, and must file the bond therein required, according to law, before answering the complaint. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4 (1924).

Vendee in Possession.—Where a vendee is let into possession before the purchase money is paid, and the vendor brings an action to recover the possession, the defendant must file the undertaking to secure rents and damages provided for by this section before he will be allowed to answer. *Allen v. Taylor*, 96 N. C. 37, 1 S. E. 462 (1887).

In an action to remove a cloud on the title a defense bond is not required. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956 (1903).

An action to establish a parol trust in lands and to have defendant render an accounting as mortgagee in possession, and for an order directing defendant to convey the lands to plaintiff upon payment of any amount found due upon the accounting, is held not strictly one in ejectment, and this section requiring defendant in ejectment actions to file bond, is inapplicable. *Bryant v. Strickland*, 232 N. C. 389, 61 S. E. (2d) 89 (1950).

An action to establish a parol trust, with prayer that defendant be directed to execute deed to plaintiff, is not an action for recovery or possession of real property within the meaning of this section and plaintiff is not entitled to have the answer

stricken and judgment by default final rendered for failure of defendant to file bond. *Hodges v. Hodges*, 227 N. C. 334, 42 S. E. (2d) 82 (1947).

Liability of Surety.—The surety on the bond under this section is liable only for rents and profits pending litigation and subsequent to filing the bond. *Hughes v. Pritchard*, 129 N. C. 42, 39 S. E. 632 (1901).

Same—Summary Judgment.—Upon judgment being rendered against defendant in an action to recover land, it is not error to enter a summary judgment against the sureties on his bond. *Rollins v. Henry*, 84 N. C. 570 (1881).

Liability for Costs on Appeal.—The defense bond and the sureties thereon, in an action of ejectment under this section are liable to the amount of the bond for the costs in the Supreme Court on appeal as well as those incurred in the superior court. *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 49 (1914); *Grimes v. Andrews*, 171 N. C. 367, 88 S. E. 513 (1916).

Court May Appoint Receiver.—This section, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N. C. 327 (1884); *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541 (1887); *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931 (1911).

Same—When Unnecessary.—In an action to recover real property or its possession, upon the approval of the defendant's bond by the clerk of the superior court for continued possession, given under this section, when the defendant has given it in compliance with the statute, the plaintiff has an adequate and sufficient remedy at law upon the bond of the principal and surety so given and approved, and the equitable right to the appointment of a receiver, § 1-502, par. 1, is not

available to the plaintiff, it appearing that a money demand will sufficiently compensate him. *Jones v. Jones*, 187 N. C. 589, 122 S. E. 370 (1924).

Substantial Compliance with Section.—Where, in an action in ejectment, defendant, after consultation with the clerk, tenders justified bond in the minimum amount required by this section, and the clerk accepts the bond and makes notation thereof on the records, there is a substantial compliance with the statute and plaintiff's remedy if he deems the bond insufficient is by motion in the cause. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364 (1947).

Ignorance That Bond Required.—Ordinarily excusable neglect cannot arise out of a mistake of law, and where judgment has been rendered by default final for plaintiff for the failure of defendant to file answer as required by the statute, the ignorance of the defendant that he was required to file the bonds, before answer, required by this section, when he is in possession of and claiming title to lands, the subject of the action, is not excusable neglect on his motion to set the judgment aside, and not allowable when it appears that the plaintiff was diligent in insisting upon his rights and has done nothing that could be regarded as a waiver thereof. *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4 (1924).

Mortgage Given for Bond.—A mortgage, given in lieu of the bond required by this section, may be foreclosed by motion, upon notice, in the original action. *Ryan v. Martin*, 103 N. C. 282, 9 S. E. 197 (1889).

Applied in *Clegg v. Canady*, 213 N. C. 258, 195 S. E. 770 (1938); *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946); *Teel v. Johnson*, 228 N. C. 155, 44 S. E. (2d) 727 (1947).

§ 1-112. Defense without bond.—The undertaking prescribed in the preceding section is not necessary if an attorney practicing in the court where the action is pending certifies to the court in writing that he has examined the case of the defendant and is of the opinion that the plaintiff is not entitled to recover; and if the defendant also files an affidavit stating that he is unable to give and is not worth the amount of the undertaking in any property whatsoever. (1869-70, c. 193; Code, s. 237; Rev., s. 454; C. S., s. 496.)

Cross Reference.—See note to § 1-111.

Editor's Note.—This section appeared formerly as a proviso attached to the preceding section. In regard to this proviso (now this section) the court said in *Wilson v. Fowler*, 104 N. C. 471, 10 S. E.

566 (1889): "The terms of the proviso are clear, explicit and exclusive. It declares 'that no such undertaking shall be required' in the case provided for. The words 'no such' are used in the broad sense of not any like that required. There is nothing

in the statute that suggests the contrary, or that an undertaking for a less sum than two hundred dollars in amount may be required in any case. The purpose is to allow persons thus poor to make defense in such actions without giving any undertaking, nor does section 350 [now § 109-29] authorize the court to require a party to execute a mortgage of real estate in the cases therein provided for. It simply allows the party, of whom an undertaking may be required in such cases, to give such mortgage instead of it, and the former must be for the same amount as the latter."

It will be observed that when one proposes to sue in forma pauperis, or to appeal (§§ 1-110 and 1-288) he is only required to swear to his inability to give the undertaking; while in order to defend an attack upon his right of possession of land, he must state not only such inability, but further, that "he is not worth the amount of the said undertaking in any property whatsoever," apparently, if not in fact, denying the privilege to one who has only sufficient exempt property to equal the amount of the bond. *Taylor v. Apple*, 90 N. C. 343 (1884).

Notice to Adverse Party Unnecessary.—Nothing in this section requires notice to be given to the adverse party, on an application for permission to defend a suit without giving the required security. *Deal v. Palmer*, 68 N. C. 215 (1873).

Upon Compliance No Order Needed.—Notice of the certificate and affidavit under this section is not necessary, and it may be questioned whether it is necessary in any case that the court should make an order allowing the defendant, upon filing such certificate and affidavit, to answer, because he answers as of right under the statute. *Deal v. Palmer*, 68 N. C. 215 (1873); *Jones v. Fortune*, 69 N. C. 322 (1873); *Taylor v. Apple*, 90 N. C. 343 (1884); *Dempsey v. Rhodes*, 93 N. C. 120 (1885).

Same—Waiver.—But if such order is

necessary the plaintiff is deemed to have waived its absence where the certificate of counsel and the affidavit of the defendant fully meet the requirements of the statute, and they and the answer were on file without objection for two years and until the trial. *Dempsey v. Rhodes*, 93 N. C. 120 (1885).

Certificate of Counsel.—Where counsel certifies that he has examined the case of the defendant, and that in his opinion the plaintiff is not entitled to recover; held, a substantial compliance with the statute. It is not intended that the enquiry of counsel should extend beyond the information derived from the defendant. *Taylor v. Apple*, 90 N. C. 343 (1884).

Same—Applies Only to Present Action.—The certificate of counsel applies only to the action as then constituted, and not to any other possible action that might be brought by plaintiff for same or similar relief. *Wilson v. Fowler*, 104 N. C. 471, 10 S. E. 566 (1889).

Example of Sufficient Compliance.—In an action to recover land, this section was sufficiently complied with when the defendant made affidavit that he was not worth two hundred dollars in any property whatever, and was unable to give the undertaking required, and his counsel certified that they had examined his case and were of opinion he "had a good defense to the action." *Wilson v. Fowler*, 104 N. C. 471, 10 S. E. 566 (1889).

Costs.—This section allowing a defendant in an action of ejectment to defend without giving bond, and § 1-288 allowing an appeal without bond, go no further than dispensing with the bond, and neither exempts the party from paying his own costs nor forbids his recovering costs. *Lambert v. Kinnery*, 74 N. C. 348 (1876); *Justice v. Eddings*, 75 N. C. 581 (1876); *Bailey v. Brown*, 105 N. C. 127, 10 S. E. 1054 (1890); *Speller v. Speller*, 119 N. C. 356, 357, 26 S. E. 160 (1896).

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946).

ARTICLE 10.

Joint and Several Debtors.

§ 1-113. **Defendants jointly or severally liable.**—Where the action is against two or more defendants, and the summons is served on one or more, but not on all of them, the plaintiff may proceed as follows:

1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise directs, and if he recovers judgment it may be entered against all the defendants thus jointly indebted, so far only as that it may be enforced against the joint property of all

and the separate property of the defendants served, and if they are subject to arrest, against the persons of the defendants served.

2. If the action is against defendants severally liable, he may proceed against the defendants served, in the same manner as if they were the only defendants.

3. If all the defendants have been served, judgment may be taken against any or either of them severally, when the plaintiff would be entitled to judgment against such defendant or defendants if the action had been against them or any of them alone.

4. If the name of one or more partners has, for any cause, been omitted in an action in which judgment has been rendered against the defendants named in the summons, and the omission was not pleaded in the action, the plaintiff, in case the judgment remains unsatisfied, may by action recover of such partner separately, upon proving his joint liability, notwithstanding he was not named in the original action; but the plaintiff may have satisfaction of only one judgment rendered for the same cause of action. (C. C. P., s. 87; Code, s. 222; Rev., s. 455; C. S., s. 497.)

Editor's Note.—See 13 N. C. Law Rev. 83, for comment on cases discussed in following note.

Partners—In General. — Members of a partnership are jointly and severally bound for all its debts; and because of the joint liability the creditor and each partner has a right to demand that the joint property shall be applied to the joint debts; and because of the several liability, a creditor may, at will, sue any one or more of the partners. *Hanstein v. Johnson*, 112 N. C. 253, 17 S. E. 155 (1893).

Where, in an action against a partnership, service of summons has been made on some of the partners but not all, upon a verdict in plaintiff's favor, a judgment is

properly entered binding upon the partnership's joint property, and upon the individual members served, but not individually upon those not so served with process. *Hancock v. Southgate*, 186 N. C. 278, 119 S. E. 364 (1923).

Same—Purpose of Section.—This section was intended to prevent a partner, who was not served with the summons, from defeating an action against him on the ground that judgment had already been taken against his co-partner; and so the cause of action was merged in the judgment, and authorizes an action against him separately, provided the first judgment remains unsatisfied. *Navassa Guano Co. v. Willard*, 73 N. C. 521 (1875).

§ 1-114. Summoned after judgment; defense. — When a judgment is recovered against one or more of several persons jointly indebted upon a contract in accordance with the preceding section, those who were not originally summoned to answer the complaint may be summoned to show cause why they should not be bound by the judgment, in the same manner as if they had been originally summoned. A party so summoned may answer within the time specified denying the judgment, or setting up any defense thereto which has arisen subsequent to such judgment; and may make any defense which he might have made to the action if the summons had been served on him originally. (C. C. P., ss. 318, 322; Code, ss. 223, 224; Rev., ss. 456, 457; C. S., s. 498.)

Statute of Limitations May Bar Action. —Where an action was begun against certain administrators and the sureties on their bond, and one surety was not served with summons and more than three years thereafter this latter surety was served, it was held that the three-year statute of limitations was a bar to the action against the surety. *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391 (1894). See *Ruffy v. Claywell*, etc., Co., 93 N. C. 306 (1885).

Where an action was instituted and judgment obtained against A. B. & Co., upon a bill of exchange, and C, who was

a secret partner in the firm, was not joined as defendant, and the plaintiff afterwards, and more than three years after the cause of action accrued, discovered that C was a partner and instituted an action against him: Held, that the action was barred by the statute of limitations. *Navassa Guano Co. v. Willard*, 73 N. C. 521 (1875).

When Motion in Cause Proper.—Where a judgment is taken against two of three partners who are liable jointly and severally, the proper method to enforce the liability of the third partner is a new action and not a motion in the action in which

such judgment was rendered; it is only when the liability is joint and not several that the motion in the cause is proper.

Davis v. Sanderlin, 119 N. C. 84, 25 S. E. 815 (1896).

§ 1-115. **Pleadings and proceedings same as in action.**—The party issuing the summons may demur or reply to the answer, and the party summoned may demur to the reply. The answer and reply must be verified in like cases and manner and be subject to the same rules that apply in an action, and the issues may be tried and judgment given in the same manner as in action and enforced by execution if necessary. (C. C. P., ss. 323, 324; Code, ss. 225, 226; Rev., ss. 458, 459; C. S., s. 499.)

ARTICLE 11.

Lis Pendens.

§ 1-116. **Filing of notice of suit.**—In actions affecting the title to real property, the plaintiff, at the time of issuing the summons, or at any time after the time of filing the complaint, or when at any time after a warrant of attachment is issued, or a defendant when he sets up an affirmative cause of action in his answer and demands substantive relief, or at any time after the time of filing his answer, if it is intended to affect real estate, may file with the clerk of each county in which the property is situated a notice of the pendency of the action, containing the name of the parties, the object of the action, and the description of the property in that county affected thereby. (C. C. P., s. 90; Code, s. 229; Rev., s. 460; 1917, c. 106; C. S., s. 500; 1949, c. 260.)

Editor's Note.—The 1949 amendment rewrote this section and inserted the words "at the time of issuing the summons" near the beginning of the section. See 27 N. C. Law Rev. 475.

In General.—The general doctrine of *lis pendens* is familiar and is firmly established. It may be stated to be thus: When a person buys property pending an action of which he has notice, actual or presumed, in which the title to it is in issue, from one of the parties to the action, he is bound by the judgment in the action, just as the party from whom he bought would have been. The rule is absolutely necessary to give effect to the judgments of courts, because if it were not so held, a party could always defeat the judgment by conveying in anticipation of it to some stranger, and the plaintiff would be compelled to commence a new action against him, and so on indefinitely. Rollins v. Henry, 78 N. C. 342 (1878).

The principle of *lis pendens* is that the specific property must be so pointed out by the proceedings as to warn the whole world that they meddle with it at their peril, and the pendency of such suit duly prosecuted is notice to a purchaser so as to bind his interest. Todd, etc., Co. v. Outlaw, 79 N. C. 235 (1878).

The established rule is that a *lis pendens*, duly prosecuted, and not collusive, is notice to a purchaser so as to affect and bind his interest by the decree; and the *lis*

pendens begins from the service of the subpoena after the bill is filed. Lacassagne v. Chapuis, 144 U. S. 119, 12 S. Ct. 659, 36 L. Ed. 368 (1892).

A Harsh Rule.—The rule *lis pendens*, while founded upon principles of public policy and absolutely necessary to give effect to the decree of the courts is, nevertheless, in many instances very harsh in its operation; and one who relies upon it to defeat a bona fide purchaser must understand that his case is *strictissimi juris*. Arrington v. Arrington, 114 N. C. 151, 19 S. E. 351 (1894).

The section is designed to supplement the registration law and to provide a simple and readily available means of ascertaining the existence of adverse claims to land not otherwise disclosed by the registry. Notice under the act is required to give constructive notice to prospective purchasers when the claim is in derogation of the record. Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

The effect of *lis pendens* and the effect of registration are in their nature the same thing. They are only different examples of the operation of the rule of constructive notice. They are each record notices upon the absence of which a prospective innocent purchaser may rely. Whitehurst v. Abbott, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

Section Similar to English and New York Statutes.—This section is in sub-

stance a copy of 2 Victoria, which has received a construction by the English courts. It is there held that no *lis pendens*, of which a purchaser has not express notice, will now bind him unless it be duly registered. The provisions of the New York Code for the filing of *lis pendens*, is similar to ours, and has received there the same construction as the English statute. *Todd, etc., Co. v. Outlaw*, 79 N. C. 235 (1878).

Modifies Common-Law Rule.—The common-law rule, was that if the real estate to be affected by the judgment or decree were situated in several counties, it would all be bound by the *lis pendens* arising from the pendency of a suit in the county in which only a part of it lies, since, "all persons are supposed to be attentive to what passes in courts of justice"; whereas the plain purpose of this section was to modify the rule so as to require notice in all counties where the real estate is situated. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890).

As to real property, there is but one rule of *lis pendens* in North Carolina, and the provisions of this section are a substitute for the common-law rule. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890).

The filing of notice under this section is essential to give constructive notice to those who are not directly interested in the proceedings. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

Lis pendens notice under this section is not exclusive. Nor is it designed to protect intermeddlers. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

"Action" as used in this section embraces all judicial proceedings affecting the title to real property or in which title to land is at issue. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

Section Adequately Protects Rights of Trustor.—In a suit attacking the validity of a foreclosure sale under a deed of trust, a temporary order enjoining further transfer of the property by the *cestui que trust*, the purchaser at the sale, is properly dissolved, since plaintiff trustor has an adequate remedy at law by filing notice of *lis pendens* in accordance with this and subsequent sections. *Whitford v. North Carolina Joint Stock Land Bank*, 207 N. C. 229, 176 S. E. 740 (1934).

This section and former § 1-449 were construed in pari materia, and where notice of levy of attachment on defendant's land in a county was given under the provisions of § 1-449, by certification of the levy to the clerk of the court for that county and

his notation thereof on his judgment docket and indexing in the index to judgments the effect was to take the land in *custodia legis*, and it was not an action affecting the title to lands within the purview of this section, but from the day of such notice, unless the land was released, the attachment constituted a lien superior to that of a judgment rendered in favor of another, and a later judgment in the attachment proceedings related back to the filing and indexing of the attachment, and where such notice under § 1-449 was given, the filing of *lis pendens* in the same county under the provisions of this section was unnecessary. *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929). For present provisions relating to subject matter of former § 1-449, see §§ 1-440.15 et seq. and 1-440.33.

Jurisdiction of Court.—In order that the right to real property and personal chattels may be affected by *lis pendens*, they must be within the jurisdiction of the court and subject to its power. *Enfield v. Jordan*, 119 U. S. 680, 7 S. Ct. 358, 30 L. Ed. 523 (1887).

Continuous Litigation.—In order for the doctrine of *lis pendens* to apply, there must be continuous litigation. *Lee County v. Rogers*, 7 Wall. (74 U. S.) 181, 19 L. Ed. 160 (1868).

An unreasonable delay in prosecution, so far as third persons are concerned, loses its force as a *lis pendens*. *Redfield v. Ystalyfera Iron Co.*, 110 U. S. 174, 3 S. Ct. 570, 28 L. Ed. 109 (1884).

Applies to Action in Another County.—Strangers to an action are not affected with constructive notice of an action involving the title to lands situate in a county other than that in which the action is pending, unless the notice, *lis pendens*, is given under this section. *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901 (1889).

The pending action does not constitute notice as to land in another county until and unless notice thereof is filed in the county in which the land is located. *Whitehurst v. Abbott*, 225 N. C. 1, 33 S. E. (2d) 129 (1945).

Action Not Affecting Title to Realty.—Where the mortgagee of lands brings an action to recover on the note secured by the mortgage and to set aside a deed of the mortgagor, but not to foreclose the mortgage, the action is not one affecting the title to land within the meaning of this section, and the judgment of the lower court canceling and removing the notice of *lis pendens* from the records will be affirmed

on appeal. *Threlkeld v. Malcragson Land Company*, 198 N. C. 186, 151 S. E. 99 (1930).

Breach of Option Contract Not Included.—An action to recover damages for the breach of an option contract is not an action affecting the title to realty, within this section, and the filing of notice in such case will not affect a purchaser pending that action. *Horney v. Price*, 189 N. C. 820, 128 S. E. 321 (1925).

When No Notice Required. — No entry of *lis pendens*, under this section, is required in any case when the action is in the county where the land lies. *Badger v. Daniel*, 77 N. C. 251 (1877); *Rollins v. Henry*, 78 N. C. 342 (1878); *Todd, etc., Co. v. Outlaw*, 79 N. C. 235 (1878); *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901 (1889); *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890); *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894); *Bird v. Gilliam*, 125 N. C. 76, 34 S. E. 196 (1899); *Jarrett v. Holland*, 213 N. C. 428, 196 S. E. 314 (1938).

No change in the rule is brought about by this section prescribing how notice of a *lis pendens* shall be given when the transaction is in one and the same county, and notice is furnished in the record in the pending action. *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639 (1903).

Where the action is brought in the county where the land is situated, and the pleadings contain "the names of the parties, the object of the action, and the de-

scription of the property to be affected in that county," this is a substantial compliance with this section, as to the filing of notice, and puts in operation all of the provisions of the statute. *Collingwood v. Brown*, 106 N. C. 362, 10 S. E. 868 (1890).

If this section has no application to an action of foreclosure when brought in the county where the land lies, and it has been so held in a number of cases, it follows as a necessary corollary that the cross-indexing statute (next section) is equally inapplicable. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942) (con. op.).

Sufficient Description.—"Although it is necessary in order to constitute *lis pendens* that the proceedings should, directly or indirectly, designate specific property, yet where the description is so definite that any one reading it can learn thereby, either by the description or reference, what property is intended to be made subject to litigation, it is sufficient." *Benn. Lis Pend.*, sec. 93, 1 *Freem. Judgm.*, sec. 197. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Transfer of Suit. — Where the suit is transferred by consent to another county on the original papers and nothing is left on the files to inform a purchaser of the nature of the action and the property to be affected by it, the *lis pendens* fails and a bona fide purchaser will be protected. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

§ 1-116.1. Extending time to file complaint when notice of suit already filed; issuance of notice with summons; when notice inoperative or cancelled.—In all actions as defined in § 1-116 in which notice of pendency of the action is filed prior to the filing of the complaint, the plaintiff shall first obtain from the clerk a written order extending the date for filing the complaint as is provided in § 1-121 of the General Statutes of North Carolina. A copy of the aforesaid order of the clerk and a copy of the notice of the pendency of the action shall be served on the defendant, or defendants, at the time of the service of summons. Provided, that in all such cases if the complaint is not filed within the time fixed by the order or orders of the clerk, entered in conformity with the provisions of § 1-121 of the General Statutes of North Carolina, the notice of *lis pendens* shall become inoperative and of no effect. Provided further, that if the complaint is not filed within the time fixed by the order or orders of the clerk, the clerk may on his own motion and shall on the ex parte application of any interested party cancel such notice of *lis pendens* by appropriate marginal entry on the original record, which entry shall recite the failure of the plaintiff to file his complaint within the time allowed. Such applications for cancellation, when made in a county other than that in which the action was instituted, shall include a certificate over the hand and seal of the clerk of the county in which the action was instituted that the plaintiff did not file his complaint within the time allowed. The fees of the clerk may be recovered against the plaintiff and his surety. (1949, c. 260.)

§ 1-117. **Cross-index of lis pendens.**—Any party to an action desiring to claim the benefit of a notice of lis pendens, whether given formally under this article or in the pleadings filed in the case, shall cause such notice to be cross-indexed by the clerk of the superior court in a docket to be kept by him, to be called Record of Lis Pendens, which index shall contain the names of the parties to the action, where such notice (whether formal or in the pleadings) is filed, the object of the action, the date of indexing, and sufficient description of the land to be affected to enable any person to locate said lands. The clerk shall be entitled to a fee of twenty-five cents for indexing said notice, to be paid as are other costs in the pending action. (1903, c. 472; Rev., s. 464; 1919, c. 31; C. S., s. 501.)

Construed with § 47-18. — Lis pendens and registration each have the purpose of giving constructive notice by record, and this section and § 47-18 must be construed in pari materia, and while the lis pendens statutes do not affect the registration laws, the converse is not true. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942).

Registration as Notice of Pendency of Foreclosure Suit. — An action was instituted to foreclose a duly registered deed of trust in which the trustee and the cestuis and the owner of the equity of redemption by mesne conveyances, were

made parties, and while the action was pending the owner of the equity sold the property. It was held that the duly registered deed of trust was constructive notice, not only of the lien, but also of the pendency of the foreclosure suit, since it would have been discovered by a prudent examiner, and therefore notice of the suit under this section was not required. *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942).

Cited in *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929).

§ 1-118. **Effect on subsequent purchasers.**—From the cross-indexing of the notice of lis pendens only is the pendency of the action constructive notice to a purchaser or incumbrancer of the property affected thereby; and every person whose conveyance or incumbrance is subsequently executed or subsequently registered is a subsequent purchaser or incumbrancer, and is bound by all proceedings taken after the cross-indexing of the notice to the same extent as if he were made a party to the action. For the purposes of this section an action is pending from the time of cross-indexing the notice. (C. C. P., s. 90; Code, s. 229; Rev., s. 462; 1919, c. 31; C. S., s. 502.)

Editor's Note. — Previous to the adoption of § 1-117, regarding a cross index, the filing of notice as provided in § 1-116 was all that was necessary to affect all purchasers with notice. See *Toms v. Warson*, 66 N. C. 417 (1872).

Judgment Relates Back to Beginning of Suit.—If a suit was pending against a person for certain property when he parted with it, in which there was afterwards a judgment, that judgment relates to the commencement of the suit and binds subsequent purchasers. *Briley v. Cherry*, 13 N. C. 2 (1828); *Cates v. Whitfield*, 53 N. C. 266 (1860); *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455 (1887).

Fraudulent Purchaser of Lands.—Where the president of a corporation, a substantial owner of its shares of stock, has personally bought in the lands which the company is under a binding contract to convey, before suit brought to enforce the contract, and with full knowledge of the plaintiff's right, taken deed for same from his com-

pany, before complaint filed, he and his corporation are concluded from setting up the doctrine of lis pendens as a defense, and his purchase will be held ineffective and fraudulent as to the decree rendered and the rights established in the plaintiff's favor, for specific performance. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389 (1920).

Purchase before Complaint Filed. — A purchaser of land for value after the filing of a lis pendens, but before the filing of the complaint in the action, is not charged with constructive notice of any defects in the title. *Morgan v. Bostic*, 132 N. C. 743, 44 S. E. 639 (1903).

Purchase from Litigant with Notice. — The doctrine of lis pendens, as it ordinarily prevails, only affects third persons who may take title to lands after the nature of the claim and the property affected are pointed out with reasonable precision by complaint filed or by notice given pursuant to this section but the principle is not oper-

ative where one buys from a litigant with full notice or knowledge of the suit, its nature and purpose and the specific property to be affected. *Morris v. Basnight*, 179 N. C. 298, 102 S. E. 389 (1920).

Purchaser from Successful Party.—One who, relying upon the judgment of the superior court, takes a conveyance from the successful party before the expiration of the ten days, takes it subject to the right

of appeal and of the judgment which may be entered therein, and he is conclusively fixed with notice of the litigation. *Rollins v. Henry*, 78 N. C. 342 (1878); *Dancy v. Duncan*, 96 N. C. 111, 1 S. E. 455 (1887); *Bird v. Gilliam*, 125 N. C. 76, 34 S. E. 196 (1899).

Cited in *Brinson v. Lacy*, 195 N. C. 394, 142 S. E. 317 (1928); *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929).

§ 1-119. **Notice void unless action prosecuted.**—The notice of lis pendens is of no avail unless it is followed by the first publication of notice of the summons or by an order therefor, or by the personal service on the defendant within sixty days after the cross-indexing. (C. C. P., s. 90; Code, s. 229; Rev., s. 461; 1919, c. 31; C. S., s. 503.)

Service Within 60 Days Required.—Where a party lives in a different county of the State, and claims as a bona fide purchaser, to affect him with notice of lis pendens the requirements of the statute must be strictly followed; among other things,

it must be served within sixty days after its filing. *Powell v. Dail*, 172 N. C. 261, 90 S. E. 194 (1916).

Cited in *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929).

§ 1-120. **Cancellation of notice.**—The court in which the said action was commenced may, at any time after it is settled, discontinued or abated, on application of any person aggrieved, on good cause shown, and on such notice as is directed or approved by the court, order the notice authorized by this article to be cancelled of record, by the clerk of any county in whose office the same has been filed or recorded; and this cancellation must be made by an endorsement to that effect on the margin of the record, which shall refer to the order. (C. C. P., s. 90; Code, s. 229; Rev., s. 463; C. S., s. 504.)

Notice Continues until Cancelled.—Were the suit has been prosecuted with proper diligence the lis pendens continues until the final judgment, or until it has been cancelled under the directions of the court. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Loss or Destruction of Notice.—The mere loss or destruction of the notice will not affect its efficacy, if the statute has been fully complied with. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Same—When by Act of Party.—If the party, by any act of his own has, contrary

to the usual course of the court, consented to or been instrumental in the removal from its files of the notice of lis pendens (or, as in some cases, its substitute, the complaint), leaving nothing whatever upon the record which could inform a purchaser of the nature of the action and the property sought to be subjected, it must follow, according to every principle of equity and fair dealing, that the purchaser will be protected. *Arrington v. Arrington*, 114 N. C. 151, 19 S. E. 351 (1894).

Cited in *Threlkeld v. Malcragson Land Co.*, 198 N. C. 186, 151 S. E. 99 (1930).

§ 1-120.1. **Article applicable to suits in federal courts.**—The provisions of this article shall apply to suits affecting the title to real property in the federal courts. (1945, c. 857.)

Editor's Note.—As to lis pendens in federal courts, see 23 N. C. Law Rev. 330.

It would seem that the Advisory Committee notes under Rule 64 of Civil Pro-

cedure for the District Courts of the United States (1938 Edition, p. 139) support the validity of this statute.

SUBCHAPTER VI. PLEADINGS.

ARTICLE 12.

Complaint.

§ 1-121. **First pleading and its filing.**—The first pleading on the part of

the plaintiff is the complaint. It must be filed in the clerk's office at or before the time of the issuance of summons and a copy thereof delivered to the defendant, or defendants, at the time of the service of summons; provided, that the clerk may at the time of the issuance of summons on application of plaintiff by written order extend the time for filing complaint to a day certain not to exceed twenty (20) days, and a copy of such order shall be delivered to the defendant, or defendants, at the time of the service of summons in lieu of a copy of the complaint: Provided further, said application and order shall state the nature and purpose of the suit. The clerk shall not extend the time for filing complaint beyond the time specified in such order; except that when application is made to the court, under article forty-six of this chapter, for leave to examine the defendant prior to filing complaint, and it shall be made to appear to the court that such examination of defendant is necessary to enable the plaintiff to file his complaint, and such examination is allowed, the clerk shall extend the time for filing complaint until twenty (20) days after the report of the examination is filed as required by § 1-571. When the complaint is not filed at the time of the issuance of the summons the clerk shall, when the complaint is filed, make an order directing the sheriff to serve a copy of such complaint on each of the defendants by delivery of a copy thereof to each of them, and the sheriff shall within ten days make such service and make a written return, on the paper containing the order issued to him, showing the date of service and the date of return, or, if for any reason he is unable to make service, he shall show in his return the reason therefor. If the sheriff's return shows that service of copy of the complaint as provided above has not been made on a defendant because such defendant is not to be found in the county where the summons was originally served on him, and the plaintiff causes affidavit to be made and filed showing that such defendant cannot, after due diligence, be found in the State, it shall not be necessary to make, or attempt to make, service thereof on such defendant in any other manner. (C. C. P., s. 92; 1868-9, c. 76, s. 3; 1870-1, c. 42, s. 3; Code, ss. 206, 232, 238; Rev., ss. 465, 466; 1919, c. 304, s. 2; C. S., s. 505; 1927, c. 66, s. 3; 1949, c. 1113, s. 1.)

Editor's Note.—By the amendment of 1919 a clause "otherwise the suit may, on motion, be dismissed" which originally appeared in the section was omitted, but subsequently was restored by the Consolidated Statutes. In changing other provisions of c. 156 of the Laws of 1919, this section in its original form was reenacted without change by the Extra Session of 1920 and 1921. See *Campbell v. Asheville*, 184 N. C. 492, 114 S. E. 825 (1922).

The 1927 amendment not only materially enlarged the provisions of the section but changed the time of filing the complaint. Prior to this amendment the complaint was to be filed on or before the return day of the summons, on pain of suit being dismissed at the cost of the plaintiff, and the clerk was authorized to extend, upon motion, the time of filing to a day certain. This was substantially all that this section had formerly provided. The change in the time of filing the complaint was effected in view of the changes introduced in § 1-89 with regard to the service and return of the summons.

The 1949 amendment rewrote the former last three sentences of this section to ap-

pear as the last two sentences above. For comment on amendment, see 27 N. C. Law Rev. 432.

Article 46 of this chapter, referred to in this section, formerly consisted of §§ 1-568 through 1-576. These sections were repealed by Session Laws 1951, c. 760, which inserted §§ 1-568.1 through 1-568.27 covering the subject matter of the repealed sections.

Prior to the amendment of 1919 the complaint was to be filed on or before the third day of the term to which the action was brought. See *Hill v. Hotel Co.*, 188 N. C. 586, 125 S. E. 266 (1924).

Similarity to Former Equity Practice.—The Code and the Constitution substantially adopt the practice and procedure of the courts of equity. The only difference between the practice under the Code and the former equity practice is that by the Code the summons does not follow, but precedes the complaint. *Wilson v. Moore*, 72 N. C. 558 (1875); *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904). (Decided under the former law.) The summons no more precedes the complaint under the present law, save under the exceptional

circumstances designated in the section as amended.—Ed. Note.

New Complaint as to New Defendant.—A new or an amended complaint must be filed as against a new defendant brought in subsequent to the filing of the original complaint. And a judgment by default for want of an answer where no such complaint is filed is irregular and capable of being set aside. *Vass v. People's Bldg., etc., Ass'n*, 91 N. C. 55 (1884).

Duty to Plead though Copy of Complaint Not Delivered.—A defendant, having made a general appearance, by motion to set aside a default judgment, which was allowed and time granted defendant in which to plead, it is his duty to answer or demur, even though a copy of the complaint filed has not been delivered to him as required by this section, and, upon his failure to do either, the court has authority to enter judgment by default and inquiry, without notice. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140 (1945).

Extension of Time.—Prior to 1921, (the time when the Civil Code of Procedure was restored) it was discretionary with the judge of the superior court to allow extension of time for the filing of pleadings; and the motion to extend the time for filing the complaint should be made before the judge, and not before the clerk. *Anderson v. Anderson*, 1 N. C. 20 (1789). See also, *Brendle v. Heron*, 68 N. C. 495 (1873). But this is no longer the rule. See *Campbell v. Asheville*, 184 N. C. 492, 114 S. E. 825 (1922).

Where the clerk of the court has extended the time for filing the complaint in accordance with this section, and the defendant has appealed to the superior court, it is within the sound legal discretion of the trial judge, given by § 1-152, to allow the complaint to be filed, and his sustaining the clerk's order to that effect is an

exercise of this discretion. *Hines v. Lucas*, 195 N. C. 376, 142 S. E. 319 (1928).

Same—By Consent of Parties.—In *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778 (1898), neither the complaint nor the answer was filed at the proper time, but there was an entry made on the minutes, which on its face did not purport to be by order of the court, and which was admitted to have been by consent of the parties to the effect that the plaintiff have thirty days to file his complaint and the defendant sixty days thereafter. This procedure seems to be permissible.

Same—Motion to Dismiss Necessary to Prevent Extension.—The fact that this section requires the complaint to be filed at or before the return day of the summons, (before the amendment of 1927) does not prevent the plaintiff from filing it thereafter if the defendant fails to move to dismiss the action for the plaintiff's failure to so file. *Roberts v. Allman*, 106 N. C. 391, 11 S. E. 424 (1890).

Amendment of Order Extending Time for Filing Complaint.—The trial court below permitted plaintiffs to amend order extending time to file complaint, served together with the summons, to show the nature and purpose of the suit as required by this section, and denied a motion to dismiss for want of proper service of process. The case was affirmed by an equally divided court. *Whitehurst v. Anderson*, 228 N. C. 787, 44 S. E. (2d) 358 (1947).

Judgment of Non Pros.—In the absence of a complaint filed at the proper time the defendant may move for a judgment of non pros. *Vass v. People's Bldg., etc., Ass'n*, 91 N. C. 55 (1884).

Cited in *O'Brian v. Bennett*, 213 N. C. 400, 196 S. E. 326 (1938); *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945).

§ 1-122. Contents.—The complaint must contain—

1. The title of the cause, specifying the name of the court in which the action is brought, the name of the county in which the trial is required to be had, and the names of the parties to the action, plaintiff and defendant.

2. A plain and concise statement of the facts constituting a cause of action, without unnecessary repetition; and each material allegation must be distinctly numbered.

3. A demand for the relief to which the plaintiff supposes himself entitled. If the recovery of money is demanded, the amount must be stated.

4. In actions for the recovery of a debt contracted for the purchase of land, a statement that the consideration of the debt was the purchase money of certain land, describing the land in an intelligible manner, such as the location, boundaries,

and acreage. (C. C. P., s. 93; 1879, c. 217; Code, ss. 233-4; Rev., ss. 467-8; C. S., s. 506.)

I. In General.

II. Formal Parts of Complaint.

III. Statement of Facts Constituting the Cause of Action.

IV. Demand for Relief.

V. Statement of Consideration for the Purchase of Land.

Cross References.

As to a bill of particulars, see § 1-150. As to amendment to indefinite pleadings, see § 1-153. As to limitation of judgment to demand in complaint, see § 1-226. As to debt for purchase of land, denied by answer, see § 1-136. As to form of execution on judgment for purchase money, see § 1-313, subsection 5.

I. IN GENERAL.

Logic and Precision of Common Law Not Discarded. — The rules of common law as to the pleading which are only the rules of logic, have not been abolished by the Code. *Crump v. Mims*, 64 N. C. 767 (1870). The notion that the Code of Civil Procedure is without order or certainty and that any pleading however loose or irregular, may be upheld, is erroneous; while it is not perfect it has both logical order, precision and certainty, when it is properly observed. *Webb v. Hicks*, 116 N. C. 598, 21 S. E. 672 (1895).

Construction of Pleadings.—While the pleadings are to be construed liberally, they are to be so construed as to give the defendant an opportunity to know the grounds upon which he is charged with liability. *Thomason v. Seaboard, etc., R. Co.*, 142 N. C. 318, 55 S. E. 205 (1906).

Old and New Procedure Distinguished.—Under the former system the practice was in declaring to proceed on the special contract and also in other counts, called the common counts, so that, if unable to recover on the special assumpsit, relief might be had on some of the counts in general assumpsit on the implied promise or obligation. If the plaintiff under that system had "counted" only on the special contract, not being able to recover on that, he would have failed in his action. But under the Code all forms of pleading which existed before are abolished, and now we have only the forms of pleading and the rules by which their sufficiency is to be determined, part of which are prescribed in this section. *Jones v. Mial*, 82 N. C. 252 (1880).

For an eloquent expression of the abolition of the old system of pleading and the substitution therefor the new system,

see *Pierce v. North Carolina R. Co.*, 124 N. C. 83, 32 S. E. 399 (1899).

For a discussion of the similarity between the civil procedure adopted in this State and that which prevailed in the courts of King's Bench, in England, see *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904).

Same Substantial Certainty as at Common Law a Requisite.—The object of the Code was to abolish the different forms of action and the technical and artificial modes of pleading used at common law, but not to dispense with the certainty, regularity and uniformity which are essential in every system adopted for the administration of justice. The plaintiff must state his cause of action with the same substantial certainty as was formerly required in a declaration. *Oates v. Gray*, 66 N. C. 442 (1872).

Theory and Form of Action Immaterial.—Where the facts in the complaint in an action for damages caused by an action brought by the defendant to have plaintiff's deed declared void constitute a cause of action, it is immaterial whether the action is for slander of title, malicious prosecution, or for an abuse of legal process, and the complaint is sufficient. *Chatham Estates v. American Nat. Bank*, 171 N. C. 579, 88 S. E. 783 (1916).

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794 (1930); *Hinton v. Whitehurst*, 214 N. C. 99, 198 S. E. 579 (1938); *Herndon v. Massey*, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941).

II. FORMAL PARTS OF COMPLAINT.

Title of Cause.—A paper-writing introduced before a justice of the peace, purporting upon its face only to be a verified account upon which judgment is sought, lacking the requisites of a complaint, under the provisions of this section, in failing to state the title of the cause, the name of the county and parties, will not be considered as a verified complaint on the trial in the superior court, requiring the answer there to be verified; and upon an oral answer denying the liability and raising the issue, the question is for the determination of the jury under proper evidence. *Van Smith Bld. Material Co. v. Tarboro Hardware Co.*, 173 N. C. 55, 91 S. E. 524 (1917).

Parties.—A general designation of parties as the “heirs of M. C.” is irregular and will not be tolerated. *Kerlee v. Corpening*, 97 N. C. 330, 2 S. E. 664 (1887).

It also constitutes a fatal defect on demurrer to designate the plaintiffs in a complaint as “H. M. & Co.,” without setting out the individual names of persons composing the firm. *Morrow v. Morgan*, 117 N. C. 504, 23 S. E. 489 (1895).

As to parties generally, see §§ 1-57 et seq. and the notes thereto.

III. STATEMENT OF FACTS CONSTITUTING THE CAUSE OF ACTION.

Provisions of Section Not Mere Matter of Form.—This section requiring that the plaintiff shall state in a plain, strong, intelligible manner his grounds of action, is not a mere matter of form. It is of the essential substance of the litigation. It is necessary to the end that the contending parties may understand and prepare to meet each the other's contention, and prepare himself for the trial of issues of law or fact presented, that the court may have a proper, just and thorough apprehension of the controversy, and that the same may go into the record and stand as a perpetual memorial of the litigation and all that it embraces. Any other course of procedure would lead to endless confusion and litigation. If this were not done, it would be difficult to show what any litigation embraced or that it had been settled and ended, and when and how. It is not sufficient that the plaintiff had a cause of action and can prove it; he must first plead it, then prove it. *McLaurin v. Cronly*, 90 N. C. 50 (1884).

Result of Noncompliance.—Unless the complaint contains a plain and concise statement of the facts constituting a cause of action, without unnecessary repetition pursuant to this section, courts will be hampered in determining what are the proper issues, both as to form and to number. The principles of good pleading are retained under our present system. *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593 (1925).

Defendant Must Not Be Left in Doubt.—The facts should be so stated as to leave the defendant in no doubt as to alleged cause of action against him, so that he may know how to answer and what defense to make. *Hussey v. Norfolk*, etc., R. Co., 98 N. C. 34, 3 S. E. 923 (1887).

Right to Demand Filing of Amended Complaint.—Several elements of damages may be alleged on one cause of action, and where this has been done, defendant's mo-

tion to require plaintiff to file an amended complaint, based on the theory that each element of damage constituted a separate cause of action and should be separately alleged, is properly refused under this section. *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196 (1934).

Matter Should Be Such as Would Be Competent on Hearing.—Nothing ought to be in a complaint, or remain there over objection, which is not competent to be shown on the hearing. *Duke v. Crippled Children's Comm.*, 214 N. C. 570, 199 S. E. 918 (1938), citing *Pemberton v. Greensboro*, 203 N. C. 514, 166 S. E. 396 (1932).

“A plain and concise statement of facts,” within the meaning of this section, means a statement of all the facts necessary to enable the plaintiff to recover. By a “plain” statement is meant a direct and positive averment of fact, which does not leave the existence of the fact to be inferred merely from the existence of some other fact. *Commissioners v. McPherson*, 79 N. C. 524 (1878); *Citizens Bank v. Gahagan*, 210 N. C. 464, 187 S. E. 580 (1936).

Redundancy in pleading does not present quite the theoretical and technical problems posed by the subject of relevancy, and would seem to include anything which is unnecessary to “a plain and concise statement of the facts constituting a cause of action,” such as unnecessary repetition, and the detailed statement of evidential matters, however relevant the latter may be when presented upon the trial. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299 (1942).

A party to an action is entitled as a matter of right to put into his pleadings a concise statement of the facts constituting his cause of action or defense, and nothing more. *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938); *Wadesboro v. Cox*, 215 N. C. 708, 2 S. E. (2d) 876 (1939).

Material and Essential Rather than Collateral or Evidential Facts Must Be Stated.—The meaning of this section is that the complaint shall contain the material, essential, and ultimate facts upon which the right of action is based, and not collateral or evidential facts, which are only to be used to prove and establish the ultimate facts. *Chason v. Marley*, 223 N. C. 738, 28 S. E. (2d) 223 (1943).

This section prescribes an ideal pattern for the drafting of a complaint. The complaint should set forth the essential facts without alleging evidential facts better left for proof at the time of the trial.

Rhodes v. Jones, 232 N. C. 547, 61 S. E. (2d) 725 (1950).

The function of the complaint is to state the ultimate and decisive facts which constitute the cause of action but not the evidence necessary to prove such issuable facts. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

A complaint should state in a plain and concise manner the material and essential facts constituting plaintiff's cause of action, so as to disclose the issuable facts determinative of plaintiff's right to relief, and should not contain collateral, irrelevant, redundant or evidential matter. Barron v. Cain, 216 N. C. 282, 4 S. E. (2d) 618 (1939).

Facts Must Be Stated, Not Conclusions or Evidence.—The Code of Civil Procedure modifying the method of pleading does not abolish "all forms" of pleading. The fundamental principle of pleading that facts or circumstances constituting the cause of action must be pleaded and not the pleader's conclusions of law drawn from those facts or evidence, holds as true as ever. With respect to the statement of these facts there has been no relaxation of the requisite in the new form, and no alteration from the old, except to require greater particularity of separately numbering every material fact. Moore v. Hobbs, 79 N. C. 535 (1878); Lassiter v. Roper, 114 N. C. 17, 18 S. E. 946 (1894); Gossler v. Wood, 120 N. C. 69, 27 S. E. 33 (1897).

A complaint which merely states a conclusion of law is demurrable both at common law and under the Code. Rountree v. Brinson, 98 N. C. 107, 3 S. E. 747 (1887).

Matters of Defense Need Not Be Alleged.—If it is alleged that the consideration for the debt or the note sued upon is the purchase money of certain lands, and the lands are specifically described, it is not necessary to allege that the plaintiff has a good title, and that he had tendered a deed to the defendant—these being matters of defense. Toms v. Fite, 93 N. C. 274 (1885).

Complaint Considered as a Whole.—A complaint will be sustained, as against a demurrer, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms. New Bern Banking, etc., Co. v. Duffy, 156 N. C. 83, 72 S. E. 96 (1911); Hendrix v. Southern R. Co., 162 N. C. 9, 77 S. E. 1001 (1913). See also, Halstead v. Mullen, 93 N. C. 252 (1885); Stokes v. Taylor, 104 N. C. 394, 10 S. E. 566 (1889); McEachin v. Stewart, 106 N.

C. 336, 11 S. E. 274 (1890); Purcell v. Richmond, etc., R. Co., 108 N. C. 954, 12 S. E. 954 (1891); Holden v. Warren, 118 N. C. 327, 24 S. E. 770 (1896).

Sufficiency of the Facts.—If the facts stated in the complaint, together with those drawn into issue on the answer of the defendants, constitute a right to any relief whatever, the plaintiff is entitled to have it on the case as it was, without amendment. Jones v. Mial, 82 N. C. 252 (1880).

Plaintiff need not set forth the full contents of the contract which is the subject matter of his action, nor incorporate the same in the complaint by reference to a copy thereof attached as an exhibit. He must allege in a plain and concise manner the material, ultimate facts which constitute his cause of action. The production of evidence to support the allegations thus made may and should await the trial. Wilmington v. Schutt, 228 N. C. 285, 45 S. E. (2d) 364 (1947).

Averment of Willingness in Reciprocal Contract.—Where the plaintiff sues upon a special contract involving the performance of reciprocal acts between himself and the defendant, he must aver and show a readiness and willingness to perform on his part. Jones v. Mial, 79 N. C. 165 (1878).

Facts Warranting Joinder of Actions.—Where two causes of action are sought to be joined in the same complaint, the complaint must state such facts as would show that the two causes of action can be united under § 1-123. Allen v. Jackson, 86 N. C. 321 (1882); Manufacturing Co. v. Barrett, 95 N. C. 36 (1886).

Facts Supporting Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. In such case a motion to strike allegations that the injury was willful, wanton or malicious, is properly denied. Long v. Love, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

Proof of Foreign Law.—This section requires that the complaint contain a plain and concise "statement of facts constituting the cause of action." Upon those facts, if true, the law gives a "right of action." This right of action is a matter of law of which the court usually takes judicial notice, but if the tort or contract accrued beyond the State line the law of

the foreign state should be pleaded and proved—not because it is in that case a part of the “cause of action” any more than if the transaction had taken place within the State, but because the court is not presumed to know the law of all other states. *Lassiter v. Norfolk, etc., R. Co.*, 136 N. C. 89, 48 S. E. 642 (1904).

A complaint for converting a mortgaged crop, which avers title to such crop raised by the mortgagor and by him conveyed to the plaintiff, its delivery to the defendant, its value, and its appropriation by the defendant to his own use, after demand by the plaintiff, is a concise and definite statement of every material fact upon which the right to recover depends, and complies with this section. *Womble v. Leach*, 83 N. C. 84 (1880).

Motion to Strike out Redundant Matter from Complaint.—Where the trial court has allowed the plaintiff to file an amendment to the complaint to be confined to certain phases of the controversy or to allegations as to certain and specific matters, the plaintiff must confine himself to the restrictions under which he is permitted to amend or the trial judge may order stricken therefrom any further matters or any allegations that are irrelevant or redundant and not in conformity with the statute requiring a plain and concise statement of the cause of action without unnecessary repetition, and the granting of the defendant's motion to strike out certain parts of the amended complaint will be sustained on appeal if the complaint is sufficient in its allegations after the portions objected to have been stricken out to present every phase of the controversy. *Ellis v. Ellis*, 198 N. C. 767, 153 S. E. 449 (1930).

Where, in an action attacking the administratrix and guardian in the administration of an estate on the ground of fraud, recitals and denunciations of fraud in matters not necessary to a statement of any cause of action set forth in the pleading should be stricken as a matter of right upon motion made in apt time. *Privette v. Morgan*, 227 N. C. 264, 41 S. E. (2d) 845 (1947).

IV. DEMAND FOR RELIEF.

This section contemplates that the complaint should set forth a demand for relief to which the plaintiff supposes himself entitled. *Griggs v. Stoker Service Co.*, 229 N. C. 572, 50 S. E. (2d) 914 (1948).

But Relief Is Granted in Absence of Prayer Therefor. — Notwithstanding this section, the decisions have consistently followed the rule that under the Code of

Civil Procedure the relief to be granted in an action does not depend upon that asked for in the complaint, but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. *Griggs v. Stoker Service Co.*, 229 N. C. 572, 50 S. E. (2d) 914 (1948).

It is the apparent purpose of the new system, while simplifying the method of procedure, to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. *Jones v. Mial*, 79 N. C. 165 (1878).

The relief to be granted in an action does not depend upon that asked for in the complaint; but upon whether the matters alleged and proved entitle the complaining party to the relief granted, and this is so in the absence of any prayer for relief. *Bryan v. Canady*, 169 N. C. 579, 86 S. E. 584 (1915).

Party Not Limited to Specific Relief Prayed.—Under this section a party is not restricted to the specific relief demanded by him, but may have any additional and different relief which the pleadings and facts proved show to be just and proper. *Knight v. Houghtalling*, 85 N. C. 17 (1881); *McNeill v. Hodges*, 105 N. C. 52, 11 S. E. 265 (1890); *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155 (1900).

What Determines the Measure of Relief.—Under the Code system the demand for relief is made wholly immaterial, and that it is the case made by the pleadings and facts proved, and not the prayer of the party, which determines the measure of relief to be administered, the only restriction being that the relief given must not be inconsistent with the pleadings and proofs. In other words, the court has adopted the old equity practice, when granting relief under a general prayer, except that now no general prayer need be expressed, but is always implied. *Knight v. Houghtalling*, 85 N. C. 17 (1881); *Harris v. Sneeden*, 104 N. C. 369, 10 S. E. 477 (1889); *Gattis v. Kilgo*, 125 N. C. 133, 34 S. E. 246 (1899); *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904).

In the absence of any formal demand for judgment the court will grant such judgment as the party may be entitled to have, consistent with the pleadings and proofs. *Demsey v. Rhodes*, 93 N. C. 120 (1885); *Staton v. Webb*, 137 N. C. 35, 49 S. E. 55 (1904).

Alternative Relief. — The form of the prayer for judgment is not material, and

the plaintiff can unite two causes of action relating to the same transaction and obtain alternative relief. *Herring v. Cumberland Lumber Co.*, 159 N. C. 382, 74 S. E. 1011 (1912).

V. STATEMENT OF CONSIDERATION FOR THE PURCHASE OF LAND.

See § 1-136 and clause 5 of § 1-313 and the notes thereto.

§ 1-123. **What causes of action may be joined.**—The plaintiff may unite in the same complaint several causes of action, of legal or equitable nature, or both, where they all arise out of—

1. The same transaction, or transaction connected with the same subject of action.

2. Contract, express or implied.

3. Injuries with or without force to person or property.

4. Injuries to character.

5. Claims to recover real property, with or without damages for the withholding thereof, and the rents and profits of the same.

6. Claims to recover personal property, with or without damages for the withholding thereof; or,

7. Claims against a trustee, by virtue of a contract, or by operation of law.

But the causes of action so united must all belong to one of these classes, and, except in actions for the foreclosure of mortgages, must affect all the parties to the action, and not require different places of trial, and must be separately stated.

In actions to foreclose mortgages, the court may adjudge and direct the payment by the mortgagor of any residue of the mortgage debt that remains unsatisfied after a sale of the mortgaged premises, in cases in which the mortgagor is personally liable for the debt secured; and if the mortgage debt is secured by the covenant or obligation of any person other than the mortgagor, the plaintiff may make that person a party to the action, and the court may adjudge payment of the residue of the debt remaining unsatisfied after a sale of the mortgaged premises, against the other person, and may enforce such judgment as in other cases. (C. P., s. 126; Code, s. 267; Rev., s. 469; C. S., s. 507.)

I. In General.

II. Causes of Action with Reference to Transaction, or Subject of Action.

III. Causes of Action in Contract.

IV. Causes of Action for Tort to Person or Property.

V. Must Affect All Parties and Have Same Venue.

Cross References.

See notes under §§ 1-69, 1-127. As to parties generally, see §§ 1-57 et seq. As to who may be defendants, see § 1-69. As to improper joinder of causes of action as ground for demurrer, see § 1-127, subsection 5. As to section prohibiting deficiency judgments in foreclosures of purchase money mortgages, see § 45-21.33.

I. IN GENERAL.

Editor's Note.—For a discussion of this section in connection with the right to join in one action the right of an injured person to sue for personal injury and the right of the personal representative to sue conferred by the wrongful death statute, see 25 N. C. Law Rev. 84.

For an article recommending this sec-

tion be changed to conform to corresponding provision in federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

The common law does not generally allow the joinder of causes of action of different natures because it leads to prolixity, the multiplication of issues and confusion. *Gregory v. Hobbs*, 93 N. C. 1 (1885).

The purpose of this section is to extend the right of plaintiffs to join actions, not merely by including equitable as well as legal causes of action, but to make the ground broad enough to cover all causes of action which a plaintiff may have against a defendant, so that the court may not be forced "to take two bites at a cherry," but may dispose of the whole subject of controversy and its incidents and corollaries in one action. *Hamlin v. Tucker*, 72 N. C. 502 (1875); *Gregory v. Hobbs*, 93 N. C. 1 (1885); *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944).

The purpose of this section is to permit the consolidation of causes of action when the facts as to all may be stated as a connected whole, are so restricted in scope that they may be examined in relation to

each other, and are directed to the same subject matter which constitutes one general right. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946).

Same—Section Relating to Counterclaim.—The purpose and intent of subsection 1 of this section and subsection 1 of § 1-137, relating to causes which may be pleaded as counterclaims, are substantially the same, i. e., to permit the trial in one action of all causes of action arising out of one contract or transaction connected with the same subject of action, and therefore decisions on one of the statutes is authority on the other. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

This section should be liberally construed to the end that justiciable controversies may be expeditiously adjusted by judicial decree at a minimum of cost to the litigants and the public. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946).

Joinder Not Mandatory but Permissive.—The provisions of this section are permissive. They are not mandatory as to compel the joinder of separate causes of action arising out of the same transaction. *Gregory v. Hobbs*, 93 N. C. 1 (1885); *Raper Lumber Co. v. Wallace*, 93 N. C. 22 (1885); *Tyler v. Capeheart*, 125 N. C. 64, 34 S. E. 108 (1899).

Joinder Is Subject to Restrictions.—The joinder of causes of action is not primarily instigated by the court, but is done on the initiative of the parties seeking to assert and enforce their rights by final judgment of the court; and while under the supervision of the court it is not a matter of discretion but is subject to the restrictions provided in this section. *Horton v. Perry*, 229 N. C. 319, 49 S. E. (2d) 734 (1948).

Whether legal or equitable, the joinder of causes of action and the parties to whom they belong must come within the provisions of this chapter, unless by some special modifying statute or recognized rule of practice an exception is created. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

Consolidation of Actions Distinguished.—There is a substantial difference between the consolidation of cases for the convenience of trial and the joinder of causes of action for judicial determination in their combined aspect. The former is in the exercise of the inherent power of the court and, in applicable cases, in its discretion; but this may be exercised only for the purpose of trial, and in that declared purpose will be found its limitations;—it cannot annul or suspend the statute relat-

ing to joinder. *Horton v. Perry*, 229 N. C. 319, 49 S. E. (2d) 734 (1948).

Effect of Section upon Existing Law.—This section does not make any substantial change in the rules of practice which obtained before the adoption of the Code in the courts of equity with regard to multifariousness. Whatever effect it may have had has been to enlarge the right of uniting in one action different causes of action. The equity rule as existing prior to the Code was thus announced by *Ruffin, C. J.*, in *Bedsole v. Monroe*, 40 N. C. 313 (1848): "If the grounds of the bill be not entirely distinct and wholly unconnected; if they arise out of one and the same transaction, or series of transactions, forming one course of dealing, and all tending to one end—if one unconnected story can be told of the whole, the objection of misjoinder of actions cannot apply." And it has been held not to apply, "When there has been a general right in the plaintiff, covering the whole case, although the rights of the defendants may have been distinct." *Heggie v. Hill*, 95 N. C. 304 (1886).

Former Equity Practice Followed.—Before this section was adopted, the doctrine of multifariousness was generally understood by the profession, and as the Code has in the main conformed to the equity practice, it may be well to look to those old landmarks for a guide through the mist that envelopes the subject. *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3 (1937), citing *Young v. Young*, 81 N. C. 91 (1879).

In interpreting this section with regard to multifariousness and misjoinder of parties our courts will take into consideration the principles of the old practice formerly existing exclusively in suits in equity. *Craven County v. Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931).

Each Cause Must Belong to Same Class.—No two causes of action which belong to different classes enumerated in this section can be joined in the same cause of action. *Land Co. v. Beaty*, 69 N. C. 329 (1873). And this, it is said, even though the different causes of action are connected with the same subject of the action or arise out of the same transaction. *Id.* But this last conclusion has been repeatedly repudiated in the case of joinder of tort and contract actions which are connected with the same subject of the action or arise out of the same transaction. See post, "Causes of Actions with Reference to Transaction and Subject to Action," II.

In order for joinder of causes of actions to be permissible, the causes joined must arise out of any one (and not out of dif-

ferent) of the classes enumerated in this section. In other words, each clause allowing joinder is to be taken independent of the other. See *Sutton v. McMillan*, 72 N. C. 102 (1875).

Thus a condemnation proceeding being purely statutory, a cause of action for compensation and one for damages as for a trespass can not be joined. *Abernathy v. South, etc.*, R. Co., 150 N. C. 97, 63 S. E. 180 (1908).

Under this section, if the complaint states a connected story, forming a general scheme and tending to a single end, the plaintiff may unite in the same complaint several causes of action. *Shaffer v. Morris Bank*, 201 N. C. 415, 160 S. E. 481 (1931).

The power of the court to allow amendments "material to the case" as provided in § 1-163 is a broad and discretionary power, and the phrase should be construed in connection with § 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. In regard to a related new cause of action set up by amendment, the statute of limitations operates as of the time of the amendment and not the institution of the action. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

Provision Requiring Each Cause of Action to Be Stated Separately.—When a plaintiff seeks to recover in one action on two or more causes of action, he must state each cause of action separately, setting out in each the facts upon which that cause of action rests. *King v. Coley*, 229 N. C. 258, 49 S. E. (2d) 648 (1948).

Inconsistent Causes.—Even if the causes of action were to some extent inconsistent, there is authority to the effect that the complaint is not always on that account demurrable. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910); *Hardin v. Boyd*, 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141 (1885).

No Undue Increase of Cost or Inconvenience.—Under the provisions of this section where there is but one subject-matter of the suit or action in which several parties have divergent interests, and they may all be united in one suit without undue increase of cost or inconvenience to the parties, a motion to dismiss for multifariousness and misjoinder of parties is

properly denied. *Craven County v. Investment Co.*, 201 N. C. 523, 160 S. E. 753 (1931).

Judgments.—Causes of action based on several judgments may be joined in one complaint. *Moore v. Nowell*, 94 N. C. 265 (1886).

Method of Taking Advantage of Misjoinder.—A misjoinder of causes of action is a ground of demurrer and can be taken advantage of in no other way. *Burks v. Ashworth*, 72 N. C. 496 (1875). See § 1-127, clause 5, and the notes thereto.

Demurrer for misjoinder of parties and causes of action will be sustained under this section if the several causes of action alleged do not affect all the parties to the action. *Lucas v. North Carolina Bank, etc.*, Co., 206 N. C. 909, 174 S. E. 301 (1934).

Execution of Deed and Demand for Land.—The plaintiff can unite, in the same action, a demand for the execution of a deed and for possession of the land, while under the old system the lost or destroyed deed could only be established in a court of equity, where a decree for title and such other relief as might be proper could be made and enforced according to the practice of that court. *Jennings v. Reeves*, 101 N. C. 447, 7 S. E. 897 (1888).

Effect of Dismissal upon Appeals from Preliminary Orders.—Upon the dismissal of an action for misjoinder of parties and causes, appeals from all preliminary orders such as for an audit of the books of one of defendants are dismissed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943).

Where Defect in Pleading Relates Merely to Misjoinder.—If the defect in the pleading, upon demurrer under this section, relates merely to misjoinder of actions, the court will, under § 1-132, salvage the action by ordering it to be divided into as many actions as are necessary for determination of the causes of action stated; but where there is a misjoinder both of causes and of parties, this procedure cannot be followed. *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943).

Cited in *Pender County v. King*, 197 N. C. 50, 147 S. E. 695 (1929); *Shuford v. Yarborough*, 197 N. C. 150, 147 S. E. 824 (1929); *Andrews Music Store v. Boone*, 197 N. C. 174, 148 S. E. 39 (1929); *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1929); *Berger v. Stevens*, 197 N. C. 234, 148 S. E. 244 (1929); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Mack Truck Corp. v. Wachovia Bank and Trust Co.*, 199 N. C. 203, 154 S. E. 42 (1930);

Daniels v. Duck Island, 212 N. C. 90, 193 S. E. 7 (1937); Bellman v. Bisette, 222 N. C. 72, 21 S. E. (2d) 896 (1942); Beam v. Wright, 222 N. C. 174, 22 S. E. (2d) 270 (1942); Corbett v. Hilton Lbr. Co., 223 N. C. 704, 28 S. E. (2d) 250 (1943); Hatcher v. Williams, 225 N. C. 112, 33 S. E. (2d) 617 (1945).

II. CAUSES OF ACTION WITH REFERENCE TO TRANSACTION, OR SUBJECT OF ACTION.

The general rule which may be deduced from the decisions is that, if the causes of action be not entirely distinct and unconnected, if they arise out of one and the same transaction, or a series of transactions forming one dealing and all tending to one end, if one connected story can be told of the whole—they may be joined in order to determine the whole controversy in one action. *Bedsole v. Monroe*, 40 N. C. 313 (1848); *Young v. Young*, 81 N. C. 92 (1879); *King v. Farmer*, 88 N. C. 22 (1883); *Fisher v. Trust Co.*, 138 N. C. 224, 50 S. E. 659 (1905); *Hawk v. Pine Lumber Co.*, 145 N. C. 47, 58 S. E. 603 (1907); *Howell v. Fuller*, 151 N. C. 315, 66 S. E. 131 (1909); *Balfour Quarry Co. v. West Constr. Co.*, 151 N. C. 345, 66 S. E. 217 (1909); *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910); *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502 (1921); *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156 (1934); *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3 (1937); *Holland v. Whittington*, 215 N. C. 330, 1 S. E. (2d) 813 (1939); *Griggs v. Griggs*, 218 N. C. 574, 11 S. E. (2d) 878 (1940); *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416 (1941); *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946); *Owen v. Hines*, 227 N. C. 236, 41 S. E. (2d) 739 (1947).

Each cause of action must relate to one general right, and each must be so germane to it as to be regarded as a part thereof. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946).

The complaint is multifarious unless all the causes of action alleged therein arose out of one and the same transaction or series of transactions forming one course of dealing, and all tending to one end. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946).

Where the matter is wholly distinct and did not stem out of the transaction set out in the original complaint and is not sufficiently correlated thereto, the real objection would be noncompliance with this

section. *Nassaney v. Culler*, 224 N. C. 323, 30 S. E. (2d) 226 (1944).

Source of Litigation.—While it was the object of the legislature to avoid a multiplicity of suits and to prevent protracted and vexatious litigation, this subdivision of this section has given rise to more unprofitable litigation upon its construction than any other section. *Young v. Young*, 81 N. C. 92 (1879).

The word "transaction" is used in the statute in reference to the joinder of actions in the sense of the conduct or finishing up of an affair, which constitutes as a whole the "subject of action." *Cheatham v. Bobbitt*, 118 N. C. 343, 24 S. E. 13 (1896).

The word "transaction," as employed in this section, means something which has taken place whereby a cause of action has arisen, and embraces not only contractual relations but also occurrences in the nature of tort. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924 (1949).

The "subject of action" means the thing in respect to which the plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948). See *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924 (1949).

The connection with the subject of action must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

Under this section it is not necessary that the causes of action of several plaintiffs be identical, but only that the causes of action arise out of the same transaction or transactions connected with the same subject of action. *Wilson v. Horton Motor Lines*, 207 N. C. 263, 176 S. E. 750 (1934).

Legal and equitable causes of action, arising out of tort and ex contractu, may be united under this section in the same complaint where they arise out of the same transaction or series of transactions forming a connected whole. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156 (1934).

Series of Transactions Forming One Course of Dealing.—Causes of action which arise from a series of transactions connected together and forming one course of dealing may be joined. *King v. Farmer*, 88 N. C. 22 (1883); *Balfour, etc., Co. v. West Constr. Co.*, 151 N. C. 345, 66 S. E.

217 (1909); *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3 (1937).

General Right Arising out of Series of Transactions.—*Young v. Young*, 81 N. C. 92 (1879).

Tort and Contract May Be Joined.—An action arising upon a contract united in the same complaint with one arising in tort is not a misjoinder, and a demurrer thereto will not be sustained "where they arise out of the same transaction or are connected with the same subject of action." *Cook v. Smith*, 119 N. C. 350, 25 S. E. 958 (1896); *Railroad Co. v. Wakefield Hdw. Co.*, 135 N. C. 73, 47 S. E. 234 (1904); *Reynolds v. Mt. Airy, etc., R. Co.*, 136 N. C. 345, 48 S. E. 765 (1904); *Hawk v. Pine Lumber Co.*, 145 N. C. 48, 58 S. E. 603 (1907); *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

In the earlier cases of *Logan v. Wallis*, 76 N. C. 416 (1877), and *Doughty v. Atlantic, etc., R. Co.*, 78 N. C. 22 (1878), it was broadly stated that a cause of action founded on a tort could not be joined with one founded on contract; but in *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917 (1890), this rule was explained and extended so as to permit such a joinder of actions, provided they arose out of the same transaction. *Benton v. Collins*, 118 N. C. 196, 24 S. E. 122 (1896); *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897).

For example in *Hamlin v. Tucker*, 72 N. C. 502 (1875), it was held that a plaintiff may in the same complaint join as separate causes of action: (1) the harboring and maintaining his wife; (2) the conversion of certain personal property, to which the plaintiff is entitled *jure mariti*; (3) inducing the wife while harbored and maintained to execute to defendant a deed for land, under which he had received the rents, and (4) converting to defendant's own use certain mules, farming utensils, etc., set out in a marriage settlement executed by the plaintiff and his wife. *Hawk v. Pine Lumber Co.*, 145 N. C. 48, 58 S. E. 603 (1907).

Likewise in *Young v. Young*, 81 N. C. 92 (1879), the court held that a complaint containing several causes of action, viz.: (1) to declare one defendant a trustee of land, (2) to recover judgment of other defendants for purchase money of same, (3) and to recover possession of the land with damages for withholding it, is not demurrable.

Stockholder's Suit against Corporate Officers.—Where the stockholders of a corporation sue its officers for damages for their mismanagement and negligence in accepting worthless paper, and inducing the plaintiffs to become indorsee thereon to their loss and damage, and in failing to indorse these papers themselves under an agreement to do so, the causes of action are properly joined, one sounding in tort and the other being to enforce an equitable right arising out of transactions connected with the same subject matter. *Ayers v. Bailey*, 162 N. C. 209, 78 S. E. 66 (1913).

Suit against Defaulting Corporate Officer and Surety.—A suit by the receiver of a corporation against its defaulting officer and the surety or guarantor for his honesty or fidelity is not objectionable as a misjoinder of parties and causes of action, the alleged default of the principal having occurred that created the surety's liability within the terms and conditions of its bond. *Shuford v. Yarborough*, 197 N. C. 150, 147 S. E. 824 (1929), distinguishing *Clark v. Bonsol*, 157 N. C. 270, 72 S. E. 954 (1911), and citing *Robinson v. Williams*, 189 N. C. 256, 126 S. E. 621 (1925); *Carswell v. Talley*, 192 N. C. 37, 133 S. E. 181 (1926); *Greene County v. National Bank*, 193 N. C. 524, 137 S. E. 593 (1927).

Actions on Insurance Policies.—In *McGowan v. Life Insurance Co.*, 141 N. C. 367, 54 S. E. 287 (1906), the complaint alleged that the plaintiff had been induced to take out fifteen policies on the lives of herself, her children and grandchildren by means of certain false and fraudulent representations made to her by the defendant's agents that they were ten-year tontine policies; that after paying her weekly assessments for ten years, when she demanded performance it was refused, and she discovered that the policies did not mean what the defendant's agents had represented to her. It was held that the causes of action were properly joined, on the theory that they all arose out of a transaction connected with the same subject of the action. See also, *Pretzfelder & Co. v. Merchants Ins. Co.*, 116 N. C. 491, 21 S. E. 302 (1895).

Suit to Engraft Parol Trust on Land.—Where the complaint in a suit to engraft a parol trust upon the title to lands in favor of a husband and wife, alleges that they gave a mortgage on three tracts of land, the husband having title in two of them and his wife in the other, and that the husband for himself and as agent for his wife had agreed with a third person that the

latter should bid it in at the sale and hold the title in trust for them upon certain trust relations: Held, in a suit against the administrator of the alleged deceased trustee, the complaint was not demurrable upon the ground of a misjoinder of parties and causes of action. *Cole v. Shelton*, 194 N. C. 741, 140 S. E. 734 (1927).

In an action to recover land on the ground that the sale under execution was void, it was held that all matter raised by the pleading could all be settled in one action. *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928).

Action to Foreclose Mortgage and Recover Land.—An action brought to foreclose a mortgage upon a tract of land cannot be joined with an action to recover the possession of another tract of land, as these causes do not arise out of the same transaction, nor are the transactions connected with the same subject of action. *Edgerton v. Powell*, 72 N. C. 64 (1875).

Actions for Mortgaged Property and Mortgage Debt.—A demand for judgment for the possession of mortgaged property is properly joined with a demand for judgment for the debt secured thereby. *Martin v. McNeely*, 101 N. C. 634, 8 S. E. 231 (1888); *Kiger v. Harmon*, 113 N. C. 406, 18 S. E. 515 (1893).

Action for Damages by Husband and Wife.—Where a civil action for damages is brought by a husband and wife for an alleged assault against them both, for alleged false arrest of the male plaintiff and abuse of process in swearing out a peace warrant against him and his false imprisonment, the defendant's demurrer on the ground of misjoinder of parties and causes of action is properly sustained and the case dismissed, the several causes of action not affecting all the parties to the action as required by this section and § 52-10, authorizing a married woman to bring suit for damages for personal injuries without the joinder of her husband. *Sasser v. Bullard*, 199 N. C. 562, 155 S. E. 248 (1930).

Scheme and Conspiracy to Defraud.—The complaint alleged fraud and conspiracy on the part of defendants inducing plaintiffs to sign a deed describing not only the property intended to be conveyed by plaintiffs, but also other valuable property, and that further, pursuant to fraud and conspiracy to deprive plaintiffs of the purchase price of the property intended to be conveyed, which was to be paid in cash or secured by registered lien, defendant grantees executed unsecured notes therefor and defendant attorney wrongfully

withheld one of the notes so executed, and prayed for reformation of the deed and for judgment on the notes. Held: Defendants' demurrer on the ground of misjoinder of parties and causes of action was properly overruled, since all the matters alleged arose out of the same transaction or transactions connected with the same subject of action. *Griggs v. Griggs*, 218 N. C. 574, 11 S. E. (2d) 878 (1940).

Mental Incompetency and Undue Influence.—In action to set aside deed on ground of mental incompetency of grantor, and duress and undue influence on part of grantees, a demurrer for misjoinder of causes of action was properly overruled. Mental incompetency and weakness of mind are not too far apart psychologically or too radically inconsistent as to require assertion in separate actions. *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510 (1945).

Warranties—Predecessors in Title.—A grantee of lands against whom a recovery has been had for a part thereof may sue his grantor for damages upon the covenants and warranty in his deed, and the successive warrantors in his chain of title, separately or in the same action, the subject matter being the same, our Code system not favoring a multiplicity of suits. *Winders v. Southerland*, 174 N. C. 235, 93 S. E. 726 (1917).

Proceedings under § 50-16.—A complaint in proceedings by the wife under § 50-16, for allowance for subsistence and counsel fees, with allegations that the husband had fraudulently conveyed his lands to his father under a conspiracy to defraud the plaintiff out of her marital rights, and afterwards had grossly abused her and coerced her into accepting a deed of separation is good and a demurrer thereto for misjoinder of parties and causes of action should be overruled, the various causes for which relief is sought being based on a conspiracy or arising out of the same subject matter or transaction. *Taylor v. Taylor*, 197 N. C. 197, 148 S. E. 171 (1929).

Causes of Action Not Properly Joined.—Although this section permits several causes of action to be united in the same complaint where they all arise out of the same transaction, it was held that causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing may not be properly joined in the same complaint. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708 (1950).

Same—Joinder of Causes of Action in

Tort.—A cause of action to recover the balance of compensation due plaintiff under an express contract of employment is improperly united with a cause of action to recover damages for assault committed by defendant upon plaintiff when he visited the office of the defendant to discuss the matter and a cause of action to recover damages for false imprisonment of plaintiff by defendant growing out of the assault, since the action *ex contractu* is asserted in respect to the contract of employment and arose out of the wrongful breach thereof by defendant, while the causes of action in tort are addressed to the violation of right of liberty and security of person, constituting a different subject of action and arising out of a different transaction, i. e., the infliction of personal injuries; but the causes of action in tort may be properly joined since they arose at the same time out of the same transaction, and further, relate to the injuries to the person. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924 (1949).

III. CAUSES OF ACTION IN CONTRACT.

Contracts and Torts. — See notes under the preceding analysis line.

Implied Contract Arising out of Tort.—Generally a cause of action based on a contract cannot be joined with a cause of action based on tort. But where the tort is of such a nature that the plaintiff may waive it and sue upon an implied contract, the causes of action may be properly joined. *Logan v. Wallis*, 76 N. C. 416 (1877).

Specific Performance and Action for Damages.—It is well settled that a cause of action for specific performance may be joined with one for damages resulting from a breach of the contract, or from a delayed performance, or for any other damages growing out of the transaction to which the plaintiff may show himself entitled. *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440 (1906).

Action for Statutory Penalties.—An action for a penalty given by a statute to any person injured is an action on a contract. Hence it may not be joined with another cause of action based on tort to person or property. *Doughty v. Atlantic, etc., R. Co.*, 78 N. C. 22 (1878); *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917 (1890).

A party suing for penalties against the same defendant may unite several such causes of action in the same complaint. *Burrell v. Hughes*, 116 N. C. 430, 21 S. E.

971 (1895); *Carter v. Wilmington, etc., R. Co.*, 126 N. C. 437, 36 S. E. 14 (1900).

A cause of action for a penalty for unreasonable delay in delivery of goods may be joined with one for recovery of the value of goods not delivered. *McCullen v. Seaboard Air Line R. Co.*, 146 N. C. 568, 60 S. E. 506 (1908); *Robertson v. Atlantic Coast Line R. Co.*, 148 N. C. 323, 62 S. E. 413 (1908).

Under this section allowing the joinder of several causes of action arising out of contract, express or implied, three causes of action against a register of deeds for statutory penalties for failure to record, and for wrongful issuance of, marriage licenses, may be united in the same complaint. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Action for Rescission and Breach. — Plaintiff may not unite in the same complaint an action for the rescission of a contract and one for its breach. The rights are opposed and the remedies inconsistent. *Lykes & Co. v. Grove*, 201 N. C. 254, 159 S. E. 360 (1931).

IV. CAUSES OF ACTION FOR TORT TO PERSON OR PROPERTY.

Injury to Person and Property May Be Joined. — Causes of action for "injuries with or without force to persons and property, or to either," may be joined, and different causes of action for such injuries may be joined against one or more defendants, provided that each of such causes affects all the parties defendant. *Howell v. Fuller*, 151 N. C. 315, 66 S. E. 131 (1909).

Trespass and Assault.—A count in trespass for forcibly entering the plaintiff's close may be joined with a count for an assault and battery. *Flinn v. Anders*, 31 N. C. 328 (1849).

Destroying Property and Trespass.—An action for willingly destroying a horse may be joined with a count for trespass in entering on the plaintiff's tenement. *Rippey v. Miller*, 46 N. C. 479 (1854).

Trespass Vi Et Armis and on the Case. — In an action for false imprisonment, under the Code, the common-law actions of trespass vi et armis and of trespass on the case may be joined in one complaint. *Hogwood v. Edwards*, 61 N. C. 350 (1867); *Bryan v. Stewart*, 123 N. C. 92, 31 S. E. 286 (1898).

Complaint alleging that plaintiff was injured by defendant's negligence and that thereafter defendant wrongfully discharged him is subject to demurrer for misjoinder as two causes of action have no interde-

pendent connection and are not connected with same subject matter. *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946), distinguishing *Hamlin v. Tucker*, 72 N. C. 502 (1875); *Peitzman v. Zebulon*, 219 N. C. 473, 14 S. E. (2d) 416 (1941).

V. MUST AFFECT ALL PARTIES AND HAVE SAME VENUE.

As to general provisions relating to parties, see §§ 1-57 et seq.

General Rule.—As stated in the next to the last paragraph of the section, causes of action may not be united under the provisions of this section, except those for the foreclosure of mortgages, unless they affect all the parties thereto. *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664 (1921).

Same—Mandatory. — This provision of the statute is mandatory and not merely directory. Thus in *Eller v. Carolina, etc., R. Co.*, 140 N. C. 140, 52 S. E. 305 (1905), where no formal objection was taken to the defect, the court said that they would take notice of it so that attention may be called to this important provision of the law which is mandatory and intended to protect a substantial right of the defendant.

Causes Affecting Different Parties. — Comprehensive as are the provisions of this section, allowing several causes of action to be united in the same action, it does not extend to and embrace distinct causes of action against different persons having no substantial connection with each other in respect of such causes of action. It does not provide for the consolidation of all sorts of causes of action in the same action, nor does it allow two or more different persons to be sued in the same action in respect to distinct causes of action where there is no joint or common liability among them. Different causes of action in favor of and against different parties must be litigated in different actions. *Brown v. Coble*, 76 N. C. 391 (1877); *Logan v. Wallis*, 76 N. C. 416 (1877); *Street v. Tuck*, 84 N. C. 605 (1881); *Burns v. Williams*, 88 N. C. 159 (1883); *Mitchell v. Mitchell*, 96 N. C. 14, 1 S. E. 648 (1887).

When a complete determination of a cause of action joined with others requires parties not necessary to the other causes of action, it is demurrable. *Logan v. Wallis*, 76 N. C. 416 (1877).

Thus a plaintiff could not unite in one suit a cause of action for wrongful attachment and one against the surety on the attachment bond for a breach thereof. *Rail-*

road Co. v. Hardware Co., 135 N. C. 73, 47 S. E. 234 (1904).

An action against insurer to reform plaintiff's fire insurance policy and to upset settlement and recover an additional sum under the policy as reformed, and against plaintiff's mortgagee to restrain foreclosure and recover rents, is defective in that the several causes do not affect all parties to the action, and the action is properly dismissed upon demurrer for misjoinder of parties and causes. *Mills v. North Carolina Joint Stock Land Bank*, 208 N. C. 674, 182 S. E. 336 (1935).

Plaintiffs, sureties on the bond of the clerk of the superior court, sought to recover in this action against the county accountant for alleged negligence in failing to properly audit the books of the clerk, against the members of the board of county commissioners for alleged negligence in employing incompetent accountants and in failing to employ competent ones after discovering the neglect of both the county accountant and the clerk, and against the members of the board of county commissioners as statutory bondsmen, in approving the bond of the county accountant in a penal sum less than that required by statute. Defendants' demurrers for misjoinder of parties and causes of action were properly sustained, since one of the causes sounds in contract while the others sound in tort, and since the causes alleged do not affect all the parties to the action. *Ellis v. Brown*, 217 N. C. 787, 9 S. E. (2d) 467 (1940).

Injuries to Father and Son by the Same Negligence. — The joinder of a cause of action brought by a son, an employee, to recover of his employer damages for a personal injury alleged to have been caused by the latter's negligence, with that of the father to recover for the loss of the son's services alleged to have been caused by the same negligent act, is demurrable on the ground of misjoinder of parties and causes of action. *Thigpen v. Cotton Mills*, 151 N. C. 97, 65 S. E. 750 (1909).

Causes Affecting Husband and Wife Separately. — A husband and wife can not join their separate actions for damages for mental anguish caused by defendant's negligence, and recover one sum in satisfaction of their several claims. *Eller v. Railroad*, 140 N. C. 140, 52 S. E. 305 (1905).

Actions against Different Insurance Companies.—Where a person was insured in several companies, and each policy limited the amount of his recovery thereunder to the proportion of the loss which the

policy should bear to the total insurance, it was proper, in an action to recover for a loss, to make each company a party defendant. *Pretzfelder & Co. v. Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302 (1895).

Action against Partner. — A cause of action against one on a joint contract as a partner may be joined with a cause of action against such partner individually. *Logan v. Wallis*, 76 N. C. 416 (1877).

Actions upon Administrator's and Clerk's Bonds.—A complaint in which are joined two causes of action, the one upon a clerk's and the other upon a bond of an administrator, is demurrable. *Street v. Tuck*, 84 N. C. 605 (1881).

Action against Two Carriers. — Where a carrier has accepted a shipment beyond its own line, and upon its not being delivered, agrees by parol to have it re-shipped to the starting point, and delivery is made there in bad condition, a joinder of

causes of action against the two defendants to recover damages to the shipment while in their possession is proper. *Lyon v. Atlantic, etc., R. Co.*, 165 N. C. 143, 81 S. E. 1 (1914).

Joinder of Contract and Tort Actions against Different Defendants.—A contract action against one person may not be joined with a tort action against the same person; much less may a contract action against one person be joined with a tort action against the same and another person. *Land Co. v. Beatty*, 69 N. C. 329 (1873). For causes relating to joinder of tort and contract actions generally, see ante, this note, "Causes of Action with Reference to Transaction, or Subject of Action," II.

Different Venue.—Actions requiring different places of trial cannot be joined. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

ARTICLE 13.

Defendant's Pleadings.

§ 1-124. **Demurrer and answer.**—The only pleading on the part of the defendant is either a demurrer or an answer. He may demur to one or more of several causes of action stated in the complaint, and answer to the residue. (C. C. P., ss. 94, 103; Code, ss. 238, 246; Rev., ss. 470, 471; C. S., s. 508.)

Cross Reference.—As to counterclaim in answer, see § 1-140.

Applies to Several Causes of Action Not to Several Allegations. — If a party answer and also demur to the same cause of action, the answer overrules the demurrer; but pleadings, in which a party answers to some and demurs to others of the allegations made in support of any one cause of action, are erroneous. This section applies only where a complaint or

answer contains several causes of action. *Ransom v. McClees*, 64 N. C. 17 (1870). A party can not answer some of the allegations of a single cause of action, and demur to others. *Love v. Commissioners*, 64 N. C. 706 (1870); *State v. Young*, 65 N. C. 579 (1871); *Von Glahn v. De Rossett*, 76 N. C. 292 (1877); *Speight v. Jenkins*, 99 N. C. 143, 5 S. E. 385 (1888).

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930).

§ 1-125. **When defendant appears and pleads; petition to remove to federal court; extension of time; clerk to mail answer to plaintiff.**—The defendant must appear and demur or answer within thirty (30) days after the service of summons upon him, or within thirty (30) days after the final determination of a motion to remove as a matter of right, or after the final determination of a motion to dismiss upon a special appearance, or after the final determination of any other motion required to be made prior to the filing of the answer, or after final judgment overruling demurrer, or after the final determination of a motion to set aside a judgment by default under § 1-220, or to set aside a judgment under § 1-108. Upon the filing in a district court of the United States of a petition for the removal of a civil action or proceeding from a court in this State and the filing of a copy of the petition in the State court, the State court shall proceed no further therein unless and until the case is remanded; and in the event it shall be finally determined in the United States courts that the case was not removable or was improperly removed, or for other reason should be remanded, and a final order is entered remanding the case to the State court, the defendant or defendants, or any other party who would have been permitted

or required to file a pleading had the removal proceedings not been instituted, will have thirty (30) days after the filing in such State court of a certified copy of the order of remand to file motions or demur, answer or otherwise plead. If the time is extended for filing the complaint, and a copy of the complaint, when filed, is served on the defendant, then, in such case, the defendant shall have thirty days after the date when the copy of the complaint was served on him, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final date fixed for filing the complaint, whichever is the later date, in which to plead. If the time is extended for filing complaint, and a copy of the complaint, when filed, is not served on the defendant, then, in such case, said defendant shall have thirty days after the date of the sheriff's return showing that service was not made of such complaint, pursuant to G. S. § 1-121, or the defendant shall have thirty days after the final day fixed for filing the complaint, whichever is the later date, in which to plead. The clerk shall not extend the time for filing answer or demurrer more than once nor for a period of time exceeding twenty days except by consent of parties. The defendant shall, when he files answer, likewise file at least one copy thereof for the use of the plaintiff, and his attorney; and the clerk shall not receive and file any answer until and unless such copy is filed therewith. The clerk shall forthwith mail the copy of answer filed to the plaintiff or his attorney of record. This section shall also apply to all courts of record inferior to the superior court, where any defendant resides out of the county from which the summons is issued and no court of record inferior to the superior court shall fix such return date at less than thirty (30) days. (1870-1, c. 42, s. 4; Code, s. 207; Rev., s. 473; 1919, c. 304, s. 3; C. S., s. 509; Ex. Sess. 1921, c. 92, s. 1, par. 3; 1927, c. 66, s. 4; 1935, c. 267; 1949, c. 808, s. 1; 1949, c. 1113, s. 2.)

Cross References.—As to judgment by default final, see § 1-211. As to judgment by default and inquiry, see § 1-212. As to extension of time for filing of answer or reply by judge in his discretion, see § 1-152. As to provisions relating to summons, see §§ 1-88 et seq.

Editor's Note.—This section has undergone material changes both in phraseology and substance since 1920. As it originally stood in the Consolidated Statutes, it required the defendant to appear and demur or answer within twenty days after the return day of the summons, and in case of extension of time for the filing of the complaint, twenty days from the filing of such complaint, with an authority in the clerk to extend the time for filing the answer or demurrer for good cause shown; otherwise the plaintiff would have judgment by default.

By the 1921 amendment these provisions were so framed as to allow the filing of the answer or demurrer twenty days after service of complaint, or within twenty days after the final determination of a motion to remove as a matter of right.

The same amendment inserted a provision to the effect that in case the complaint was not served, for good cause shown, the clerk may extend the time to a day certain; and a limitation upon the power of the clerk not to extend beyond

twenty days after service of the complaint upon each of the defendants. (To this latter effect, see *Lerch v. McKinne*, 186 N. C. 244, 119 S. E. 193 (1923); *Battle v. Mercer*, 187 N. C. 437, 122 S. E. 4 (1924), where it was said that this limitation is a material part of the statute the object of which is to give the defendant twenty days after he is informed of the complaint.)

The amendment of 1927 changed the basis of the time within which the demurrer or the answer was to be filed. While formerly this was dependent upon the return day of the summons, being twenty days from such day, now, under the section as amended, the return day of the summons has no bearing upon the time for filing the answer or the demurrer, the basis of such time now being the service of the summons upon the defendant, irrespective of the time of its return. This change was effected to harmonize the time of filing the answer or demurrer with the new changes wrought into § 1-121 fixing the time of filing the complaint, and § 1-89 relative to the service and return of process.

The 1927 amendment also increased from twenty to thirty days the time within which the answer may be filed where the time is extended for the filing of the complaint. The limitation against extending the time more than once is also new. So also is the requirement for filing a copy

of the answer for the use of the plaintiff.

The amendment of 1935 added the last sentence of the section relating to courts to which it is applicable.

The first 1949 amendment inserted the present second sentence. The second 1949 amendment inserted the present third and fourth sentences in lieu of the former second sentence.

For comment on the 1949 amendments, see 27 N. C. Law Rev. 432. For comment on provisions relating to summons, see 1 N. C. Law Rev. 9. For an analysis of summons in inferior courts, see 13 N. C. Law Rev. 372.

Not Repugnant to § 1-140.—Construing the acts amendatory of this section and § 1-140 together there is no repugnancy between them so as to repeal by implication the provision of the latter, that an answer of defendant setting up a counterclaim will be deemed denied unless a copy thereof is served on the plaintiff or his attorney. *Williams-Fulghum Lumber Co. v. Welch*, 197 N. C. 249, 148 S. E. 250 (1929).

A motion to strike out is required to be made before answer or demurrer, and therefore when such motion is made within thirty days from the filing and service of summons and complaint, and notice of the motion is mailed to and received by plaintiff's attorney within that time, plaintiff is not entitled to judgment by default prior to the final determination of the motion, since defendants have thirty days after final determination of the motion in which to answer or demur. *Heffner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293 (1938).

Presumption That Copy of Answer Filed and Mailed to Plaintiff.—A pleading is "filed" when it is delivered for that purpose to the proper officer and received by him, and upon plaintiff's admission that answer had been filed, it will be presumed that copy thereof for the use of plaintiff had likewise been filed and mailed to him or his attorney of record, as required by this section. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Motion to Dismiss on Special Appearance.—Defendant making a special appearance and moving to dismiss is entitled to final determination of his motion prior to the hearing of plaintiff's motion for judgment by default. *Bank of Pinehurst v. Derby*, 215 N. C. 669, 2 S. E. (2d) 875 (1939).

Where purported special appearance did not challenge the jurisdiction of the court and it could not be treated as a demurrer, the court properly concluded that it was

not a valid plea, but having overruled it without finding that it was irrelevant and frivolous and made in bad faith for purpose of delay, leave to answer should have been granted. *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242 (1945).

Extension of Time.—It has been held that the power of court to extend the time of filing the pleadings or doing of any other act is neither affected nor curtailed by the provisions of this section. See *McNair v. Yarboro*, 186 N. C. 111, 118 S. E. 913 (1923); *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513 (1925).

This section does not affect the right of the superior court judge to allow an extension of time under § 1-152. *Washington v. Hodges*, 200 N. C. 364, 156 S. E. 912 (1931).

Same—Consent of Defendant.—The clerk has authority, upon request of the defendant, to extend the time for filing the answer beyond the twenty days allowed by this section, (prior to amendment of 1927) but he may not, of his own motion, extend the time without the defendant's consent, beyond that requested, and bar him of his right to move the cause to another county when his motion is made before answer filed within the twenty days allowed him from the filing of the complaint, though under a misapprehension as to the statutory time he has requested the clerk to allow him two weeks in which to file his answer, the time to which he is entitled by the statute. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409 (1920).

Same—Beyond Time Requested.—Where a defendant has acted within the time allowed him by law to file his motion to change the venue of the action, and has requested the clerk for an extension of two weeks from the filing of the complaint in which to answer under a misapprehension of the statutory time allowed by this section, the extension of time by the clerk beyond that requested is not upon his application, and the failure of the defendant to specially controvert this upon the argument will not deprive him of his right. *Stevens Lumber Co. v. Arnold*, 179 N. C. 269, 102 S. E. 409 (1920).

Same—On Appeal.—The defendant against whom the judgment by default has been rendered, may on appeal apply to the judge for an extension of time. *Brooks v. White*, 187 N. C. 656, 122 S. E. 561 (1924).

Same—Modification of Order at Subsequent Term.—An order extending time for

defendant to plead, and providing that, in case he did not do so within the time limited, judgment should be entered for plaintiff, is not a judgment conclusively affecting rights and interests of parties, and is not made so by defendant's consent to entry of such order, and hence it may be modified by another judge at a subsequent term. *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321 (1898); *Cook v. Bank*, 131 N. C. 96, 42 S. E. 550 (1902); *United, etc., Baptist Church, N. E. Conference v. United, etc., Baptist Church, N. W. Conference*, 158 N. C. 564, 74 S. E. 14 (1912).

Plaintiff May Have Judgment by Default.—If the complaint is filed in compliance with § 1-121, and the defendant fails to appear and answer at the same term, the plaintiff may have a judgment by default. *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840 (1893).

Removal.—Where an action is removed to the county of defendants' residence upon motion aptly made, defendants have 30 days after final determination of their motion to remove in which to answer or demur. *Monfils v. Hazlewood*, 218 N. C. 215, 10 S. E. (2d) 673 (1940).

Same — Time of Removal to Federal Court.—The federal statute with respect to removal of causes of action from the State to the federal courts provides that the defendant must file his petition "at or

before the time at which he is required to plead." This requirement is imperative and no order of the court or stipulation of the parties allowing an extension of time to plead can extend the time for filing the petition. *Meeke v. Valleytown Mineral Co.*, 122 N. C. 790, 29 S. E. 781 (1898); *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778 (1898). But see *Avent v. Deep River Lumber Co.*, 174 F. 298 (1909) holding that under this section an order made by the court extending the time to answer operates to extend the time for filing the petition for removal.

The filing of an answer in the State court by a defendant after his petition for removal has been denied does not affect his right to file the record in the federal court and obtain an order of removal therefrom before the time when his answer was due. *Avent v. Deep River Lumber Co.*, 174 F. 298 (1909).

The time for filing an answer expires when it is actually filed, so far as it affects the defendant's right to apply for a removal of the cause to the federal court. *Howard v. Southern R. Co.*, 122 N. C. 944, 29 S. E. 778 (1898).

Applied in *Harrell v. Welstead*, 206 N. C. 817, 175 S. E. 283 (1934).

Cited in *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484 (1943); *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946).

§ 1-126. Sham and irrelevant defenses.—Sham and irrelevant answers and defenses may be stricken out on motion, upon such terms as the court may in its discretion impose. (C. C. P., s. 104; Code, s. 247; Rev., s. 472; C. S., s. 510.)

Editor's Note.—For article on motion to strike pleadings, see 29 N. C. Law Rev. 3.

What Constitutes Sham Defenses.—A sham answer is false in fact; an irrelevant or frivolous one has no substantial relation to the controversy and presents no defense to the action, though its contents may be true. *Howell v. Ferguson*, 87 N. C. 113 (1882).

The answer or defense must be really a sham pleading; that is to say, it must set up matter as a defense which is a mere pretense and has not the color of fact. The design was to prevent vexatious defenses by the plea of matter for delay, false in fact, and so known to be by the pleader. And, while in general such a pleading may be stricken out where the falsehood can be clearly shown, the power ought not to be exercised in any case where the matter objected to, as presented or in any other form, might constitute a

defense. *Boone v. Hardie*, 83 N. C. 471 (1880).

An answer which avers that "no allegation of the complaint is true," is a sham plea, and will be stricken on motion as provided by this section. *Flack v. Dawson*, 69 N. C. 42 (1873).

So also is a plea that the court had no jurisdiction of the action, or a plea alleging the want of parties, as these are required by the following section to be raised by demurrer. *Flack v. Dawson*, 69 N. C. 42 (1873).

Conclusions of Law.—An answer stating conclusions of law puts no fact in issue, and for this reason is a sham pleading which may be stricken out. *Deloatch v. Vinson*, 108 N. C. 147, 12 S. E. 895 (1891).

Denial of Material Allegations.—Where defendants file answer denying material allegations of the complaint, the court is without authority, on plaintiffs' motion to strike out the answer as sham and irrele-

vant, to hear evidence, find facts contra the allegations and denials of the answer, and thereupon strike said allegations and denials and grant plaintiffs' motion for judgment on the pleadings. *Broocks v. Muirhead*, 221 N. C. 466, 20 S. E. (2d) 273 (1942).

A reference of issues upon sham pleas is erroneous, but if the reference embrace an issue on a good plea which may be referred, it will be sustained as to that while it is reversed as to the others. *Flack v. Dawson*, 69 N. C. 42 (1873).

Answer after Sham Demurrer Overruled.—It is in the discretion of the trial judge to permit the defendant to answer after overruling a demurrer to the complaint, though the demurrer were frivolous. *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186 (1909).

Appeal.—The refusal to hold a demurrer or answer frivolous and to render judgment thereon is not appealable (*Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713 (1896); *Abbott v. Hancock*, 123 N. C.

89, 31 S. E. 271 (1898)), where the reasons are given. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381 (1906); *Parker v. North Carolina R. Co.*, 150 N. C. 433, 64 S. E. 186 (1909).

The action of the judge of the superior court in passing upon the judgment of the clerk of the court in refusing to strike out the defendant's answer as sham and frivolous, under this section, is upon a matter of law requiring exception thereto and an appeal to the Supreme Court. *Wellons v. Lassiter*, 200 N. C. 474, 157 S. E. 434 (1931).

The superior court has the power and authority to determine on appeal the order of the clerk of the court in refusing a motion under this section to strike out the defendant's answer on the ground that it was sham and frivolous. *Wellons v. Lassiter*, 200 N. C. 474, 157 S. E. 434 (1931).

Applied in *New Hanover County v. Sidbury*, 225 N. C. 679, 36 S. E. (2d) 242 (1945).

ARTICLE 14.

Demurrer.

§ 1-127. **Grounds for.**—The defendant may demur to the complaint when it appears upon the face thereof, either that:

1. The court has no jurisdiction of the person of the defendant, or of the subject of the action; or,
2. The plaintiff has not legal capacity to sue; or,
3. There is another action pending between the same parties for the same cause; or,
4. There is a defect of parties plaintiff or defendant; or,
5. Several causes of action have been improperly united; or,
6. The complaint does not state facts sufficient to constitute a cause of action. (C. C. P., s. 95; Code, s. 239; Rev., s. 474; C. S., s. 511.)

- I. In General.
- II. Lack of Jurisdiction.
- III. Lack of Legal Capacity.
- IV. Pendency of Another Action.
- V. Defect of Parties.
- VI. Misjoinder of Several Causes of Action.
- VII. Failure to State Sufficient Facts.

Cross Reference.

As to objection by answer where grounds for demurrer do not appear on face of complaint, see § 1-133.

I. IN GENERAL.

All Demurrers Special. — Under our practice all demurrers are special and may be pleaded only for the causes specified in this section. *Shaffer v. Morris Bank*, 201

N. C. 415, 160 S. E. 481 (1931).

Demurrer Does Not Admit Conclusions of Law.—A demurrer challenges the sufficiency of the pleading, taking as true the facts alleged and the relevant inferences of facts deducible therefrom, but the demurrer does not admit inferences or conclusions of law. *Cathey v. Southeastern Const. Co.*, 218 N. C. 525, 11 S. E. (2d) 571 (1940); *General American Life Ins. Co. v. Stadiem*, 223 N. C. 49, 25 S. E. (2d) 202 (1943).

Defect Must Appear on Face of Complaint.—Demurrer to the jurisdiction on ground that summons was issued out of a recorder's court to another county in an action *ex contractu* involving less than \$200.00, is bad as a speaking demurrer, since the defect does not appear upon the

face of the complaint. *Four County Agricultural Credit Corp. v. Satterfield*, 218 N. C. 298, 10 S. E. (2d) 914 (1940).

Enumeration of Grounds Exclusive.—The enumeration in this section of the grounds upon which a demurrer may be based is exclusive. Hence a demurrer does not lie except in the cases specifically mentioned in this section. *Dunn v. Barnes*, 73 N. C. 273 (1875); *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997 (1891).

Thus the statute of limitation which does not appear in the enumeration may not be taken advantage of by demurrer, but must be raised by answer. *Green v. North Carolina R. Co.*, 73 N. C. 524 (1875).

Section Differs from § 1-183.—Under this section demurrer to plaintiff's pleadings challenges the sufficiency of the pleadings, and is different in purpose and result from demurrer to the evidence under § 1-183, which challenges the sufficiency of the evidence. *Coleman v. Whisnant*, 226 N. C. 258, 37 S. E. (2d) 693 (1946).

Objections Waived—Exceptions. — All objections except those on the ground that the court has no jurisdiction of the person of the defendant or the subject matter of the action, and that the complaint does not state facts sufficient to constitute a cause of action, are waived unless they are taken by demurrer or answer. But the exceptions referred to may be taken advantage of by demurrer even in the appellate court. *Clements v. Rogers*, 91 N. C. 63 (1884); *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207 (1942). See § 1-134, and the note thereto.

Same—No Cause Stated.—The objection that the complaint states no cause of action or that the court has no jurisdiction may be made either by written demurrer or demurrer *ore tenus* and cannot be waived. *Baker v. Garris*, 108 N. C. 218, 13 S. E. 2 (1891).

Motion to Make More Certain.—Where a pleading is indefinite and uncertain, it is not subject to demurrer, but the proper remedy is by motion to make more definite and certain. *Seaboard Air Line R. Co. v. Main*, 132 N. C. 445, 43 S. E. 930 (1903).

The same rule applies where the complaint does not fully state the terms of the contract sued on. *Wood v. Kincaid*, 144 N. C. 393, 57 S. E. 4 (1907).

Where a complaint alleging negligence states a cause of action, the remedy of a defendant desiring a more definite statement of the alleged negligence is by motion to make the complaint more definite and certain, and not by demurrer. *Allen*

v. Carolina Cent. R. Co., 120 N. C. 548, 27 S. E. 76 (1897); *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894 (1908). See § 1-153, and notes thereto.

Redundancy in pleading must be objected to by motion before answer, and not by demurrer. *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997 (1891). See § 1-153, and notes.

Alternative, Argumentative, or Hypothetical Allegations.—That a complaint is "argumentative, hypothetical, and in the alternative," is no ground for demurrer. *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997 (1891); *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897); *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351 (1898).

Inconsistency of Causes.—A complaint is not always demurrable because two alleged causes of action are to some extent inconsistent. *Worth v. Knickerbocker Trust Co.*, 152 N. C. 242, 67 S. E. 590 (1910).

Informality in the Demand for Judgment.—Any informality in the demand for judgment in a complaint is not ground for demurrer, and must be disregarded when the sum demanded, and how it is due, sufficiently appear from the summons and complaint. *Dunn v. Barnes*, 73 N. C. 273 (1875).

By filing answer defendants waive right to demur except for want of jurisdiction or for failure of the complaint to state a cause of action, and such waiver applies to an amended complaint when the amended complaint is substantially the same as the original complaint to which answer was filed. *Schnibben v. Ballard, etc., Co.*, 210 N. C. 193, 185 S. E. 646 (1936).

Applied in Board of Drainage Com'rs v. Jarvis, 211 N. C. 690, 191 S. E. 514 (1937); *Smith v. Sink*, 211 N. C. 725, 192 S. E. 108 (1937); *Beam v. Wright*, 222 N. C. 174, 22 S. E. (2d) 270 (1942); *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510 (1945); *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222 (1947); *Bledsoe v. Coxie Lbr. Co.*, 229 N. C. 128, 48 S. E. (2d) 50 (1948).

Cited in Pender County v. King, 197 N. C. 50, 147 S. E. 695 (1929); *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929); *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618 (1929); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Leach v. Page*, 211 N. C. 622, 191 S. E. 349 (1937); *Oldham v. Ross*, 214 N. C. 696, 200 S. E. 393 (1939); *Montgomery v. Blades*, 222 N. C. 463, 23 S. E. (2d) 844 (1943); *Montgomery v. Blades*, 223 N. C. 331, 26 S. E. (2d) 567 (1943); *Sandlin v. Yancey*, 224

N. C. 519, 31 S. E. (2d) 532 (1944); Williams v. Gibson, 232 N. C. 136, 59 S. E. (2d) 602 (1950).

II. LACK OF JURISDICTION.

Objection to the jurisdiction of the court over the subject matter of the action is presented by demurrer, and a demurrer is a plea to the cause of action set out in the complaint. Williams v. Cooper, 222 N. C. 589, 24 S. E. (2d) 484 (1943).

May Be Made at Any Time.—Demurrer *ore tenus* on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. Brissie v. Craig, 232 N. C. 701, 62 S. E. (2d) 330 (1950).

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion *ore tenus*. Tucker v. Baker, 86 N. C. 1 (1882). See § 1-134.

The decision of the question whether a cause of action arose out of tort or contract so as to determine whether the superior court or the justice of the peace has exclusive original jurisdiction, involves only the cause of action as alleged in the complaint, and evidence offered by plaintiff cannot be considered in deciding the question presented by demurrer *ore tenus*, under subsection 1 of this section and § 1-134. Roebuck v. Short, 196 N. C. 61, 144 S. E. 515 (1928).

Plea to Jurisdiction Is a Sham Plea.—See note to section immediately preceding.

Plea That Industrial Commission Has Jurisdiction.—In an action by an administrator to recover for the wrongful death of his intestate, a plea to the jurisdiction of the court on the ground that the Industrial Commission had exclusive jurisdiction of the cause is in effect a demurrer to the complaint, and where it does not appear from the complaint that the defendant regularly employed more than five employees in this State, the plea to the jurisdiction should be overruled. Southerland v. Harrell, 204 N. C. 675, 169 S. E. 423 (1933).

Demurrer for Want of Proper Service of Summons.—Where a nonresident defendant wishes to demur to the jurisdiction of the court for the want of proper service of summons on him, he must enter a special appearance for that purpose and confine his demurrer to that objection alone; and where he has entered a general appearance, or demurred on the further ground that the court has no jurisdiction of the subject matter, it is to be taken as a general appearance as to the

merits, waiving the objection as to proper service, and he will be bound by the adverse judgments of the court having jurisdiction over the subject-matter of the action. Dailey Motor Co. v. Reaves, 184 N. C. 260, 114 S. E. 175 (1922).

Under this section the defendant may demur to the complaint when it appears upon its face, the court had no jurisdiction of the person of defendant, and the right to dismiss an action for want of jurisdiction by entering a special appearance for the purpose is imbedded in our procedure. Smith v. Houghton, 206 N. C. 587, 174 S. E. 506 (1934).

III. LACK OF LEGAL CAPACITY.

Must Appear on the Face of Complaint.—Unless the lack of legal capacity appears on the face of the complaint, a demurrer cannot be sustained based on that objection. Fisher v. Traders' Mut. Life Ins. Co., 136 N. C. 217, 48 S. E. 667 (1904).

Action for Death by Wrongful Act.—Where an action for wrongful death is instituted in this State by an administratrix appointed by the court of another state, the defect may be taken by demurrer, since such plaintiff does not have legal capacity to sue and the complaint does not state facts sufficient to constitute a cause of action. Monfils v. Hazlewood, 218 N. C. 215, 10 S. E. (2d) 673 (1940).

IV. PENDENCY OF ANOTHER ACTION.

Pendency in This State Prerequisite.—Upon a demurrer on the ground of pendency of action, it must appear that the other action is pending in courts of this State. Sloan & Co. v. McDowell, 75 N. C. 29 (1876); Ridley v. Seaboard, etc., R. Co., 118 N. C. 996, 24 S. E. 730 (1896); Carpenter, etc., Co. v. Hanes, 162 N. C. 46, 77 S. E. 1101 (1913).

Pending in Another County.—A demurrer to a complaint, setting up the prior pendency in another county of an action upon the same subject matter between the same parties, will be sustained, under this section, and, when such allegations do not so appear in the pleading, objection to the pendency of the second action may be taken by answer. Allen v. Salley, 179 N. C. 147, 101 S. E. 545 (1919).

Availed of by Demurrer or Answer.—If the pendency of the former action appear on the face of the complaint, it may be taken advantage of by demurrer; otherwise by answer. Curtis v. Piedmont Lumber, etc., Co., 109 N. C. 401, 13 S. E. 944 (1891); Allen v. Salley, 179 N. C. 147, 101

S. E. 545 (1919); *Reed v. Carolina Mtg. Co.*, 207 N. C. 27, 175 S. E. 834 (1934); *Reece v. Reece*, 231 N. C. 321, 56 S. E. (2d) 641 (1949).

Where a prior action is pending between the same parties, involving substantially the same subject matter, the second action will be dismissed upon demurrer if the pendency of the prior action appears on the face of the complaint. But if the fact does not so appear, objection may be raised by answer (§ 1-133) and treated as a plea in abatement. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

Speaking Demurrer. — A motion to dismiss on the ground of the pendency of a prior action between the parties cannot be treated as a demurrer when this fact does not appear upon the face of the complaint, since in such instance a demurrer would be bad as a speaking demurrer. *Reece v. Reece*, 231 N. C. 321, 56 S. E. (2d) 641 (1949).

Conclusiveness of Prior Judgment. — Under this section the rights of plaintiff are remitted to a prior judgment, and defendant's demurrer to the complaint in the second action will be sustained. *Turner v. Turner*, 205 N. C. 198, 170 S. E. 646 (1933).

Applied in *Fletcher Lbr. Co. v. Wilson*, 222 N. C. 87, 21 S. E. (2d) 893 (1942).

V. DEFECT OF PARTIES.

As to joinder of parties, see § 1-70 and notes.

Lack of Necessary Parties. — Where a substituted trustee brings an equitable action to reform a deed of trust and certain mortgage notes which are negotiable and the holders of these notes are not parties plaintiff a demurrer under this section will be sustained. *First Nat. Bank v. Thomas*, 204 N. C. 599, 169 S. E. 189 (1933).

How Taken Advantage of. — If there is a defect of material parties, the defendant must take advantage of the same by demurrer if the defect appears from the complaint, and if not, by answer. Otherwise he will be deemed to have waived such objection. *Kornegay v. Farmer's, etc., Steamboat Co.*, 107 N. C. 115, 12 S. E. 123 (1890); *Styers v. Alspaugh*, 118 N. C. 631, 24 S. E. 422 (1896); *Lanier v. Pullman Co.*, 180 N. C. 406, 105 S. E. 21 (1920). See *Yonge v. New York Life Ins. Co.*, 199 N. C. 16, 153 S. E. 630 (1930); *Wiggins v. Harrell*, 200 N. C. 336, 156 S. E. 9 (1931); *Sims v. Dalton*, 202 N. C. 249, 162 S. E. 550 (1932).

The rule of the common law requiring the nonjoinder of defendants in actions ex

contractu to be pleaded in abatement, has been changed, and the omission of a necessary party defendant may, under this section be taken advantage of by demurrer when the defect appears upon the face of the complaint. *Merwin v. Ballard*, 65 N. C. 168 (1871).

A plea alleging want of parties is a sham plea. The objection must be raised by demurrer. *Flack v. Dawson*, 69 N. C. 42 (1873).

The nonjoinder of parties plaintiff may not be taken advantage of under a general issue. It must be raised by demurrer. *Lewis v. McNatt*, 65 N. C. 63 (1871).

A motion to dismiss the action is an inappropriate method of raising the question of want of proper parties. This must be raised by a demurrer. *Davidson v. Elms*, 67 N. C. 228 (1872).

How Defect of Party Cured. — Where there is a defect of parties, the question may be raised by demurrer, and when so raised the defect may be cured by making the lacking party a party to the action. *Graves v. Barrett*, 126 N. C. 267, 35 S. E. 539 (1900).

Same—Correction of Misjoinder of Parties. — A misjoinder of parties plaintiff may upon demurrer or motion be corrected by taxing the plaintiff with such costs as are incurred by the misjoinder. *Prichard v. Mitchell*, 139 N. C. 54, 51 S. E. 783 (1905).

Misjoinder of an Unnecessary Party. — While a nonjoinder of one who is a necessary party is fatal, a misjoinder of one who is not a necessary party is a mere surplusage. *Green v. Green*, 69 N. C. 294 (1873). Hence the misjoinder of an unnecessary party is not a ground for demurrer. *Hargrove v. Hunt*, 73 N. C. 24 (1875); *State v. Berryhill*, 84 N. C. 133 (1881); *Sullivan v. Field*, 118 N. C. 358, 24 S. E. 735 (1896).

To sustain a demurrer to the complaint there must be a misjoinder of parties and causes of action, and a misjoinder of an unnecessary party is alone insufficient to have the action dismissed. *Star Furniture Co. v. Carolina, etc., Ry. Co.*, 195 N. C. 636, 143 S. E. 242 (1928); *Shuford v. Yarbrough*, 197 N. C. 150, 147 S. E. 824 (1929), citing *Abbott v. Hancock*, 123 N. C. 99, 31 S. E. 368 (1898); *Roberts v. Mfg. Co.*, 181 N. C. 204, 106 S. E. 664 (1921); *Bank v. Angelo*, 193 N. C. 576, 137 S. E. 705 (1927). See *Winders v. Hill*, 141 N. C. 694, 54 S. E. 440 (1906).

Plaintiff Not Real Party in Interest. — Where the plaintiff in the complaint is not the real party in interest under § 1-57, the complaint is subject to demurrer under

this section. *Fishell v. Evans*, 193 N. C. 660, 137 S. E. 865 (1927).

Averment of Corporate Capacity.—In a suit against a railroad company, it may be designated as a company by its corporate name, without an averment of its corporate capacity, and if this is disputed, it should be by answer and not by demurrer. *Stanly v. Richmond, etc., R. Co.*, 89 N. C. 331 (1883).

Misjoinder of Parties and Causes.—There is a misjoinder both of parties plaintiff and of causes of action where two or more persons having distinct causes of action against the same defendants join as plaintiffs in one suit. But where there is only one party plaintiff there can be no misjoinder of parties plaintiff. *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492 (1950).

Where two plaintiffs institute one action against defendants for the recovery of their respective property alleged to have been destroyed by the negligence of defendants, and there is no allegation that each defendant had an interest in the property of the other, there is a misjoinder of parties and causes of action, and the cause is demurrable. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2 (1950).

Where, in an action instituted by copartners against lessors to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, the complaint alleges that the original lease was made to the copartners but prior to the acts complained of a new agreement was entered into under which one of the partners bought out the interest of the other and the agreement sued on was made solely with the remaining partner, it was held that there is but one party plaintiff to whom relief could be available on the facts alleged, and therefore dismissal on demurrer for misjoinder of parties and causes was improperly entered. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708 (1950).

Cited in *Lamson Co. v. Morehead*, 199 N. C. 164, 154 S. E. 50 (1930).

VI. MISJOINDER OF SEVERAL CAUSES OF ACTION.

As to what causes may be joined, see § 1-123, and the notes thereto.

What Constitutes Misjoinder.—A complaint in an action which is not so prolix as to mislead or confuse the defendants or to conceal or obscure, by its elaboration or redundant words, the real cause of action is sufficient; and if the matters alleged arise

out of one and the same transaction, or series of transactions, forming one course of dealings, all tending to one end, narrating the transaction as a whole, the cause stated is not objectionable as multifarious. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232 (1916).

Defendant's demurrer to the complaint on the ground of misjoinder in that the complaint stated three separate causes of action, was properly overruled, for although the complaint does not allege that the separate deeds were executed by the defendants, respectively, pursuant to a conspiracy to hinder, delay, and defraud creditors, an inference to that effect is not only permissible but inescapable from the facts alleged. *Barkley v. McClung Realty Co.*, 211 N. C. 540, 191 S. E. 3 (1937).

Same—Motion to Make More Certain.—Where the several causes of action are of such a nature that they can be properly joined under § 1-123, but they are not put together in a very logical way, the proper method of taking advantage of the defect is not by demurrer but by a motion to make more certain and definite. *State v. McCanless*, 193 N. C. 200, 136 S. E. 371 (1927).

Misjoinder of Parties and Causes.—See cases cited under preceding analysis line of this note.

Amendment Eliminating Misjoinder.—In an action to quiet title, where the plaintiff was permitted to amend his complaint to eliminate a misjoinder of several causes of action, no basis for a demurrer remained. *Sparks v. Sparks*, 230 N. C. 715, 55 S. E. (2d) 477 (1949).

The Court May Divide the Several Misjoined Causes.—Even if the several causes have been improperly joined the court may allow the pleadings to conform thereto upon such terms as are just, and order the action to be divided into as many actions as are necessary for the proper determination of the controversy. See post § 1-132. *State v. McCanless*, 193 N. C. 200, 136 S. E. 371 (1927).

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924 (1949).

Complaint Not Demurrable for Misjoinder.—A complaint alleging that defendants, officers and agents of a corporation, made fraudulent misrepresentations of fact as to the financial condition of the corporation, thereby inducing plaintiff to sell the

corporation merchandise on credit, and that defendants thereafter secretly caused the corporation to convey its assets to them with the purpose of cheating and defrauding plaintiff and other creditors, and that the corporation was thereafter placed in receivership with virtually no assets, with prayer that plaintiff recover of defendants the amount lost through the extension of credit, was held to state only the one cause of action for actionable fraud on the part of defendants and is demurrable neither on the ground of misjoinder of causes nor the ground that it stated a cause of action to set aside the conveyances appertaining solely to the corporate receivers. *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492 (1950).

Applied in *Grady v. Warren*, 201 N. C. 693, 161 S. E. 319 (1931).

Cited in *Daniels v. Duck Island*, 212 N. C. 90, 193 S. E. 7 (1937); *Bowen v. Mewborn*, 218 N. C. 423, 11 S. E. (2d) 372 (1940) (con. op.).

VII. FAILURE TO STATE SUFFICIENT FACTS.

See § 1-122, clause 2, and note.

Demurrer Tests Sufficiency of Pleading.

—A demurrer on the ground that the complaint fails to state a cause of action tests the sufficiency of the pleading. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345 (1950).

Question of Sufficiency Can Be Presented Only by Demurrer. — The sufficiency of the allegations of a complaint is not presented by a motion that certain designated allegations be stricken from the complaint, on the ground that said allegations are improper, irrelevant, and immaterial. That question can be presented only by a demurrer to the complaint, either in writing or ore tenus. *Poovey v. Hickory*, 210 N. C. 630, 188 S. E. 78 (1936); *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299 (1942).

Fatal Defect in Complaint.—When it appears upon the face of the complaint that it is fatally defective, a demurrer will be sustained under this section. *Carson v. Jenkins*, 206 N. C. 475, 174 S. E. 271 (1934).

Demurrer to Several Causes One of Which Is Sufficiently Stated. — Where the petition states several causes of action any one which is good, a demurrer to the whole petition on the ground that it states no cause of action will be overruled. *State v. McCanless*, 193 N. C. 200, 136 S. E. 371 (1927).

Motion to Divide or Make More Certain.

— Objection for misjoinder of causes of action should be made upon motion to divide them; objection to the complaint for multifarious, irrelevant, and redundant allegations, upon motion, made before answer or demurrer or time allowed to plead, to make it more definite and certain. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232 (1916).

Defective Statement Which Can Be Cured by Amendment.

—Where a pleading contains a defective statement, as the omission of a necessary allegation which can be cured by amendment, a demurrer will lie. *Bowling v. Burton*, 101 N. C. 176, 7 S. E. 701 (1888); *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927 (1896); *Ladd v. Ladd*, 121 N. C. 118, 28 S. E. 190 (1897); *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907); *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96 (1911).

But a complaint can not be overthrown by a demurrer unless it be wholly insufficient. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907).

Complaint Liberally Construed.

— Demurrer to a complaint on the ground that it fails to state a cause of action should be overruled if the complaint liberally construed alleges facts sufficient to constitute a cause of action or if facts sufficient for the purpose can be gathered from it. *Sparrow v. Morrell & Co.*, 215 N. C. 452, 2 S. E. (2d) 365 (1939).

Complaint Considered as a Whole.

— A demurrer can not be sustained to a complaint if in any portion or to any extent it presents a cause of action, or if sufficient facts can be fairly gathered therefrom. *Caho v. Norfolk, etc., R. Co.*, 147 N. C. 20, 60 S. E. 640 (1908); *Jones v. Henderson*, 147 N. C. 120, 60 S. E. 894 (1908); *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96 (1911); *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102 (1912); *Hoke v. Glenn*, 167 N. C. 594, 83 S. E. 807 (1914).

A demurrer to a complaint on the ground that its allegations were insufficient to constitute a cause of action will not be sustained if, taking the pleading in its entirety, it is sufficient in one or more of its parts; and where the demurrer is that the contract sued on was a wagering one and no recovery could be had under § 16-3, and two causes of action are alleged, if only one of them should be good the demurrer should be overruled. *Meyer v. Fenner*, 196 N. C. 476, 146 S. E. 82 (1929).

Time of Demurrer.—Defendant may de-

mur ore tenus at any time on the ground that the complaint fails to state a cause of action. *Aldridge Motors v. Alexander*, 217 N. C. 750, 9 S. E. (2d) 469 (1940).

Motion Ore Tenus.—A petition which is demurrable on this ground may also be taken advantage of by a motion ore tenus. *Tucker v. Baker*, 86 N. C. 1 (1882).

Paragraph Setting Forth Additional Elements of Damage.—A demurrer to a single paragraph of a complaint on the theory that such paragraph attempts to set up a second separate cause of action and fails to state facts sufficient for that purpose, is improvidently granted when the pleading considered as a whole sufficiently states but a single cause of action and the paragraph objected to merely sets forth additional elements of damage. *Moore v. Carolina Cas. Ins. Co.*, 231 N. C. 729, 58 S. E. (2d) 756 (1950).

Applied in *Grady v. Warren*, 201 N. C. 693, 161 S. E. 319 (1931); *Heater v. Carolina Power, etc., Co.*, 210 N. C. 88, 185 S. E. 447 (1936); *Reed v. Farmer*, 211 N. C.

249, 189 S. E. 882 (1937); *Swaringen v. Poplin*, 211 N. C. 700, 191 S. E. 746 (1937); *Doyle v. Whitley*, 214 N. C. 814, 200 S. E. 888 (1939); *Fletcher Lbr. Co. v. Wilson*, 222 N. C. 87, 21 S. E. (2d) 893 (1942); *Cooley v. Baker*, 231 N. C. 533, 58 S. E. (2d) 115 (1950); *Johnson v. Salsbury*, 232 N. C. 432, 61 S. E. (2d) 327 (1950); *Hoppe v. Deese*, 232 N. C. 698, 61 S. E. (2d) 903 (1950).

Cited in *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339 (1929); *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930); *Begnell v. Safety Coach Line*, 198 N. C. 688, 153 S. E. 264 (1930); *Redfern v. McGrady*, 199 N. C. 128, 154 S. E. 3 (1930); *Lamson Co. v. Morehead*, 199 N. C. 164, 154 S. E. 50 (1930); *Key v. Home Chair Co.*, 199 N. C. 794, 156 S. E. 135 (1930); *Bennett v. Southern Ry. Co.*, 211 N. C. 474, 191 S. E. 240 (1937); *Kirby v. Reynolds*, 212 N. C. 271, 193 S. E. 412 (1937); *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844 (1937); *Horner v. Chamber of Commerce*, 231 N. C. 440, 57 S. E. (2d) 789 (1950).

§ 1-128. Must specify grounds.—The demurrer must distinctly specify the grounds of objection to the complaint, or it may be disregarded. It may be taken to the whole complaint, or to any of the alleged causes of action stated therein. (C. C. P., s. 96; Code, s. 240; Rev., s. 475; C. S., s. 512.)

The purpose of this section seems to be to give an opportunity to ask for an amendment if the defect admits of cure, or permits further costs to be avoided if the defect is incurable, since the party, upon the particulars being indicated, may become satisfied of the invalidity of his cause of action and discontinue further proceedings. *Thompson v. Johnson Funeral Home*, 205 N. C. 801, 172 S. E. 500 (1934).

Comparison of Statute of 4 Anne and This Section.—In regard to demurrers this section improves upon the Statute of 4 Anne, and requires every demurrer, whether for substance or form, to specify distinctly the ground of objection to the complaint. *Garrett v. Trotter*, 65 N. C. 430 (1871).

Nature of Demurrer under the Code.—A demurrer under the Code differs from the former demurrer at law in this: Every demurrer, whether for substance or form, is now special, and must distinctly specify the ground of objection to the complaint, or be disregarded; it differs from the former demurrer in equity, in that the judgment overruling it is final, and decides the case, unless the pleadings are amended by leave to withdraw the demurrer and put in an answer. *Love v. Commissioners*, 64 N. C. 706 (1870).

Must Specify for Purposes of Amend-

ment.—A demurrer must specify the ground upon which it is based to the end that the defect may be supplied by amendment. *Garrett v. Trotter*, 65 N. C. 430 (1871).

A demurrer to the complaint ore tenus must distinctly specify the grounds of objection or it may be disregarded. *Seawell v. Chas. Cole & Co.*, 194 N. C. 546, 140 S. E. 85 (1927).

Otherwise It May Be Disregarded.—Under this section if the demurrer, interposed by the defendants, does not “distinctly specify the grounds of objection to the complaint,” it may be disregarded or treated as a motion to dismiss from the refusal of which no appeal lies. *Griffin v. Bank of Coleridge*, 205 N. C. 253, 171 S. E. 71 (1933).

A demurrer will not be sustained if the pleadings, liberally construed, are sufficient to sustain the causes therein, to which objection is made. *Enloe v. Ragle*, 195 N. C. 38, 141 S. E. 477 (1928).

Upon an appeal from a judgment overruling a demurrer to the complaint the merits of the controversy are not presented, and the court will determine only whether a cause of action has been sufficiently alleged. *Star Furniture Co. v. Carolina, etc., Ry. Co.*, 195 N. C. 636, 143 S. E. 242 (1928).

Strictness of the Requirement.—In *Love v. Commissioners*, 64 N. C. 706 (1870), the court said: "It is so easy to specify the ground of objection that the court is not disposed to relax the rule. There is no use in having a scribe unless you cut up to it." *Bank v. Bogle*, 85 N. C. 203 (1881); *Alford v. McCormac*, 90 N. C. 151 (1884).

A demurrer "that the complaint states no cause of action whatever" against the defendant, will be disregarded. It must distinctly specify the grounds of objection to the complaint. *Goss v. Waller*, 90 N. C. 149 (1884).

Motion to Dismiss Must Also Specify Grounds.—A motion to dismiss an action because the complaint does not state facts sufficient to constitute a cause of action is a demurrer, and should be disregarded unless it specifies the particulars of the alleged defect. *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621 (1892).

Demurring to Some Allegations and Replying to Others.—The latter sentence of this section clearly refers to a complaint containing several causes of action; or an answer taking two distinct grounds. Hence a party may not demur to some of the al-

legations supporting the same cause of action or the same defense, and reply to others. *Ransom v. McCless*, 64 N. C. 17 (1870).

Insufficient Demurrers. — A demurrer must distinctly specify the grounds of objection, and demurrer to the further defense and answer of defendant on the ground that it does not "constitute a counterclaim in that it does not state a cause of action" is insufficient. *Duke v. Campbell*, 233 N. C. 262, 63 S. E. (2d) 555 (1951).

Where further defense and answer are set up in unity in five paragraphs in the answer, a demurrer directed to a portion of one of such paragraphs for failure to set up a counterclaim is a nullity, since in such instance the demurrer must be to the whole of the further defense and answer. *Duke v. Campbell*, 233 N. C. 262, 63 S. E. (2d) 555 (1951).

Cited in *State v. Suncrest Lumber Co.*, 197 N. C. 4, 147 S. E. 682 (1929); *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930); *Early v. Farm Bureau Mut. Automobile Ins. Co.*, 224 N. C. 172, 29 S. E. (2d) 558 (1944).

§ 1-129. **Amendment; hearing.**—If a demurrer is filed the plaintiff may be allowed to amend. If plaintiff fail to amend within five days after notice, the parties may agree to a time and place of hearing the same before some judge of the superior court, and upon such agreement it shall be the duty of the clerk of the superior court forthwith to send the complaint and demurrer to the judge holding the courts of the district, or to the resident judge of the district, who shall hear and pass upon the demurrer: Provided, if there be no agreement between the parties as to the time and place of hearing the same before the judge of the superior court, then it shall be the duty of the clerk of the superior court to send the complaint and demurrer to the judge holding the next term of the superior court in the county where the action is pending, who shall hear and pass upon the demurrer at that term of the court. Notwithstanding any other provisions of this section, any such demurrer, upon ten days' notice to the adverse party, may be heard and passed upon out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (1919, c. 304, s. 4; C. S., s. 513; Ex. Sess. 1921, c. 92, s. 5; 1949, c. 147.)

Cross Reference.—See notes under §§ 1-131, 1-163.

Editor's Note.—Prior to the amendment of 1921 the plaintiff was allowed to amend within three days, and upon failure to amend within such time, and in the absence of agreement between the parties as to the time and place of hearing the demurrer, it was made the duty of the clerk to send the complaint and the demurrer to the judge holding the courts of the district or to the resident judge of the district who was required to fix the time and place of hearing and notify the parties when and where he shall hear and pass upon the demurrer. There was no provision made as

to the procedure in case there was no agreement between the parties. Besides these substantial changes, the phraseology of the section was also materially affected.

The 1949 amendment added the last sentence of this section. For brief comment on amendment, see 27 N. C. Law Rev. 434.

As to changes affecting this and other sections, see article entitled "Changes in North Carolina Procedure," in 1 N. C. Law Rev. 7-14.

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is

by motion to make the complaint more definite under § 1-153 or the court may allow an amendment. In *re* Will of York, 231 N. C. 70, 55 S. E. (2d) 791 (1949).

Presumption on Appeal.—Where the plaintiff has not asked to be permitted to file an amendment to his complaint upon a demurrer being interposed thereto on

the ground that a cause of action had not been sufficiently alleged, it will be considered on appeal that he has concluded to rely solely on the pleading he has filed. *Ballinger v. Thomas*, 195 N. C. 517, 142 S. E. 761 (1928).

Cited in *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459 (1940).

§ 1-130. Appeals.—Upon the rendering of the decision upon the demurrer, if either party desires to appeal, notice shall be given and the appeal perfected as is now provided in case of appeals from decisions in term time. (1919, c. 304, s. 5; C. S., s. 514; Ex. Sess. 1921, c. 92, s. 6.)

Cross Reference.—As to appeal from judicial order or determination in superior court, see § 1-277.

Editor's Note.—The word "rendering" was substituted for the words "return",

and the words "from decisions" were inserted, by the 1921 amendment.

Cited in *Williams v. Cooper*, 222 N. C. 589, 24 S. E. (2d) 484 (1943).

§ 1-131. Procedure after return of judgment.—Within thirty days after the return of the judgment upon the demurrer, if there is no appeal, or within thirty days after the receipt of the certificate from the Supreme Court, if there is an appeal, if the demurrer is sustained the plaintiff may move, upon three days' notice, for leave to amend the complaint. If this is not granted, judgment shall be entered dismissing the action. If the demurrer is overruled the answer shall be filed within thirty days after the receipt of the judgment, if there is no appeal, or within thirty days after the receipt of the certificate of the Supreme Court, if there is an appeal. Otherwise the plaintiff shall be entitled to judgment by default final or by default and inquiry according to the course and practice of the court. (1919, c. 304, ss. 6, 7; C. S. s. 515; Ex. Sess. 1921, c. 92, ss. 7, 8; 1949, c. 972.)

Cross Reference.—As to pleading over after demurrer interposed in good faith, see § 1-162.

Editor's Note.—By the 1921 amendment the word "judgment" was substituted for the words "decision overruling the demurrer" in the third sentence.

The 1949 amendment substituted "thirty days" for "ten days" so as to make the section consistent with § 1-125. For brief comment on amendment, see 27 N. C. Law Rev. 434.

Statute Liberally Construed.—This section is in aid of an expeditious administration of justice and should be liberally construed and applied, to the end that actions may be tried on their merits and not dismissed because of defective pleadings. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929); *Citizens Bank v. Gahagan*, 210 N. C. 464, 187 S. E. 464 (1936).

Discretion of Court.—A demurrer to a complaint will be sustained upon the insufficiency of the complaint to state a cause of action, and where a judgment sustaining such demurrer has been appealed from and upheld by the Supreme Court, the trial court has the power under this section, in the exercise of his sound discretion, to allow the plaintiff to amend the

original complaint upon motion made within ten (now thirty) days after receipt by the clerk of the superior court of the certificate showing that the judgment of the superior court had been affirmed. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929), affirmed in *McKeel v. Latham*, 202 N. C. 318, 162 S. E. 747 (1932); *Hood v. Elder Motor Co.*, 209 N. C. 303, 183 S. E. 529 (1936).

A motion for leave to amend a complaint under this section is addressed to the sound discretion of the trial court, and his order denying the motion is not subject to review on appeal in the absence of gross abuse of this discretion. *McKeel v. Latham*, 203 N. C. 246, 165 S. E. 694 (1932).

Order Sustaining Demurrer Does Not Effect Dismissal.—Where the complaint fails to state a cause of action, order sustaining demurrer on this ground does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345 (1950).

Judgment Should Not Be Rendered at Same Time Demurrer Overruled.—The

action of the court in overruling defendant's demurrer and at the same time rendering judgment for plaintiff as prayed for in the complaint is error, since defendant has ten (now thirty) days after the demurrer is sustained or, if an appeal is taken, ten (now thirty) days after the certificate of the Supreme Court is received, in which to file answer. *Rayburn v. Rayburn*, 218 N. C. 514, 11 S. E. (2d) 463 (1940).

Dismissal Unless Motion to Amend Is Made.—Where a demurrer ore tenus interposed in the Supreme Court is sustained, questions of law presented by appellant's exception to the overruling of his written demurrers by the lower court need not be considered, and the case will be remanded with direction that it be dismissed, unless in apt time plaintiff moves for leave to amend as provided by this section. *White v. Charlotte*, 207 N. C. 721, 178 S. E. 219 (1935).

A failure to amend the complaint after judgment sustaining demurrer thereto works a dismissal. *Webb v. Eggleston*, 228 N. C. 574, 46 S. E. (2d) 700 (1948).

Amendment after Demurrer Sustained.—Under this section where the Supreme Court affirms the judgment of the court below sustaining the demurrer of one of defendants, the decision is without prejudice to plaintiff's right to amend the complaint, if so advised. *Byrd v. Wal-drop*, 210 N. C. 669, 188 S. E. 101 (1936), wherein the court inadvertently referred to § 1-191.

Where the Supreme Court holds that the demurrer to the complaint should have been sustained, the plaintiff may move for leave to amend in accordance with this section. *Johnston County v. Stewart*, 217 N. C. 334, 7 S. E. (2d) 708 (1940).

Where it is determined on appeal that respondent's demurrer to the petition in condemnation proceedings should have been sustained, petitioner may apply to the court below for leave to amend the petition if so advised. *Gastonia v. Glenn*, 218 N. C. 510, 11 S. E. (2d) 459 (1940).

Where the Supreme Court sustains demurrer ore tenus upon appeal, plaintiffs may apply for leave to amend their pleadings. *Perkins v. Langdon*, 231 N. C. 386, 57 S. E. (2d) 407 (1950).

Notice of Motion.—After decision of the Supreme Court sustaining a demurrer to the complaint, but not dismissing the action, plaintiff moved during term to be allowed to file amended complaint. Defendant's objection thereto on the

ground that it was entitled to three days' written notice of the motion, is untenable, since parties are fixed with notice of all motions or orders made in pending causes during term, and the statutory provisions are not applicable in such instances. *Harris v. Board of Education*, 217 N. C. 281, 7 S. E. (2d) 538 (1940).

In reversing the judgment of the lower court overruling defendant's demurrer, the opinion of the Supreme Court stated that plaintiff will be given reasonable time to amend her complaint, if she so desires. There was no motion by plaintiff in the Supreme Court to be allowed to amend. The statement merely indicated to plaintiff that the procedure to amend under the provisions of this section, was still open to her, and the opinion of the Supreme Court does not entitle her to file amended complaint as a matter of right without notice to defendant. *Scott v. Harrison*, 217 N. C. 319, 7 S. E. (2d) 547 (1940).

Where plaintiff, after notice of defendant's intention to move to be allowed to amend his answer, requests and obtains a continuance of the motion he thereby waives his right to object that notice of the motion was not given him within the ten-day (now thirty-day) period prescribed by this section even conceding that the provisions of this section are applicable, the purpose of the requirement of notice being merely to call the matter to the attention of the adverse party and to give him reasonable time for preparation. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479 (1940).

Demurrer to Affirmative Defense Set up in Answer.—Where the Supreme Court holds that plaintiff's demurrer to an affirmative defense set up in the answer should have been sustained and that defendant might move for leave to amend "in accordance with the provision of C. S. 515," [§ 1-131] the provision for amendment of the answer in accordance with this section is an inadvertence, and cannot be held to confine defendant to the procedure specified in this section, the provisions of this section not being applicable to the amendment of an answer after judgment sustaining a demurrer to an affirmative defense or counterclaim, but only to the amendment of the complaint after judgment sustaining a demurrer thereto, and the Supreme Court having no right to require defendant to adopt an inappropriate procedure in seeking an amendment to his answer. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479 (1940). See also, *Barber v. Ed-*

wards, 218 N. C. 731, 12 S. E. (2d) 234 (1940).

Under this section where an action has been dismissed for misjoinder of parties and causes, the action is not pending and the court has no power to allow a motion to amend the pleadings. *Grady v. Warren*, 202 N. C. 638, 163 S. E. 679 (1932).

Appeal.—Where the trial judge has allowed the plaintiff's motion to amend his complaint under this section upon due notice, within ten days after the receipt of the certificate by the clerk of the trial court from the Supreme Court on a former appeal, sustaining a demurrer to the complaint, the procedure is, if objected to by the defendants, to note an exception and appeal from the final judgment, and an appeal otherwise will be dismissed as premature. *Morris v. Cleve*, 194 N. C. 202, 139 S. E. 230 (1927).

Judgment overruling defendant's demurrer for failure of the complaint to state a cause of action does not preclude

defendant from raising the same question by a motion to dismiss or for judgment as of nonsuit. *Law v. Cleveland*, 213 N. C. 289, 195 S. E. 809 (1938).

Judgment of Clerk Final and Conclusive.—The judgments of the clerk of the court rendered within the authority given him by this section, are judgments of the superior court, and have the same effect as those rendered by the judge, and when not appealed from, are final and conclusive. *Williams v. Williams*, 190 N. C. 478, 130 S. E. 113 (1925).

Cited in *Morris v. Cleve*, 197 N. C. 253, 257, 148 S. E. 253 (1929); *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618 (1929); *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165 (1939); *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911 (1940); *Watson v. Lee County*, 224 N. C. 508, 31 S. E. (2d) 535 (1944); *Barker v. Barker*, 232 N. C. 495, 61 S. E. (2d) 360 (1950); *Gill v. Smith*, 233 N. C. 86, 62 S. E. (2d) 546 (1950).

§ 1-132. Division of actions when misjoinder.—If the demurrer is sustained for the reason that several causes of action have been improperly united, the judge shall, upon such terms as are just, order the action to be divided into as many actions as are necessary for the proper determination of the causes of the action therein mentioned. (C. C. P., s. 131; Code, s. 272; Rev., s. 476; C. S., s. 516.)

Provisions of Section Mandatory.—It is the duty of the judge on just terms to divide the action on the docket for separate trials. *Gattis v. Kilgo*, 125 N. C. 133, 34 S. E. 246 (1899).

See *Weeks v. McPhail*, 128 N. C. 134, 38 S. E. 292 (1901), where the division of the action is spoken of as being within the discretion of the court.

Court Will Sever Causes Improperly United.—Where several causes of action have been improperly united, the cause will not be dismissed, but the court will sever the causes and divide the action. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345 (1950); *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708 (1950). See also, *Pressley v. Great Atlantic, etc., Tea Co.*, 226 N. C. 518, 39 S. E. (2d) 382 (1946).

Where there is a misjoinder of causes of action alone, the action need not be dismissed upon demurrer, but the court is authorized to divide the action for separate trials. *Smith v. Gibbons*, 230 N. C. 600, 54 S. E. (2d) 924 (1949).

Causes of action to recover for wrongful eviction and detention of personal property, breach of lease contract and malicious injury to business and credit standing, may not be properly joined in the same complaint and the causes should

be severed upon demurrer. *Snotherly v. Jenrette*, 232 N. C. 605, 61 S. E. (2d) 708 (1950).

With or without Terms.—The judge may permit an amendment to divide the action with or without terms. *State v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Different Venues.—Where causes of action have been improperly joined, the court may order the action to be divided upon demurrer, though triable in different counties. *Richmond Cedar Works v. Roper Lumber Co.*, 161 N. C. 603, 77 S. E. 770 (1913).

Dismissal of One of Two Causes for Lack of Jurisdiction.—Where two causes of action are improperly joined, but one of them, because of the amount involved, is not within the jurisdiction of the court, it may be dismissable as to the one over which the court has no jurisdiction. *Railroad Co. v. Wakefield Hdw. Co.*, 135 N. C. 73, 47 S. E. 234 (1904).

Misjoinder of Causes and Parties.—Where there is not only a misjoinder of distinct causes of action, but also misjoinder of parties having no community of interest, the action cannot be divided under this section. *Jones v. McKinson*, 87 N. C. 294 (1882); *Mitchell v. Mitchell*, 96 N. C. 14, 1 S. E. 648 (1887); *Cro-*

martie v. Parker, 121 N. C. 198, 28 S. E. 297 (1897); *Mortan v. Western Union Tel. Co.*, 130 N. C. 299, 41 S. E. 484 (1902); *Roberts v. Utility Mfg. Co.*, 181 N. C. 204, 106 S. E. 664 (1921); *Rose v. Freemont Warehouse, etc., Co.*, 182 N. C. 107, 108 S. E. 389 (1921); *Taylor v. Postal Life Ins. Co.*, 182 N. C. 120, 108 S. E. 502 (1921); *Citizens Nat. Bank v. Angelo*, 193 N. C. 576, 137 S. E. 705 (1927); *Southern Mills v. Summit Yarn Co.*, 223 N. C. 479, 27 S. E. (2d) 289 (1943).

A demurrer should be sustained where there is a misjoinder of parties and causes of action, and the court is not authorized in such cases, to direct a severance of the respective causes of action for trial under the provisions of this section. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2 (1950).

For example an action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a quantum meruit, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. *Shore v. Holt*, 185 N. C. 312, 117 S. E. 165 (1923).

In a suit by a county against three defendants to foreclose a tax lien on five tracts of land, title to tracts 1, 2, and 3, being in E. L. for life with remainder to E. J., title to tract 4 being in E. L. in fee and the other defendants never having had any interest therein, and title to tract 5 being in E. J., and the other defendants never having had any interest

therein, the joinder of the third defendant, H. F., was mere surplusage and not fatal, as he was not a necessary party; but a joint demurrer for misjoinder of actions and parties should have been sustained, since there can be no division of the action under this section. *Moore County v. Burns*, 224 N. C. 700, 32 S. E. (2d) 225 (1944).

Divisible, Even though Demurrable.—A complaint in which are joined two causes of action, the one upon a clerk's bond and the other upon a bond of an administrator, is demurrable. But in such case the court may order the action to be divided. *Street v. Tuck*, 84 N. C. 605 (1881).

Further Service of Summons.—Where a division of the action is ordered under this section, no further service of summons is necessary. *Hodges v. Wilmington, etc., R. Co.*, 105 N. C. 170, 10 S. E. 917 (1890).

Motion to Divide.—In *Dunn v. Aid Society*, 151 N. C. 133, 65 S. E. 761 (1909), the court held that where there is a misjoinder of actions the remedy is by motion to divide the actions where the defendant was already in court and had received notice by the summons and complaint. To same effect, see *Solomon v. Bates*, 118 N. C. 311, 24 S. E. 478 (1896); *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232 (1916).

Principle of section stated in *State v. McCanless*, 193 N. C. 200, 136 S. E. 371 (1927).

Cited in *Pender County v. King*, 197 N. C. 50, 147 S. E. 695 (1929); *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618 (1929); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Lillian Knitting Mills Co. v. Earle*, 233 N. C. 74, 62 S. E. (2d) 492 (1950).

§ 1-133. Grounds not appearing in complaint.—When any of the matters enumerated as grounds of demurrer do not appear on the face of the complaint, the objection may be taken by answer. (C. C. P., s. 98; Code, s. 241; Rev., s. 477; C. S., s. 517.)

Cross Reference.—As to grounds for demurrer, see § 1-127.

Controverting Allegations of Complaint.—Where the defendant controverts the truth of the allegations contained in the complaint, this must be done by an answer and not by a demurrer. *Laney v. Hutton*, 149 N. C. 264, 62 S. E. 1082 (1908).

Pendency of Another Suit.—Where another action is pending for the same cause and between the same parties, which fact does not appear on the face of the complaint, the objection may be

taken by answer. *Cook v. Cook*, 159 N. C. 46, 74 S. E. 639 (1912); *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545 (1919). It is a ground of demurrer, if it appears on the complaint. See § 1-127, clause 3, and annotations.

This rule was followed in *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931); *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834 (1939); *Thompson v. Virginia, etc., So. R. Co.*, 216 N. C. 554, 6 S. E. (2d) 38 (1939).

One partner was sued individually for damages resulting in a collision occurring

while driving a partnership vehicle in the course of the partnership business. Thereafter the individual partners instituted suit in another county against the plaintiff in the first action to recover damages resulting to them out of the same collision. It was held that the parties to the two actions were identical for the purposes of a plea in abatement, and the second action was abated in the Supreme Court upon the plea, the remedy in the second action being by counterclaim in the first. *Dwiggins v. Parkway Bus Co.*, 230 N. C. 234, 52 S. E. (2d) 892 (1949).

Defect of parties which does not appear on the face of the complaint must

be taken advantage of by answer, otherwise it will be deemed as waived. *Lunn v. Shermer*, 93 N. C. 164 (1885). See the next section.

But where the defect does appear on the face of the complaint, it is a ground of demurrer and cannot be taken advantage of in any other way. *Burns v. Ashworth*, 72 N. C. 496 (1875).

Stated in *Cheshire v. First Presbyterian Church*, 220 N. C. 393, 17 S. E. (2d) 344 (1941).

Cited in *Hawkins v. Carter*, 196 N. C. 538, 146 S. E. 231 (1929); *Murchison Nat. Bank v. Broadhurst*, 197 N. C. 365, 148 S. E. 452 (1929); *Boney v. Parker*, 227 N. C. 350, 42 S. E. (2d) 222 (1947).

§ 1-134. **Objection waived.**—If objection is not taken either by demurrer or answer, the defendant waives the same, except the objections to the jurisdiction of the court and that the complaint does not state facts sufficient to constitute a cause of action. (C. C. P., s. 99; Code, s. 242; Rev., s. 478; C. S., s. 518.)

Cross Reference.—See note under § 1-127.

Exceptions Not Waived — Motion to Dismiss at Any Time.—As to the two exceptions mentioned in this section there can be no waiver, and objections may be made at any time. *Johnson v. Finch*, 93 N. C. 205 (1885); *Halstead v. Mullen*, 93 N. C. 252 (1885); *Gurganus v. McLawhorn*, 212 N. C. 397, 193 S. E. 844 (1937); *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207 (1942).

Same—In the Supreme Court. — The want of jurisdiction and the failure of the complaint to state facts sufficient to constitute a cause of action cannot be waived and may be taken advantage of at any time even in the Supreme Court. *Tucker v. Baker*, 86 N. C. 1 (1882); *Clements v. Rogers*, 91 N. C. 63 (1884); *Hunter v. Yarborough*, 92 N. C. 68 (1885); *Knowles v. Norfolk, etc., R. Co.*, 102 N. C. 59, 9 S. E. 7 (1889); *Raleigh v. Hatcher*, 220 N. C. 613, 18 S. E. (2d) 207 (1942).

Defective Statement and Defective Cause Distinguished.—A defective statement of a good cause of action must be taken advantage of by demurrer, and will be deemed to have been waived or cured unless so taken; but a statement of a defective cause may be taken advantage of by a motion to dismiss at any time even in the Supreme Court; or the court may dismiss the action of its own motion. *Baker v. Garriss*, 108 N. C. 218, 13 S. E. 2 (1891); *Cook v. American Exch. Bank*, 129 N. C. 149, 39 S. E. 746 (1901).

The second exception mentioned in this section applies to complaints that fail "to state facts sufficient to constitute a cause

of action," or in other words when it appears therefrom that the action will not lie. The other objections must be raised by demurrer or answer in proper time, or else they will be deemed waived. *Halstead v. Mullen*, 93 N. C. 252 (1885).

In *Garrett v. Trotter*, 65 N. C. 430 (1871), the court used the following illustrative language which explains the nature of the two exceptions referred to in this section; "The counsel for the defendant, and his Honor, fell into error by not adverting to the distinction above referred to, between a defective statement of a cause of action and a statement of a defective cause of action. There is a like distinction between a defect of jurisdiction in respect to the subject of the action, and a want of jurisdiction in respect to the person; for illustration: Action in a superior court upon a note for less than \$200; here, there is a defect of jurisdiction in respect to the subject of the action; it cannot be helped by waiver, consent, amendment or otherwise, and the sooner the proceeding is stopped the better. Action in the county of Orange, against the Charlotte and Columbia Railroad Company; here is a want of jurisdiction in respect to the person, which may be waived by consent, or by making full defense or pleading by an attorney of the court."

The failure of a complaint in an action for nondelivery of cotton to allege readiness and ability to pay is a defective statement of a good cause of action. *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642 (1903).

Lack of Jurisdiction. — The defendant by filing an answer to the complaint in the superior court did not waive his right to

demur ore tenus to the complaint on the ground that the court had no jurisdiction of the action and that the complaint does not state facts sufficient to constitute a cause of action. *Finley v. Finley*, 201 N. C. 1, 158 S. E. 549 (1931).

Demurrer ore tenus on the ground that it appears on the face of the complaint that the court is without jurisdiction may be made at any time, even in the Supreme Court on appeal. *Brissie v. Craig*, 232 N. C. 701, 62 S. E. (2d) 330 (1950).

A court has only that jurisdiction granted it by the Constitution and by statute, and it cannot acquire jurisdiction by waiver or consent, and objection to the jurisdiction may be taken at any time during the progress of the action. *McCune v. Rhodes-Rhyne Mfg. Co.*, 217 N. C. 351, 8 S. E. (2d) 219 (1940).

Defect of Parties.—The defect of non-jointness of a plaintiff unless availed of by demurrer or by plea shall be deemed to have been waived. *Lewis v. McNatt*, 65 N. C. 63 (1871). The general rule is that defects of parties must be raised by demurrer or answer. *Usry v. Suit*, 91 N. C. 406 (1884); *Knowles v. Norfolk, etc., R. Co.*, 102 N. C. 59, 9 S. E. 7 (1889); *Mizzell v. Ruffin*, 118 N. C. 69, 23 S. E. 927 (1896); *Godwin v. Jernigan*, 174 N. C. 76, 93 S. E. 443 (1917). See § 1-127, cl. 4, and annotations thereto.

Same—Legal Capacity to Sue.—A demurrer ore tenus to the complaint upon the ground of defect of parties, or that the plaintiff did not have the legal capacity to sue, will not be sustained, as such defense is deemed waived unless taken by a written answer or demurrer. *Kochs Co. v. Jackson*, 156 N. C. 326, 72 S. E. 382 (1911). See also, *Fisher v. Traders' Mut. Life Ins. Co.*, 136 N. C. 217, 48 S. E. 667 (1904). See also § 1-127, cls. 2 and 4, and annotations thereto.

Arrest of Judgment for Defective Causes.—The provisions of this section as regards complaints which do not contain facts sufficient to constitute a cause of action, are satisfied by arresting the judgment in cases where they apply. *Love v. Commissioners*, 64 N. C. 706 (1870).

Premature Institution of Action.—In an action against an executor the objection that the action is prematurely commenced should be set up by the defendant in his answer. *Clements v. Rogers*, 91 N. C. 63 (1884).

Demurrer after Answer.—A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. *Cherry v. Atlantic Coast Line R. Co.*, 185 N. C. 90, 116 S. E. 192 (1923). See *Ezzell v. Merritt*, 224 N. C. 602, 31 S. E. (2d) 751 (1944).

Demurrer ore tenus does not lie where answer has been filed and the demurrer does not raise objection to the jurisdiction or that complaint does not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829 (1942).

Answer Not Waiving Right to Demur to Amended Complaint.—The filing of answer to the original complaint does not waive defendants' right to demur to an amended complaint on the ground of misjoinder of parties and causes of action. *Teague v. Siler City Oil Co.*, 232 N. C. 65, 59 S. E. (2d) 2 (1950).

Applied in *Miller v. Roberts*, 212 N. C. 126, 193 S. E. 286 (1937); *Hanes Funeral Home v. Spencer*, 214 N. C. 702, 200 S. E. 397 (1939); *Jones v. Jones Lewis Furniture Co.*, 222 N. C. 439, 23 S. E. (2d) 309 (1942).

Cited in *Roebuck v. Short*, 196 N. C. 61, 144 S. E. 515 (1928); *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929); *Tal-lassee Power Co. v. Peacock*, 197 N. C. 735, 150 S. E. 510 (1929); *Mountain Park Institute v. Lovill*, 198 N. C. 642, 153 S. E. 114 (1930); *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930); *Begnell v. Safety Coach Line*, 198 N. C. 688, 153 S. E. 264 (1930); *Bechtel v. Bohannon*, 198 N. C. 730, 153 S. E. 316 (1930); *Carpenter v. Boyler*, 213 N. C. 432, 196 S. E. 850 (1938).

ARTICLE 15.

Answer.

§ 1-134.1. **Special appearances eliminated.**—No special appearance shall be necessary in order to present the objection that the court has no jurisdiction over the person or property of the defendant. Such objection may be presented either by motion or answer, and the making of other motions or the pleadings of other defenses simultaneously with the presentation of such objec-

tion shall not be a waiver of such objection: Provided, that the making of any motion or the filing of answer prior to the presentation of such objection shall waive it: Provided further that any interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant or such party may preserve his exception for determination upon any subsequent appeal in the cause. (1951, c. 245.)

§ 1-135. Contents.—The answer of the defendant must contain—

1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.

2. A statement of any new matter constituting a defense or counterclaim, in ordinary and concise language, without repetition. (C. C. P., s. 100; Code, s. 243; Rev., s. 479; C. S., s. 519.)

I. In General.

II. Denials.

A. General and Specific Denials.

B. Denial of Information or Knowledge.

III. New Matter in Defense.

Cross Reference.

As to contents of complaint, see § 1-122.

See note under § 1-137.

I. IN GENERAL.

Any Defense Available under Old System, Available under the New.—Under the Code the defendant may avail himself of any defense that would have been available under the old mode of procedure, either legal or equitable. *Clark v. Clark*, 65 N. C. 655 (1871).

Must State Facts.—The answer, like the complaint, must state facts upon which the validity of the defense rests. An averment of a general principle of law will not do. *Knight v. Killebrew*, 86 N. C. 400 (1882).

Statement in Plain and Intelligible Manner.—The defendant must state his grounds of defense in a plain, strong and intelligible manner. *McLaurin v. Cronly*, 90 N. C. 50 (1884).

Precision and Particularity in Alleging Defenses.—The defendant's defense must be alleged with the same precision and certainty as if alleged in a complaint. *American Nat. Bank v. Hill*, 169 N. C. 235, 85 S. E. 209 (1915).

Although an answer to a complaint in an action on a note does not set out the allegations of fraud with that particularity that the rules of pleading ordinarily require, yet, if it seems intended to raise a serious question of fraud, it will not be stricken out as frivolous, for, if filed in good faith, the defendant is entitled to have the facts alleged in it either admitted by demurrer or tried by a jury. *Campbell v. Patton*, 113 N. C. 481, 18 S. E. 687 (1893).

Allegata and Probata Must Correspond.

—No defense which is not set up in the answer may be introduced at terms and proved. The rule that the allegata and probata must correspond prevails as much under the Code as under the old system. *McLaurin v. Cronly*, 90 N. C. 50 (1884).

The plea of *res judicata* cannot be presented by demurrer, unless the facts supporting it appear on the face of the complaint. It must be taken by answer. *Hampton v. North Carolina Pulp Co.*, 223 N. C. 535, 27 S. E. (2d) 538 (1943).

Narration of Evidence Held Irrelevant Pleading.—A denial in the answer of a material fact alleged in the complaint enables defendant to show any facts which go to deny the existence of the controverted fact, and therefore narration of evidence which defendant contends sustains his denial of the controverted fact is irrelevant pleading. *Chandler v. Mashburn*, 233 N. C. 277, 63 S. E. (2d) 553 (1951).

Stated in Bourne v. Board of Financial Control, 207 N. C. 170, 176 S. E. 306 (1934).

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Hutchins v. Mangum*, 198 N. C. 774, 153 S. E. 409 (1930); *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938); *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393 (1940); *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (1942); *Smoke Mount Industries v. Fisher*, 224 N. C. 72, 29 S. E. (2d) 128 (1944).

II. DENIALS.

A. General and Specific Denials.

Old General Issue and Denials under the Code.—One principal object of the new system was to abolish or restrict the use of the general issue; to require of plaintiffs, as far as it was practicable, a statement of the facts as they were, and not according to their legal effect; and thus both to enable and to require defendants to specify

the particular facts which they intended to controvert. To permit a denial of the facts of the complaint en masse, would be to lose this object and to allow and extend, at least where the answer is not under oath, and abuse the general issue, which formerly existed. It would seem also to ignore the requirements that the denial shall be of each material allegation. The requirement seems to demand that the defendant should separately answer each material allegation by a general denial either of the whole allegation (not the whole complaint), or by a specific denial of some selected and specific part of the allegation. *Heyer v. Beatty*, 76 N. C. 28 (1877).

Nature of Denials under the Code and Purpose Thereof.—The denials referred to in this section may be a general denial—that is that the allegation is not true, or specific—that is, that it is true in some respects but not true in others. The purpose is to require the defendant frankly to deny the truth of the allegations of the complaint, if he can, or, if he can not, then to admit the truth of them, or to specifically admit the truth of them, so far as they are true within his knowledge and deny the truth of the same in particular respects, so far as he may be warranted in doing so by the facts; and he is further required to state such knowledge and information as he may have as to the allegations sufficient to form a belief. Such denials, admissions and statements of facts should be direct, positive and unequivocal—not argumentative and evasive. *Rumbough v. Southern Improve. Co.*, 106 N. C. 461, 11 S. E. 528 (1890).

A plea by denial simply controverts the material allegations of the complaint and puts plaintiff to proof; while a plea in confession and avoidance sets up new matter, which is matter not appearing in the complaint, constituting an affirmative defense, and such new matter must be properly alleged in order to give notice that it will be used. *Cohoon v. Swain*, 216 N. C. 317, 5 S. E. (2d) 1 (1939).

General Denial.—It has been repeatedly held that a general denial, that “no allegation of the complaint is true,” is not a sufficient answer under this section, because such a plea may put in one issue several matters of fact, some of which are triable by the court, and others by the jury. *Flack v. Dawson*, 69 N. C. 42 (1873); *Brown v. Cooper*, 89 N. C. 237 (1883).

Specific Denial. — An answer denying “the truth of the averments contained in the first, second, third, fourth, fifth and

sixth paragraphs of the complaint” (being the number contained in the complaint), is a specific denial of each allegation and a sufficient compliance with this section. *Brown v. Cooper*, 89 N. C. 237 (1883).

Effect of Failure to Deny.—If an allegation in the complaint is not denied in the answer, it is admitted, and is as effectual as if found by a jury. *Bonham v. Craig*, 80 N. C. 224 (1879).

Where the only controverted fact has no bearing on the rights of the parties, judgment may be rendered on the pleadings upon the facts admitted. *Jeffreys v. Boston Ins. Co.*, 202 N. C. 368, 162 S. E. 761 (1932).

B. Denial of Information or Knowledge.

Denial of Both Knowledge and Information Necessary.—A denial of knowledge without a denial of information sufficient to form a belief is not sufficient to fulfill the requirement of this section. *Durden v. Simmons*, 84 N. C. 555 (1881); *Fagg v. Southern Bldg., etc., Ass’n*, 113 N. C. 364, 18 S. E. 655 (1893).

Denial upon Information and Belief.—Where an allegation in a complaint is within the personal knowledge of the defendant, a statement in the answer that he is informed and believes that the allegations of the complaint are not true, and therefore denies the same, is not, under this section, sufficient to raise an issue. The answer may, however, be amended in the discretion of the court. *Avery v. Stewart*, 134 N. C. 287, 46 S. E. 519 (1904).

An allegation which does not relate to a personal transaction may be denied on information and belief. *Grimes v. Lexington*, 216 N. C. 735, 6 S. E. (2d) 505 (1940).

Allegations that defendant “denies that it has any knowledge or information thereof sufficient to form a belief” is not an admission of the facts alleged in the complaint but is in exact accord with this section and puts plaintiff to proof. *Campbell v. Peoples Sav. Bank, etc., Co.*, 214 N. C. 680, 200 S. E. 392 (1939).

An allegation in an answer that defendant has no information of facts alleged in a certain paragraph of the complaint, and demands proof thereof, is not sufficient to put such facts in issue. *Fagg v. Southern Bldg., etc., Ass’n*, 113 N. C. 364, 18 S. E. 655 (1893); *Woodcock v. Bostic*, 128 N. C. 243, 38 S. E. 881 (1901).

A denial of the allegations of the complaint, made in the form prescribed, i. e., of any knowledge or information thereof, sufficient to form a belief, being allowed by the Code of Civil Procedure, raises,

when interposed, a sufficient issue; and such answer is not subject to the objection of being insufficient or frivolous. *Farmers, etc., Bank v. Board*, 75 N. C. 45 (1876).

However where a complaint alleges a matter to be within the personal knowledge of defendant an answer "that defendant has no knowledge or information sufficient to form a belief" stated no defense and was an admission of the truth of the allegation of the complaint. *Lay Gas Mach. Co. v. Falls, etc., Mfg. Co.*, 91 N. C. 74 (1884).

In an action on notes given for the price of land, denial on information and belief of a count of the complaint alleging that the notes were indorsed for valuable consideration was sufficient. *Willis v. Williams*, 174 N. C. 769, 94 S. E. 513 (1917).

In an action for specific performance of a lost bond for title, which denies that the bond embraces the land in controversy according to defendant's best recollection and belief, is sufficient and raises an issue of fact. *Conder v. Stallings*, 161 N. C. 17, 76 S. E. 627 (1912).

III. NEW MATTER IN DEFENSE.

New Matter Equitable or Legal.—The answer may contain new matter in defense whether equitable or legal. *Bean v. West-*

ern, etc., R. Co., 107 N. C. 731, 12 S. E. 600 (1890).

Matters in Justification.—Under the old system of pleading, upon the general issue matter in justification could not be proved; it must be pleaded specially. Under the Code practice the principle is not changed. A defense which can not be maintained by a denial of the allegations in the complaint, must be set up as new matter in the answer. *Raynor v. Wilmington Seacoast R. Co.*, 129 N. C. 195, 39 S. E. 821 (1901).

Time of Existence of New Matter in Defense.—This section does not require that new matter constituting a defense must exist at the time of the commencement of the action, and a defense arising thereafter was recognized in *Puffer v. Lucas*, 101 N. C. 281, 7 S. E. 734 (1888), and in the later case of *Smith & Co. v. French*, 141 N. C. 1, 53 S. E. 435 (1906), it was held that, "A counterclaim connected with the plaintiff's cause of action or with the subject of the same should not necessarily or entirely mature before action commenced, nor even before answer filed." *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 80 S. E. 257 (1913). But as to this latter conclusion, see § 1-137, paragraph 2 and annotations thereto.

§ 1-136. Debt for purchase money of land denied.—If the defendant shall deny in his answer that the obligation sued on was for the purchase money of the land described in the complaint, it shall be the duty of the court to submit the issue so joined to the jury. (1879, c. 217; Code, s. 235; Rev., s. 480; C. S., s. 520; 1921, c. 45.)

Cross Reference.—See § 1-122, paragraph 4.

Editor's Note.—The amendment of 1921, substituted the words "shall deny" for the word "denies."

Defendant Entitled to Have Issue Determined by Jury.—In an action on a note alleged to have been given for the purchase money of land, the defendant, if he demands it in apt time and tenders an appropriate issue, has the right to have the question submitted to the jury as to

whether or not the note was given for the purchase money of the land. *Davis v. Evans*, 142 N. C. 464, 55 S. E. 344 (1906).

Waiver of Right of Jury Trial.—Although the defendant is under this section, entitled to have the issue whether the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned, he fails to appear and answer, he waives that right. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683 (1889).

§ 1-137. Counterclaim.—The counterclaim mentioned in this article must be one existing in favor of a defendant and against a plaintiff between whom a several judgment might be had in the action, and arising out of one of the following causes of action:

1. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of the action.

2. In an action arising on contract, any other cause of action arising also on con-

tract, and existing at the commencement of the action. (C. C. P., s. 101; Code, s. 244; Rev., s. 481; C. S., s. 521.)

- I. In General.
- II. Claims Arising out of Plaintiff's Demand.
 - A. General Rules and Instances.
 - B. Time of Existence.
- III. Claims Arising out of Independent Contract.
 - A. General Rules and Instances.
 - B. Time of Existence.
- IV. Pleading and Practice.
 - A. Rules of Pleading.
 - B. Nonsuit.
 - C. Jurisdictional Amount.

Cross Reference.

As to duty of jury to render verdict and assess the amount of recovery by defendant in the event of successful counterclaim, see § 1-204.

I. IN GENERAL.

Editor's Note.—See 13 N. C. Law Rev. 86.

The effect of the statute is to consolidate the common law recoupment and the statutory set-off, by abolishing all differences that existed between them, by treating the two under the name of counterclaim, with a liberal tendency in favor of the defendant. The consequence of this consolidation is to enable the defendant to avail himself of his claim in the same action, whether such claim arises out of the same transaction, or different transactions, and whether or not it exceeds the claim of the plaintiff, as recovery for the excess is now permissible.

Liberal Construction. — This section is very broad in its scope and terms, and should be liberally construed by the court in furtherance of the most desirable and beneficial purpose for which it is enacted. *Garrett v. Love*, 89 N. C. 205 (1883); *Smith v. Young Bros.*, 109 N. C. 224, 13 S. E. 735 (1891); *Smith v. French*, 141 N. C. 1, 53 S. E. 435 (1906).

This section on counterclaim is very broad in its scope and terms, is designed to enable parties litigant to settle well-nigh any and every phase of a given controversy in one and the same action, and should be liberally construed by the court in furtherance of this most desirable and beneficial purpose. *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 306 (1934).

While this section must be liberally construed, its reasonable restrictions must nevertheless be observed in the interest of orderly judicial investigation. *Manufac-*

turers, etc., Finance Corp. v. Lane, 221 N. C. 189, 19 S. E. (2d) 849 (1942).

More Comprehensive Than the Old Set-Off. — The counterclaim, in an action on contract, embraces not only matter that under the old practice was termed a set-off, but every other cause of action arising out of contract, whether legal or equitable, between the plaintiff and defendant. Where there are more than one plaintiff or defendant it is further extended so that not only mutual debts between the plaintiffs and defendants, but every claim by the defendants, or any one of them, against the plaintiffs, or any of them, between whom a several judgment might be had in the action, is embraced. *Neal v. Lea*, 64 N. C. 678 (1870).

Subject to the limitations expressed in this section, a counterclaim includes practically every kind of cross-demand existing in favor of defendant against the plaintiff in the same right, whether said demand be of a legal or an equitable nature. It is said to be broader in meaning than set-off, recoupment, or cross action, and includes them all, and secures to defendant the full relief which a separate action at law, or a bill in chancery, or a cross bill would have secured on the same state of facts. *Smith v. French*, 141 N. C. 1, 53 S. E. 435 (1906), followed in *Ætna Life Ins. v. Griffin*, 200 N. C. 251, 156 S. E. 515 (1931); *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 306 (1934).

There is no reason to continue the plea in bar as the limited common-law prototype of modern counterclaim, since this section gives full relief by admitting demands of that character as counterclaims at their full value, which the common law did not. *Manufacturers, etc., Finance Corp. v. Lane*, 221 N. C. 189, 19 S. E. (2d) 849 (1942).

Enumeration of Grounds Exclusive.—A defendant cannot set up as a defense or counterclaim any and every cause of action he may have against the plaintiff. He may set up only such causes as counterclaims, that fall within one of the subdivisions of this section. *Byerly v. Humphrey*, 95 N. C. 151 (1886).

Criterion to Determine a Valid Counterclaim. — The criterion, for determining whether a defense set up can be maintained as a counterclaim, is whether there is a cause of action upon which the defendant might have sustained a suit against the plaintiff; and if there is, then such cause of

action is a counterclaim. *Battle v. Thompson*, 65 N. C. 406 (1871).

Payment and Counterclaim Compared.—A payment pro tanto extinguishes the debt eo instanti and is itself thereby extinguished, so that neither remains any longer the subject of an action. On the contrary, a counterclaim which now includes a set-off, is the assertion by the defendant of an independent demand which might be maintained in an independent action. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288 (1898).

Cannot Be Set against the State.—A person, indebted to the State and sued on such indebtedness, cannot offer as a set-off or counterclaim the indebtedness of the State to him. The reason being that a counterclaim is allowed to avoid circuity of actions, and as none of its citizens can bring suit against the State, the counterclaim is not permissible. *Battle v. Thompson*, 65 N. C. 406 (1871).

With a few exceptions, growing out of public policy, the rules of law which apply to the government and individuals are the same. *McKnight v. United States*, 98 U. S. 179, 25 L. Ed. 115 (1878).

Waiver of Exemption by United States.—Although direct suits cannot be maintained against the United States, yet, when the United States institutes a suit, they waive their exemption so far as to allow a presentation by the defendant of set-offs, legal or equitable, to the extent of the demand made or property claimed. *United States v. Ringgold*, 8 Pet. (33 U. S.) 150, 8 L. Ed. 899 (1834); *The Siren*, 7 Wall. (74 U. S.) 152, 19 L. Ed. 129 (1868).

Against an Action for Tax.—A set-off is not pleadable to an action for recovery of taxes. *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543 (1906).

Equitable Counterclaim.—An equitable cause of action may be set up as a counterclaim against a legal cause of action. *Dempsey v. Rhodes*, 93 N. C. 120 (1885).

Counterclaim Where Lien upon Property Involved.—In an action upon a contract, though a lien upon property is involved, it is competent for the defendant to extinguish the debt, due from him, by a proof of counterclaim. *Poston v. Rose*, 87 N. C. 279 (1882).

Cited in *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *English Drug Co. v. Helms*, 199 N. C. 755, 155 S. E. 871 (1930); *Sineath v. Katzis*, 219 N. C. 434, 14 S. E. (2d) 418 (1941) (dis. op.); *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (1942) (dis. op.).

II. CLAIMS ARISING OUT OF PLAINTIFF'S DEMAND.

A. General Rules and Instances.

Same Purpose as Subsection 1 of § 1-123.

—See note to § 1-123.

Counterclaim for Independent Tort Not Allowed.—Under this section a counterclaim is not permissible for a distinct and independent tort, and applying the principle, in an action to recover a tract of land alleged to belong to the plaintiff, a counterclaim for a trespass by the plaintiff on a different tract of land belonging to defendant is not maintainable. *Louisville, etc., R. Co. v. Nichols*, 187 N. C. 153, 120 S. E. 819 (1924).

Same—But Permissible if It Grows out of Same Transaction.—The contention that a tort can not under any circumstances constitute a counterclaim although “connected with the subject of the action” contained in the complaint is unfounded. The contrary is decided in *Walsh v. Hall*, 66 N. C. 233 (1872), and *Bitting v. Thaxton*, 72 N. C. 541 (1875); *Lee v. Eure*, 93 N. C. 5 (1885).

Tort against Contract Claim.—If it arises out of the same transaction or is connected with the subject of the action, a tort claim may be pleaded as a counterclaim against a contract claim. *McKinnon v. Morrison*, 104 N. C. 354, 360, 10 S. E. 513 (1889); *Branch v. Chappell*, 119 N. C. 81, 25 S. E. 783 (1896); *Smith v. Old Dominion Bldg., etc., Ass'n*, 119 N. C. 257, 26 S. E. 40 (1896). The same rule applies to tort claims as against tort actions. *Branch v. Chappell*, supra.

Under subsection 1 of this section, a cause of action ex delicto may be pleaded as a counterclaim to an action ex contractu provided it arises out of the same transaction or is connected with the same subject of action. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

A cause of action in tort may be pleaded as a counterclaim to an action on contract only if it rests upon some wrong or breach of duty committed by plaintiffs in making performance of the contract. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

Damages for slander cannot be set up as a counterclaim to an action for debt. *Merritt Milling Co. v. Finlay*, 110 N. C. 411, 15 S. E. 4 (1892); *Weiner v. Eque's Style Shop*, 210 N. C. 705, 188 S. E. 331 (1936).

A demurrer to a counterclaim sounding in tort not arising out of the contract sued upon, and not connected with the same subject matter, is properly sustained under

this section. *Hoyle v. Carter*, 215 N. C. 90, 1 S. E. (2d) 93 (1939).

Where plaintiff sued her former husband to recover a monetary consideration under a written separation agreement, defendant's counterclaim for slander sounds in tort and is not "a cause of action arising out of the contract or transaction set forth in the complaint as the foundation of plaintiff's claim, or connected with the subject of actions" within the purview of the statute. *Smith v. Smith*, 225 N. C. 189, 34 S. E. (2d) 148 (1945).

Contract against Tort Claim.—In giving effect to this clause it has been held that not only the defendant could plead a counterclaim grown out of the contract sued on, but that where action is brought for what would have been formerly denominated a tort, the defendant may set up a claim arising out of contract, if it also arises out of the same transaction or vice versa. *Walsh v. Hall*, 66 N. C. 233 (1872); *Bitting v. Thaxton*, 72 N. C. 541 (1875); *Smith v. Young Bros.*, 109 N. C. 224, 13 S. E. 735 (1891).

Contract against Contract Claims Arising out of Same Transaction.—In an action upon a promissory note given in pursuance of a contract for the sale by payee of a specific article of merchandise, the maker may set up by way of counterclaim that the article furnished was not in compliance with the contract of sale, and that he was thereby damaged. *Patapsco Guano Co. v. Tillery*, 110 N. C. 29, 14 S. E. 639 (1892).

Recovery of Excess. — See § 1-204 and the notes thereto; particularly the Editor's Note.

Same—In Tort Action.—If a person be sued in tort, he may, under this section, set up a counterclaim for any damages arising out of the same transaction disclosed in the complaint, and if his damages exceed those of the complaint he is entitled to a judgment for the excess. *Bitting v. Thaxton*, 72 N. C. 541 (1875); *McKinnon v. Morrison*, 104 N. C. 354, 10 S. E. 513 (1889); *Brown v. Brown*, 121 N. C. 8, 27 S. E. 998 (1897).

Nature of Transaction Not Determined by What Plaintiff Calls His Action. — When the plaintiff files his complaint, setting forth the "transaction," whether it be a tort or a contract, the defendant may set up any claim which he has against the plaintiff, connected with the transaction set up in the complaint. In this State there being only one form of action, when the plaintiff states the "transaction" in his complaint he cannot by calling it one name

or another—as tort or contract—cut off the defendant's counterclaim growing out of the same transaction. It is the transaction that is to be investigated, without regard to its form or name. *Walsh v. Hall*, 66 N. C. 233 (1872); *Bitting v. Thaxton*, 72 N. C. 541 (1875).

What Constitutes "Subject of the Action".—The "subject of the action" means the thing in respect to which plaintiff's right of action is asserted, whether it be specific property, a contract, a threatened or violated right, or other thing concerning which an action may be brought and litigation had. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

In an action for trespass for wrongful entry on land and cutting timber, the defendants filed a counterclaim, alleging that the plaintiffs had wrongfully raised a dam and caused water to back on defendant's land, which was part of the land described in the complaint as that on which the alleged trespass had been committed: Held, that the subject of the action was the trespass committed, and not the land, and hence the counterclaim was not connected with the cause of action, and hence it was not permissible. *Bazemore v. Bridgers*, 105 N. C. 191, 10 S. E. 888 (1890).

To be "connected with the subject of the action", the connection must be immediate and direct. A remote, uncertain, partial connection is not enough to satisfy the requirements of the statute. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

What Constitutes "Arising out of Same Transaction".—Where the cause of action alleged was an obstruction placed by the defendant on the upper edge of his land, and the counterclaim attempted to be set up was that the plaintiff had placed an obstruction on the lower edge of his own land, it was held that these were two separate and distinct torts, and that the latter did not "arise out of the transaction set forth in the complaint," nor was it "connected with the subject of the action." *Street v. Andrews*, 115 N. C. 417, 20 S. E. 450 (1894).

An action for damages resulting from an automobile collision does not abate upon the death of the defendant, but may be continued upon the joinder of defendant's personal representative as a party, and the personal representative may set up therein a counterclaim for damages for the death of her intestate arising out of the same accident. *Johnson v. Smith*, 215 N. C. 322, 1 S. E. (2d) 834 (1939).

Same—Breach of Warranty of Sound-

ness. — In an action for the specific recovery of a horse, the defendant pleaded as a counterclaim, that the plaintiff sold the horse to the defendant, and, at the time of the sale, warranted that it was sound, which warranty was false, and in consequence of which the defendant had been damaged; Held, that the counterclaim arose out of the transaction set out in the complaint and was properly pleaded as a counterclaim. *Wilson v. Hughes*, 94 N. C. 182 (1886).

Same—Action for Libel and Counterclaim for Slander. — Where the plaintiff sued the defendant for libel, and the defendant set out as counterclaim slanderous words uttered by the plaintiff, it was held that the counterclaim did not fall within the first subdivision of this section. *Knott v. Burwell*, 96 N. C. 272, 2 S. E. 588 (1887).

Same — Counterclaim for Malicious Prosecution.—Where plaintiff instituted action alleging that defendant had formed a dummy corporation to which he had transferred all his assets, including chattels on which plaintiff had liens, was collecting money on conditional sales contracts which he was wrongfully refusing to pay over to plaintiff, and was dissipating and jeopardizing the assets of the business, and defendant set up a counterclaim alleging want of good faith on the part of plaintiff in maintaining and prosecuting the action and the ancillary remedies and that such wrongful acts had damaged defendant in a large sum, it was held that the counterclaim did not arise out of the transaction set out in the complaint and was not connected with the subject of plaintiff's action within subsection 1, and therefore plaintiff's demurrer to the counterclaim was properly sustained. *Manufacturers, etc., Finance Corp. v. Lane*, 221 N. C. 189, 19 S. E. (2d) 849 (1942).

The cross action must have such relation to plaintiff's claim that the adjustment of both is necessary to a full and final determination of the controversy. This means that it must be so interwoven in plaintiff's cause of action that a full and complete story as to the one cannot be told without relating the essential facts as to the other. And mere historical sequence, or the fact that a connected story may be told of the whole, is not alone sufficient. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

Plaintiffs cashed a check for the payee upon his endorsement and gave the payee in exchange merchandise and money. The maker of the check stopped payment on it, and plaintiffs procured a warrant charg-

ing the maker with issuing a worthless check. The prosecution was not pressed on appeal from the recorder's court. Plaintiffs then instituted an action to recover on the check. It was held that defendant maker was not entitled to set up a cross action for abuse of process. *Hancammon v. Carr*, 229 N. C. 52, 47 S. E. (2d) 614 (1948).

Overtime and Payments under Fair Labor Standards Act.—A complaint, alleging a breach by defendant of his contract to make patterns and cut goods for plaintiff, states a cause of action *ex contractu*, notwithstanding such breach may have been caused by defendant's neglect and failure to perform his obligations thereunder; and defendant may, therefore, plead as a counterclaim overtime, under payment and penalties under the federal Fair Labor Standards Act of 1938. *Smoke Mount Industries v. Fisher*, 224 N. C. 72, 29 S. E. (2d) 128 (1944).

B. Time of Existence.

See post, this note, "Time of Existence" III, B.

The counterclaims referred to in this clause must be existent and continue to exist between the same parties in the same right at the time they are offered and they must be due at the time the answer is filed, that is, not demands to become due in the future, but they need not be due at the time of commencement of the action. And they must arise out of the same contract or transaction which is the foundation of plaintiff's claim, or they must be connected with the subject of the action that is, generally speaking, the interest involved in the litigation, and very frequently this is the property itself. *Smith v. French*, 141 N. C. 1, 53 S. E. 435 (1906).

III. CLAIMS ARISING OUT OF INDEPENDENT CONTRACT.

A. General Rules and Instances.

Relation to Original Cause.—This section goes beyond the common-law pleading and practice, and under its provisions a defendant in an action on contract may file a counterclaim arising on a contract unrelated to the cause of action sued on when the required mutuality exists, so that two independent disputes between the parties may be settled in one action. *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 306 (1934).

Need Not Arise out of Same Transaction.—Under this clause a counterclaim need not arise out of the same transaction if it existed at the commencement of the

action. *Bitting v. Thaxton*, 72 N. C. 541 (1875); *Brown v. Carter*, 111 N. C. 183, 15 S. E. 934 (1892).

Must Be a Debt—Tax Not a Debt.—A counterclaim or set-off is a defense to an action, and exists only in favor of a defendant under this subdivision. It arises when the demand, both of the plaintiff and the defendant, is a debt, arising out of contract and existing at the commencement of the action. A tax is not a debt. *Gatling v. Commissioners*, 92 N. C. 536 (1885).

Store Account against Action for Services of Minor.—In an action to recover for services of minor children, a counterclaim of a store account against plaintiff which had been assigned to defendant, is proper under this clause. *Lynn v. Stanly Creek Cotton Mills*, 130 N. C. 621, 41 S. E. 877 (1902).

Action on Note by Bank Deposit Counterclaimed.—A depositor in a bank may set off amounts due him as deposits in an action by the bank against him to recover on a promissory note. *Graham v. Proctorville Warehouse*, 189 N. C. 533, 127 S. E. 540 (1925).

Share in Stock against Indebtedness upon Note.—Where a bank was in course of liquidation, and a stockholder was indebted to the bank by a note secured by a pledge of stock, his supposed share in the assets was held not to be available as a set-off, legal or equitable, in a suit upon the note. *First Nat. Bank v. Riggins*, 124 N. C. 534, 32 S. E. 801 (1899).

Damages for Assault in Action on Note.—Damages for an alleged assault by an officer in taking goods under claim and delivery or false arrest by him, cannot be maintained as a counterclaim in an action upon a note given by the defendant to the plaintiff for fertilizer sold to him, as it does not arise out of, and is not connected with the subject matter of the action, and does not accrue until after the commencement of the main action. *Godwin v. Kennedy*, 196 N. C. 244, 145 S. E. 229 (1928).

Damages for Slander of Title in Action to Establish Title.—Where the plaintiffs' action is to establish their title to and recover possession of mineral interest in a described 5-acre tract of land, and defendants set up as a counterclaim damages alleged to have been caused by the plaintiffs' slander of their title in 500-acre tract: Held, the cross action alleged is for damages founded upon a tort, and not on contract, and does not fall within the equitable principle of a suit to quiet title, un-

der the provisions of this section and §§ 1-135, 1-138, and a demurrer thereto is good. *Thompson v. Buchanan*, 195 N. C. 155, 141 S. E. 580 (1928).

An unpaid judgment in favor of a party to an action rendered previous to the commencement of the present action is in legal effect a contract upon which a counterclaim may be pleaded in an action by the opposing party brought against him to recover on a promissory note. *McClure v. Fulbright*, 196 N. C. 450, 146 S. E. 74 (1929).

Liability on 'County Treasurer's Bond against Past Due County Bonds.—Where defendants were indebted to plaintiff county as principal and sureties on the bond of the county treasurer for funds of the county which the treasurer had not accounted for because of the failure of the bank in which the funds were deposited, it was held that the defendants were entitled to offset their debt to the county with past-due county bonds owned by them, since the respective obligations of the county and defendants arose out of contract, and either party might have recovered judgment against the other on their respective obligations, and the county's obligation to defendants existed prior to the institution of the action. *Swain County v. Welch*, 208 N. C. 439, 181 S. E. 321 (1935).

Where a corporation gives its note to its president to secure him against any loss he might sustain by reason of his endorsement of the corporation's notes, and the president transfers the note to a third person, who brings suit, the corporation may not set up as a counterclaim in the action indebtedness due the corporation by the president. *Wellons v. Johnston*, 196 N. C. 94, 144 S. E. 521 (1928).

Where the owner of lands living thereon abandons his wife and children, and leaves the State, and his wife and minor children without support, and another took and supported them and has purchased the lands from the purchaser under an execution sale, taking deed with full covenants and warranty of title, upon the return of the execution debtor and his successfully maintaining his suit to have the deeds declared void: Held, the one who took and supported them is entitled in the settlement to the moneys he has reasonably expended for the support and maintenance of the wife and children, and this may be set up as a counterclaim against a recovery for the rents and profits, and judgment may be rendered in the same action.

Jeffreys v. Hocutt, 195 N. C. 339, 142 S. E. 226 (1928).

B. Time of Existence.

See paragraphs under preceding analysis line.

In General.—The requirement restricting a counterclaim to one that exists at the time the action was commenced is only stated in reference to the class of counterclaims described in this clause. Such is the law, for the very just and obvious reason that, when a plaintiff rightfully sues a defendant who owes him at the time the action is commenced, he shall not be put in the wrong and subjected to costs by allowing defendant to buy up claims sufficient or more than sufficient to offset his debt. But this limitation is not expressed with reference to counterclaim in the first clause of this section. *Smith v. French*, 141 N. C. 1, 53 S. E. 535 (1906). See also, *Riddick v. Moore*, 65 N. C. 382 (1871); *Bank v. Wilson*, 124 N. C. 561, 32 S. E. 889 (1899); *Griffin v. Thomas*, 128 N. C. 310, 38 S. E. 903 (1901).

Under this section a counterclaim must exist at the commencement of the action. The defendant "is not obliged to set up such counterclaim. He may omit it and bring another action. He has his election. But when he does set up his counterclaim, it becomes a cross action, and both opposing claims must be adjudicated. The plaintiff then has the right to the determination of the court of all matters brought in issue, and naturally the defendant has the same right, and neither has the right to go out of court before a complete determination of all the matters in controversy without or against the consent of the other." *McGee v. Frohman*, 207 N. C. 475, 177 S. E. 327 (1934).

When the answer sets up as a counterclaim a judgment against plaintiff which had been purchased by defendant, but fails to allege that defendant was the owner of the judgment at the time of the institution of the action, plaintiff's demurrer ore tenus to the answer will be sustained, even in the Supreme Court on appeal, since it is required that a counterclaim not arising out of plaintiff's claim must be one existing at the commencement of the action. *Barber v. Edwards*, 218 N. C. 731, 12 S. E. (2d) 234 (1940).

Collateral Demand against Assignee of Note.—The defense of set-off has, by this section, been merged in that of counterclaim, the effect of which, in one respect, is that a defendant is not allowed to off-

set the claim of a plaintiff as assignee of a note past due when assigned, by showing that the assignor was indebted to such defendant at the time of the assignment, unless such counterclaim had attached itself to the note before the assignment. *Haywood v. McNair*, 19 N. C. 283 (1837); *Wharton v. Hopkins*, 33 N. C. 505 (1850); *McConnaughey v. Chambers*, 64 N. C. 284 (1870), approved. *Neal v. Lea*, 64 N. C. 678 (1870).

In *Neal v. Lea*, 64 N. C. 678 (1870), it is held that by the proper construction of this section, no collateral demand against the assignor of a note can be set up against the assignee, and "that to make it available, the demand must have attached itself to the note in the hands of the assignor; for instance, a payment made to him not entered on the note, or a claim, which the assignor had agreed should be taken in satisfaction." The doctrine of *Haywood v. McNair*, 19 N. C. 283 (1837), was repudiated. *Harris v. Burwell*, 65 N. C. 584 (1871).

A set-off at law must exist when the plaintiff's action is brought; in equity, every set-off or counterclaim must be shown before decree, and this is also the case under the Code. *Hogan v. Kirkland*, 64 N. C. 250 (1870).

IV. PLEADING AND PRACTICE.

A. Rules of Pleading.

Allegation of Facts.—The counterclaim must disclose such a state of facts as would entitle the defendant to his action, as if he were plaintiff in the prosecution of his suit, and should contain the substance of a complaint, and contain a plain and concise statement of the facts constituting a cause of action. There is no formula prescribed and in determining its effects, its allegations shall be liberally construed with a view to substantial justice. *Battle v. Thompson*, 65 N. C. 406 (1871). It is held in the United States Supreme Court that a counterclaim is unavailable unless set up by defendant in his pleading. *McGowan v. American Pressed Tan Bark Co.*, 121 U. S. 575, 7 S. Ct. 1315, 30 L. Ed. 1027 (1887).

Same—Demand of Relief.—Strictly, a counterclaim is a cross action against the plaintiff in which the defendant may have affirmative relief; but it must, like a complaint, state the cause of action and demand the relief to which the defendant alleges he is entitled. *Hurst, etc., Co. v. Everett*, 91 N. C. 399 (1884).

Particularity in Alleging.—A counterclaim is in substance a cross action and it

should be set out with the same particularity and accuracy required in stating a cause of action in the complaint. *State v. Scott*, 84 N. C. 184 (1881).

For instance a counterclaim which only alleges that the plaintiff is indebted to the defendant, without alleging further the nature, extent, and kind of indebtedness, and how it arose, is imperfectly pleaded, and should be disregarded. *American Nat. Bank v. Northcutt*, 169 N. C. 219, 85 S. E. 210 (1915).

Allegation as to Time of Existence.—An answer setting up a counterclaim, but which fails to show that the same subsisted between the parties when the action was begun, or that it arose out of, or was connected with the subject of the plaintiff's action, is demurrable. *Reynolds v. Smathers*, 87 N. C. 24 (1882).

Replication to Counterclaim.—Whenever a counterclaim is pleaded the plaintiff must make a replication, or else it will be treated as admitted. *Davison v. West Oxford Land Co.*, 121 N. C. 146, 28 S. E. 266 (1897).

B. Nonsuit.

When Counterclaim Is Pleaded, a Nonsuit Cannot Be Taken.—*McGee v. Frohman*, 207 N. C. 475, 177 S. E. 327 (1934).

Nonsuit by Plaintiff.—Where a defendant sets up a counterclaim which does not arise out of the same transaction as the cause of action of the plaintiff, the plaintiff may submit to a nonsuit. *Olmsted v. Smith*, 133 N. C. 584, 45 S. E. 953 (1903).

Same — Where Counterclaim Arises out of Same Transaction.—When the defendant pleads, as a counterclaim, a cause of action arising out of a contract or transaction set forth in the complaint as a foundation of the plaintiff's cause of action, the plaintiff cannot be permitted to take a nonsuit, without the consent of the defendant, for the reason that, as it is a connected transaction and cause of action, the whole matter in controversy between the parties should be determined by the one action. But when the counterclaim does not arise out of the same transaction as the plaintiff's cause of action but falls under subdivision 2 of this section, the plaintiff may submit to a nonsuit. In such case the defendant may either withdraw his counterclaim, when the action will be at an end, or he may proceed to try it, at his election. *Whedbee v. Leggett*, 92 N. C. 465 (1885). Nor can he take a nonsuit where the defendant has acquired in an equitable action any other right or advantage which he is entitled to have tried

and settled in the action. *Bynum v. Powe*, 97 N. C. 374, 2 S. E. 170 (1887).

Same—As to Parties Not Necessary.—

As to persons who are not necessary or proper parties, and who have been joined as defendants, the plaintiff may be permitted at any time to enter a nonsuit, or nol pros. notwithstanding the fact that they have filed answers asserting counterclaims and asking for affirmative relief. *Lee v. Eure*, 93 N. C. 5 (1885).

Nonsuit by Defendant.—Where the defendant has set up a counterclaim as allowed by this section, as to the cause of action arising on contract, existing at the commencement of the action, and not embraced within the first subdivision of this section, he may, as a matter of right, take a nonsuit thereon at any stage of the trial before verdict. *Cahoon v. Cooper*, 186 N. C. 26, 118 S. E. 834 (1923).

But where the defendant's answer sets up a counterclaim arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim, or connected with the subject of his action, existing at the commencement thereof, it becomes a cross action, and both opposing claims must be adjusted in the action, and he may not take a nonsuit thereon as a matter of right, without the plaintiff's consent. *Cahoon v. Cooper*, 186 N. C. 26, 118 S. E. 834 (1923).

Same—After Verdict.—Where the jury have returned their verdict into court upon the issue as to defendant's counterclaim, and as to the others except one to which the judge has held no response was required, the defendant may not take a voluntary nonsuit as to the counterclaim he has set up in his answer. *Cahoon v. Cooper*, 186 N. C. 26, 118 S. E. 834 (1923).

C. Jurisdictional Amount.

Jurisdictional Amount for Counterclaims.

—As to the power of court to render judgment in favor of the defendant upon a counterclaim involving an amount exceeding the jurisdictional amount of the court, see 1 N. C. Law Rev. 224; and annotations to § 1-204.

Same—In Several Counterclaims. —

Where several counterclaims are pleaded in the same action, their aggregate sum will be taken as the jurisdictional amount. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288 (1898).

Jurisdictional Amount in Justice's Court.

—The counterclaim must be one on which judgment might be had in action, and must therefore come within the jurisdiction.

tion of the court. It cannot exceed \$200 in a justice's court. *General Elect. Co. v. Williams*, 123 N. C. 51, 31 S. E. 288 (1898).

§ 1-138. Several defenses.—The defendant may set forth by answer as many defenses and counterclaims as he has, whether they are of a legal or equitable nature, or both. They must be separately stated and numbered, and refer to the cause of action which they are intended to answer in such manner that they may be intelligibly distinguished. (C. C. P., s. 102; Code, s. 245; Rev., s. 482; C. S., s. 522.)

Same Certainty as Complaint Required.—The defenses in the answer must be as certain as the allegations of the complaint, so that the jury may separately determine the merits of each issue. See *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33 (1897).

All matters equitable in their nature should be alleged in the pleadings with such reasonable fullness, and particularly as to the constituent facts which will enable the court to see clearly the character of the equity alleged, the purpose of the pleading and the issues raised. *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 12 S. E. 600 (1890).

Contradictory Defenses.—Under this section even contradictory defenses are permissible to be pleaded. *Reed v. Reed*, 93 N. C. 462 (1885); *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 12 S. E. 600 (1890); *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900); *Upton v. R. R.*, 128 N. C. 173, 38 S. E. 736 (1901); *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 80 S. E. 257 (1913). But see *Fayetteville Waterworks Co. v. Tillinghast*, 119 N. C. 343, 25 S. E. 960 (1896); *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434 (1939).

Hence, where the answer denies the allegations of the complaint and for further defense to the action pleads matters in avoidance, it is error for the court below to disregard the denials and adjudge that the answer admits the instrument sued upon. *Reed v. Reed*, 93 N. C. 462 (1885).

Upon the same principle where the answer sets up defenses in bar, and also asks an account between plaintiff and defendant, the demand for an account can not be construed as a waiver of such defenses,

but is merely contingent on their failure. *Mull v. Walker*, 100 N. C. 46, 6 S. E. 685 (1888).

The inconsistent defenses, however, must be separately stated. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900).

Both Equitable or Legal Defenses—Affirmative Relief.—The defendant may set up as many defenses as he might have, whether denominated legal or equitable, or both, and to have such relief, affirmative or negative, as may be legally authorized on the facts constituting his defense. *Covington v. Ingram*, 64 N. C. 123 (1870); *Melvin v. Stephens*, 82 N. C. 284 (1880).

An equitable counterclaim may be asserted in an answer to a complaint containing a purely legal cause of action. *Dempsey v. Rhodes*, 93 N. C. 120 (1885).

No Leave of Court Necessary.—The defendant may plead several defenses without asking the leave of the court. *Whitaker v. Freeman*, 12 N. C. 271 (1826).

Demurrer to answer will not be sustained if sufficient facts can be gathered from pleadings to entitle defendant to some relief, notwithstanding answer fails to state separately cause or causes relied on for affirmative relief and the matters relied on as defenses, as required by this section and Rule 20(2) of the Supreme Court. *Pearce v. Pearce*, 226 N. C. 307, 37 S. E. (2d) 904 (1946).

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393 (1940); *Shore v. Shore*, 220 N. C. 802, 18 S. E. (2d) 353 (1942).

§ 1-139. Contributory negligence pleaded and proved.—In all actions to recover damages by reason of the negligence of the defendant, where contributory negligence is relied upon as a defense, it must be set up in the answer and proved on the trial. (1887, c. 33; Rev., s. 483; C. S., s. 523.)

Editor's Note.—Prior to the enactment of this section there was some doubt as to whether the fact of contributory negligence was in the first instance to be negatived by the plaintiff, or to be pleaded by the defendant in bar. But the cases are now uniform in holding that whatever doubt that may have existed upon the

question, is removed by the enactment of this section, which imposes the burden of both pleading and proving it upon the defendant.

See 13 N. C. Law Rev., 256, for comment on contributory negligence as evidence relevant to damages.

Constitutionality — Impairs No Vested

Right.—This section placing the burden of proving contributory negligence upon the defendant affects only the remedy and impairs no vested right. It was competent for the legislature to enact it. *Wallace v. Western, etc., R. Co.*, 104 N. C. 442, 10 S. E. 552 (1889).

The general rule inculcated by this section is that the defendant must properly plead the negligence of the plaintiff as a defense, and he must also assume the burden of proving his allegation of contributory negligence. *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 111 S. E. 776 (1922).

Same — Where Complaint Negatives Contributory Negligence.—The defendant can avail himself of anything appearing in plaintiff's evidence which tends to disprove contributory negligence, but this does not change the burden of proof as fixed by this section. *Wallace v. Western, etc., R. Co.*, 104 N. C. 442, 10 S. E. 552 (1889).

Applies to Actions of Employee against Employer.—This section applies to actions brought by an employee against his employer. *Hudson v. Charleston, etc., R. Co.*, 104 N. C. 491, 10 S. E. 669 (1889).

In an action for wrongful death, where defendant fails to plead contributory negligence it is not entitled to have the issue submitted to jury under this section. *Murphy v. Power Co.*, 196 N. C. 484, 145 S. E. 204 (1929), citing *Fleming v. Norfolk, etc., R. Co.*, 160 N. C. 196, 76 S. E. 212 (1912).

Presumption against Contributory Negligence.—Where there is no evidence of the fact, the presumption is against contributory negligence, even in the absence of a statute making it a matter of affirmative defense. *Norton v. North Carolina R. Co.*, 122 N. C. 910, 29 S. E. 886 (1898).

The law presumes that a person found dead and killed by the alleged negligence of another has exercised due care himself. *Cogdell v. Wilmington, etc., R. Co.*, 132 N. C. 852, 44 S. E. 618 (1903).

How the Burden of Negligence Shifts.—The burden of proof is on the plaintiff to show that his injury was caused by the negligence of the defendant. After the plaintiff has shown such negligence if the defendant wishes to plead contributory negligence as a defense, the burden is on him to show that the plaintiff was guilty of contributory negligence. After the defendant has shown this, if the plaintiff wishes to take advantage of the doctrine of last clear chance, the burden is on him. 5 N. C. Law Rev. 63; *Cox v. Norfolk, etc., Railroad*, 123 N. C. 604, 31 S. E. 848 (1898).

A plaintiff in the first instance must show negligence on the part of the defendant. Having done this he need not go further in those jurisdictions where the burden of proof is on the defendant to show contributory negligence. *Baltimore, etc., R. Co. v. Landrigan*, 191 U. S. 461, 24 S. Ct. 137, 48 L. Ed. 262 (1903); *Looney v. Metropolitan R. Co.*, 200 U. S. 480, 26 S. Ct. 303, 50 L. Ed. 564 (1906).

Assumption of Risk.—While there is a marked distinction between the doctrines of assumption of risk and contributory negligence, it is proper, in pertinent cases, to consider the application of the law relating to an assumption of risk under the issue of contributory negligence, with the burden of proof on the defendant pleading it. *Pigford v. Norfolk, etc., R. Co.*, 160 N. C. 94, 75 S. E. 860 (1912).

Motion for Nonsuit.—While contributory negligence is an affirmative defense which the defendant must plead and prove, a defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under § 1-183 when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949). See *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538 (1950); *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190 (1951).

Same—Scintilla of Evidence.—This section imposes the burden of proving contributory negligence upon the defendant. It therefore follows, that on a motion to nonsuit, the court can only consider the evidence relating to the negligence of the defendant, and if there is more than a mere scintilla of evidence tending to prove such negligence, the motion must be denied and the case submitted to the jury. *Cox v. Norfolk, etc., Railroad*, 123 N. C. 604, 31 S. E. 848 (1898).

Where there is evidence at the trial tending to sustain the allegations of the complaint, the defendant is not entitled to a judgment as of nonsuit, unless all the evidence, considered in the light most favorable to the plaintiff, sustains the defenses, e. g., contributory negligence, relied upon by the defendant in bar of plaintiff's recovery. *Pittman v. Downing*, 209 N. C. 219, 183 S. E. 362 (1936).

Question for Jury.—The question whether the plaintiff was guilty of contributory negligence is to be determined by the jury upon proof offered at the trial pursuant to this section. *Miller v. Scott*, 185 N. C. 93, 116 S. E. 86 (1923).

Hence the trial judge cannot submit a verdict on a plea of contributory negli-

gence, but must submit the issue to the jury. *United States Leather Co. v. Howell*, 151 F. 444 (1907).

It is not error, even when contributory negligence is pleaded, since the enactment of this section, to submit only the question whether the injury was caused by the defendant's negligence, and instruct the jury to respond in the negative if they find that the plaintiff, by concurrent carelessness, contributed to cause the injury. *McAdoo v. Richmond, etc., R. Co.*, 105 N. C. 140, 11 S. E. 316 (1890).

Same — Where Court Explains to the Jury the Testimony.—While it is better practice to submit an issue in regard to contributory negligence, when pleaded, and there is evidence to sustain the plea, the omission to submit the issue is not reversible error, where the court fully explained to the jury the several phases of the testimony relied upon to show contributory negligence and it was apparent that defendant had been given the benefit of such testimony with its application. *Ruffin v. R.*, 142 N. C. 120, 55 S. E. 86 (1906).

A Specific Application.—The plea that an employee of the plaintiff had negligently failed to see that he had entirely extinguished a fire started by the locomotive of the defendant railroad company, and that the fire rekindled and caused the plaintiff the damages complained of in his action, is one of contributory negligence which is required by this section to be pleaded. *Kearney v. Seaboard Air Line R. Co.*, 177 N. C. 251, 98 S. E. 710 (1919).

What Law Governs—Federal or State.—The procedure for the establishment of contributory negligence has been defined and approved under numerous decisions construing the State statutes which control contributory negligence, as referred to in the federal statutes, and it has been declared that it should be considered and treated as a partial defense, coming within the terms of the local law, and to make the same available it must be set up in the answer and proved as required by this sec-

tion. *Fleming v. Norfolk, etc., R. Co.*, 160 N. C. 197, 76 S. E. 212 (1912).

As the federal act makes no specific regulations as to the methods by which the fact of contributory negligence should be established, when the action is brought in the State court, the procedure should conform as near as may be to that of the State law applicable, including the "character of action, the order and manner of trial, the rules of pleading and evidence, etc." *Fleming v. Norfolk, etc., R. Co.*, 160 N. C. 197, 76 S. E. 212 (1912).

The Rule the Same in Federal Courts.—The same rule as to the burden of proof of contributory negligence which prevails in the courts of this State, also prevails in federal courts. *Cox v. Norfolk, etc., Railroad*, 123 N. C. 604, 31 S. E. 848 (1898); *Inland, etc., Coasting Co. v. Tolson*, 139 U. S. 551, 11 S. Ct. 653, 35 L. Ed. 270 (1891).

Contributory negligence must be pleaded in the answer and proved on the trial, the burden on the issue being upon defendant under this section. *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536 (1936).

Defendant must plead contributory negligence in order to be entitled to the submission of the issue to the jury. *Bevan v. Carter*, 210 N. C. 291, 186 S. E. 321 (1936).

A demurrer to the complaint on the ground of contributory negligence will not be sustained unless upon the face of the complaint itself contributory negligence is patent and unquestionable. *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536 (1936).

A four-year old child is incapable of negligence, primary or contributory. *Bevan v. Carter*, 210 N. C. 291, 186 S. E. 321 (1936).

Applied in *Butner v. Atlantic, etc., Ry. Co.*, 199 N. C. 695, 155 S. E. 601 (1930); *Farrell v. Thomas, etc., Co.*, 204 N. C. 631, 169 S. E. 224 (1933); *Stovall v. Ragland*, 211 N. C. 536, 190 S. E. 899 (1937).

ARTICLE 16.

Reply.

§ 1-140. Demurrer or reply to answer; where answer contains a counterclaim.—If the answer contains a counterclaim against the plaintiff or plaintiffs, or any of them, such answer shall be served upon the plaintiff or plaintiffs against whom such counterclaim is plead, or against the attorney or attorneys of record of such plaintiff or plaintiffs; the plaintiff or plaintiffs against whom such counterclaim shall be plead shall have twenty (20) days after the service thereof within which to answer or reply to such counterclaim: Provided, for good cause shown, the clerk may extend the time of filing such answer or reply to a day

certain. If a counterclaim is plead against any of the plaintiffs and no copy of the answer containing such counterclaim shall be served upon the plaintiff or plaintiffs or his or their attorneys of record, such counterclaim shall be deemed to be denied as fully as if the plaintiff or plaintiffs had filed an answer or reply denying the same. All other replies, if any, shall be filed within twenty (20) days from the filing of the answer: Provided, for good cause shown, the clerk or judge, in the event the cause shall have been transferred to the civil issue docket, may extend the time to a day certain. (1870-71, c. 42, s. 5; Code, s. 208; Rev., s. 484; 1919, c. 304; C. S., s. 524; Ex. Sess. 1920, c. 96, s. 1; Ex. Sess. 1921, c. 92, s. 1; Ex. Sess. 1924, c. 18.)

Editor's Note.—Chapter 304 of the Public Laws of 1919, which effected certain changes in the time of filing the complaint, the demurrer and the answer, contained no provision with respect to the time of filing the reply; but the Consolidated Statutes carried out the general meaning of the plan by requiring the reply, when necessary, to be filed within twenty days after the answer. But this time was subsequently changed to ten days by the acts of 1920 and 1921. See 1 N. C. Law Rev. 12. The same acts inserted a proviso to the effect that the clerk for good cause shown may extend the time to a day certain, which proviso was subsequently modified by the 1924 act to provide that the extension by the clerk for good cause could be effected in the event the cause shall have been transferred to the civil issue docket. The 1924 amendment also extended the time of filing the reply to twenty days from the filing of the answer, and added the provisions relating to counterclaim. See 3 N. C. Law Rev. 24.

Powers of Court under § 1-152 Not Affected.—The restriction put upon the power of the clerk to extend the time of filing does not affect the broad powers conferred upon the court by § 1-152. *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513

(1925).

Failure to Serve Copy of Answer Setting up Counterclaim.—It is proper for the judge of the superior court to set aside a judgment by default on defendant's counterclaim under this section when the plaintiff, or his attorney, is not served with a copy thereof, since the law denies the allegations of the counterclaim when such service is not made. *Williams-Fulghum Lumber Co. v. Welch*, 197 N. C. 249, 148 S. E. 250 (1929).

Where no service of answer is made upon plaintiffs they are under no compulsion to file a reply even though the answer sets up a counterclaim, since the law denies the counterclaim for them. *Miller v. Grimsley*, 220 N. C. 514, 17 S. E. (2d) 642 (1941).

Where an answer containing a counterclaim is not served on plaintiff or her attorney of record each allegation of the answer is deemed denied, and therefore defendant cannot be entitled to a default judgment on the counterclaim on the ground that no reply was filed thereto. *Lawrence v. Heavner*, 232 N. C. 557, 61 S. E. (2d) 697 (1950).

Applied in *Kassler v. Tinsley*, 198 N. C. 781, 153 S. E. 411 (1930); *Williams v. Thompson*, 227 N. C. 166, 41 S. E. (2d) 359 (1947).

§ 1-141. Content; demurrer to answer.—When the answer contains new matter constituting a counterclaim, the plaintiff may reply to the new matter, denying generally or specifically each allegation controverted by him or any knowledge or information thereof sufficient to form a belief; and he may allege in ordinary and concise language, without repetition, any new matter not inconsistent with the complaint, constituting a defense to the new matter in the answer. The plaintiff may in all cases demur to an answer containing new matter, where, upon its face, it does not constitute a counterclaim or defense; and he may demur to one or more of such defenses or counterclaims, and reply to the residue. Such demurrer shall be heard and determined as provided for demurrers to the complaint. In other cases, when an answer contains new matter constituting a defense by way of avoidance, the court may in its discretion, on the defendant's motion, require a reply to such new matter, and such reply shall be subject to the same rules as a reply to a counterclaim. (C. C. P., s. 105; Code, s. 248; Rev., s. 485; 1919, c. 304; C. S., s. 525.)

Cross Reference.—As to demurrer, see §§ 1-127 et seq.

Matter in Defense Deemed as Denial without Replication.—If the new matter

in the answer does not constitute a counterclaim, even in the absence of a replication such new matter is to be deemed controverted by the plaintiff as upon a direct denial. *Fitzgerald v. Shelton*, 95 N. C. 519 (1886); *Wilson v. Brown*, 134 N. C. 400, 46 S. E. 762 (1904); *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64 (1904); *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 80 S. E. 257 (1913).

For in such a case no replication is necessary, unless required by the court. *Jones v. Cohen*, 82 N. C. 75 (1880); *Fishblate v. Fidelity Co.*, 140 N. C. 589, 53 S. E. 354 (1906); *Simon v. Masters*, 192 N. C. 731, 135 S. E. 861 (1926). It is only when a counterclaim is relied on that the plaintiff's failure to reply may afford ground for a judgment for want of a replication, but not when the matter constitutes a defense to the action merely. *Barnhardt v. Smith*, 86 N. C. 473 (1882).

The Court May Require Reply.—Though no counterclaim is pleaded the court can order a reply to be filed to any defence set up in the answer or may allow it to be filed as a matter of discretion. *James v. Western, etc., R. Co.*, 121 N. C. 530, 28 S. E. 537 (1897).

May Contain New Matter.—The plaintiff may not only reply to a counterclaim, but may allege "new matter" which has no connection with the matter alleged in the complaint or the new matter alleged in the counterclaim, the requirement being that it shall not be inconsistent with the complaint. *Boyett v. Vaughan*, 79 N. C. 528 (1878); *Boyett v. Vaughan*, 85 N. C. 364 (1881).

Reply Only to New Matter in Answer.—A reply can be made only to new matter brought out in the answer. *Olmstead v. Raleigh*, 130 N. C. 243, 41 S. E. 292 (1902).

The right to reply is not restricted to cases in which defendant pleads a counterclaim, but a reply is proper if the answer alleges facts which, if established, entitle defendant to some relief. *Williams v. Thompson*, 227 N. C. 166, 41 S. E. (2d) 359 (1947).

Must Not Be Radically Inconsistent.—A party will not be allowed to maintain radically inconsistent positions, or to state one cause of action in the complaint and in the replication state another which is entirely inconsistent. *Berry v. Hyde County Land, etc., Co.*, 183 N. C. 384, 111 S. E. 707 (1922).

Plaintiffs may file a reply to new matter appearing in the answer by way of counterclaim, but by express provision of this section the allegations of the reply must

not be inconsistent with the complaint. *Miller v. Grimsley*, 220 N. C. 514, 17 S. E. (2d) 642 (1941).

Waiver by Failure to Demur.—Where an answer is defective in failing to allege that the plaintiff had knowledge of the fraud, a failure to demur thereto will have the effect of waiving such defect. *Printing Co. v. McAden*, 131 N. C. 178, 42 S. E. 575 (1902).

Sufficient Denial in Replication.—An answer having alleged a set-off, the replication thereto alleged that such answer is "untrue and denied" and reiterated the cause of action stated in the complaint: Held, sufficient to put the plea of set-off in issue and require evidence in its support. *Gregg v. Mallett*, 111 N. C. 74, 15 S. E. 936 (1892).

Statute of Limitations.—Formerly a replication was required to be filed whenever the statute of limitation was pleaded; but now a replication is necessary, only in the event the plaintiff has some matter in avoidance, such as a new promise, etc. *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387 (1893).

An appeal will lie from an order overruling a demurrer to the answer which admits the cause alleged and sets up an affirmative defense. *Cody v. Hovey*, 216 N. C. 391, 5 S. E. (2d) 165 (1939).

Amendment of Answer upon Demurrer Sustained.—The provisions of § 1-131, that plaintiff, after judgment sustaining a demurrer to the complaint must move to be allowed to amend within ten days after the return of the judgment or within ten days after receipt of the certificate from the Supreme Court, apply solely to amendment of the complaint after demurrer thereto is sustained, and the ten-day period prescribed by that section does not apply to an amendment of an answer after judgment sustaining a demurrer to an affirmative defense set up therein, the procedure regulating demurrer to an answer being provided by this section which contains no reference to § 1-131, and this conclusion is in accord with the history of the various amendments relating to civil procedure and with the principles that the adjective law will be liberally construed to promote justice and not to defeat or delay it by technical construction. *Cody v. Hovey*, 217 N. C. 407, 8 S. E. (2d) 479 (1940).

When a demurrer to the answer is sustained, defendant has the right to amend if he so elects. *Barber v. Edwards*, 218 N. C. 731, 12 S. E. (2d) 234 (1940).

Applied in *Bryan v. Acme Mfg. Co.*, 209 N. C. 720, 184 S. E. 471 (1936).

Cited in Herndon v. Massey, 217 N. C. 535 (1944); Smith v. Smith, 225 N. C. 189, 610, 8 S. E. (2d) 914 (1940); Watson v. Lee County, 224 N. C. 508, 31 S. E. (2d) 34 S. E. (2d) 148 (1945).

§ 1-142. **Demurrer to reply.**—If a reply of the plaintiff to a defense set up by the answer of the defendant is insufficient, the defendant may demur thereto, and must state the grounds thereof. (C. C. P., s. 107; Code, s. 250; Rev., s. 486; C. S., s. 526.)

ARTICLE 17

Pleadings, General Provisions.

§ 1-143. **Forms of pleading.**—The forms of pleading in civil actions in courts of record, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed by this chapter. (C. C. P., s. 91; Code, s. 231; Rev., s. 487; C. S., s. 527.)

Cross References.—As to abolition of differences between actions at law and suits in equity, see § 1-9. As to requirement that all inferior courts be subject to rules applicable in the superior courts where summons to run outside of county and filing of pleadings therein, see § 1-92.

General Effect of New Form of Procedure.—The subtle science of pleading heretofore in use is not merely relaxed but abolished by the Code, so that the forms of pleading in civil actions, and the rules by which their sufficiency is to be determined, are those prescribed in this chapter. The new system inaugurated thereby is such that few, if any, of the ancient rules are now applicable. Moore v. Edmiston, 70 N. C. 510 (1874).

Same—Rules for Certainty Not Abolished.—While the distinction between actions at law and suits in equity and all feigned issues have been abolished, and there is now but one form of action for the enforcement or protection of private rights or the redress of private wrongs, which is denominated a civil action, and while new rules have been prescribed by the chapter for determining the sufficiency of a pleading, it was not intended to repeal

those rules of pleading which are essential to produce certainty of statement and issue between the parties. Turner v. McKee, 137 N. C. 251, 49 S. E. 330 (1904).

Forms of Actions Abolished.—All the forms of pleading heretofore existing are abolished, and under the present system there is but one form of action. Bitting v. Thaxton, 72 N. C. 541 (1875).

Thus the forms of action trespass vi et armis or trespass on the case have been abolished and a civil action for all cases has been substituted therefor. Sneed v. Harris, 109 N. C. 349, 13 S. E. 920 (1891).

Pleading Should Be in Writing.—In the United States courts it is held that pleadings should be in writing, at law as in equity. McFaul v. Ramsey, 20 How. (61 U. S.) 523, 15 L. Ed. 1010 (1857).

What They Must Contain in General.—Pleadings should clearly, distinctly and succinctly state the nature of the wrong complained of, the remedy sought, and the defense set up. Chesapeake, etc., R. Co. v. Dixon, 179 U. S. 131, 21 S. Ct. 67, 45 L. Ed. 121 (1900); Bradford v. Southern R. Co., 195 U. S. 243, 25 S. Ct. 55, 49 L. Ed. 178 (1904).

§ 1-144. **Subscription and verification of pleading.**—Every pleading in a court of record must be subscribed by the party or his attorney, and when any pleading is verified, every subsequent pleading, except a demurrer, must be verified also. (C. C. P., s. 116; Code, s. 257; Rev., s. 488; C. S., s. 528.)

When Verification Necessary.—The provisions of this section which are applicable also to special proceedings, do not require that the petition (or any other pleading) be, at all events, verified. It simply requires that when one pleading is verified every subsequent one, except a demurrer, be verified. Lindsay v. Beaman, 128 N. C. 189, 38 S. E. 811 (1901).

Requirement One of Substance.—The requirement as to the verification of pleadings is one of substance, and not of form,

and a defect therein is jurisdictional. Holloman v. Holloman, 127 N. C. 15, 37 S. E. 68 (1900); Nichols v. Nichols, 128 N. C. 108, 38 S. E. 296 (1901); Martin v. Martin, 130 N. C. 27, 40 S. E. 822 (1902).

The object of the verification is, that if the defendant does not deny the allegations, the cause shall stand as if the jury had been empaneled, and the allegations put in proof without denial, the purpose being to avoid the delay of trial upon uncontroverted points. Griffin v. Asheville

Light Co., 111 N. C. 434, 16 S. E. 423 (1892).

It is to give the pleader a convenient substitute for the old bill of discovery in equity, and to eliminate all issues of fact that the parties are not willing to raise under oath. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952 (1913).

Want of Verification Fatal Defect. — Where a statute directs that the complaint of the petitioner "shall be sworn to as in other actions," the want of a proper verification is a fatal defect for which judgment will be arrested. *Cowles v. Hardin*, 79 N. C. 577 (1878).

Effect of Non-Verification. — Where a pleading is not verified in compliance with this and the two succeeding sections, the other party has a right to file an unverified pleading, and it is error to deny him such right. See *Reynolds v. Smathers*, 87 N. C. 24 (1882).

In construing this section the court has repeatedly held that if a pleading be verified and the subsequent pleading be not, the latter may be set aside and disregarded. *Harkey v. Houston*, 65 N. C. 137 (1871); *Alsbaugh v. Winstead*, 79 N. C. 526 (1878); *Wynne v. Prairie*, 86 N. C. 73 (1882); *Rogers v. Moore*, 86 N. C. 86 (1882); *Alford v. McCormac*, 90 N. C. 151 (1884).

Upon this principle if the plaintiff verify his complaint and the defendant fail to verify his answer, the plaintiff is entitled to judgment. *Alford v. McCormac*, 90 N. C. 151 (1884); *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423 (1892).

The requirement as to verification of subsequent pleadings may be waived, except in those cases where the form and substance of the verification is made an essential part of the pleading; as in an ac-

tion for divorce in which a special form of affidavit is required, § 50-8, in a proceeding to restore a lost record, § 98-14, and in an action against a county or municipal corporation, § 153-64. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Plaintiff, filing verified complaint in an action in the nature of an action to quiet title, waives verification of the answer by filing reply and allowing the matter to go to two hearings before the referee and failing to interpose objection until after an adverse referee's report. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Substantial Compliance. — The requirements of this section must be substantially complied with. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952 (1913).

Applicable to Courts of Record Only. — The requirements of this section with regard to verification applies only to courts of record, and have no application to pleading in a justice's court, which is not a court of record. *Van Smith Building, etc., Co. v. Pender*, 173 N. C. 55, 91 S. E. 524 (1917).

Amended Complaint. — A complaint amended in a material part after being verified is, in effect, unverified; and the answer to it is not required to be verified. *Rankin v. Allison*, 64 N. C. 673 (1870).

Failure to Verify Amended Answer. — Where a verified complaint is filed and defendants file a verified answer, the fact that an amended answer, which merely amplifies the defense of the original answer, is not verified, does not justify the court in disregarding the defense. *Calaway v. Harris*, 229 N. C. 117, 47 S. E. (2d) 796 (1948).

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946).

§ 1-145. Form of verification.—The verification must be in substance that the same is true to the knowledge of the person making it, except as to those matters stated on information and belief, and as to those matters he believes it to be true; and must be by affidavit of the party, or if there are several parties united in interest and pleading together, by one at least of such parties acquainted with the facts, if the party is in the county where the attorney resides and is capable of making the affidavit. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 489; C. S., s. 529.)

Cross Reference. — As to requirements of plaintiff's affidavit to be filed with complaint in divorce action, see § 50-8.

Amendment to Insufficient Verification. — Where the verification of an answer was insufficient, it is not error for the trial court to allow an amended verification, where such allowance tends to a fair trial of the case on the merits, and the adverse party is given a reasonable time to meet

the amended pleadings. *Best v. Dunn*, 126 N. C. 560, 36 S. E. 126 (1900).

No Literal Formula Required. — This section provides that the verification must be in "substance" as therein prescribed. Hence a verbal and literal following of the formula prescribed is not necessary. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900).

Same — But Following the Terms of

Section Recommended.—With reference to the contents and forms of verification, the court in *Cole v. Boyd*, 125 N. C. 496, 34 S. E. 557 (1899), said: "We do not wish to be understood as insisting upon a literal compliance. Such a requirement would be contrary to the spirit of our present system. Any form of words that is equivalent thereto will be sufficient. We may even go further and say that we should permit any form of verification that, taken in connection with the form of statement in the pleading, clearly distinguishes between personal knowledge and information so as to render the affiant legally responsible for the truth of every material allegation. But the object of verification is to verify. If it fails to do this, it is worse than useless. If a party wishes to bind his opponent with the obligations of a verified pleading, he must bind himself, and must so state every material allegation that it will not only rest under the moral sanctity of an oath, but that its falsity will fasten upon him the penalties of perjury. This is the object of a verification and the true test of its sufficiency. While it is not necessary to follow the exact words of the statute, it is always safe to do so, and we would strongly advise such course in preference to mere experimental practice, which is always dangerous."

Instances of Sufficient Verification.—An allegation that plaintiff has "reason to believe," and therefore "alleges," etc., is sufficient under this section, requiring matter to be alleged as of plaintiff's knowledge or upon "information and belief." *Ware-Kramer Tobacco Co. v. American Tobacco Co.*, 180 F. 160 (1910).

So, where an instrument in writing is charged to have been executed by a person other than the deceased, the affidavit will be sufficient if it states that the affiant has reason to believe that such instrument was not executed by the decedent or by his authority. *Apache County v. Barth*, 177 U. S. 538, 20 S. Ct. 718, 44 L. Ed. 878 (1900), construing an Arizona statute of similar import.

§ 1-146. Verification by agent or attorney.—The affidavit may also be made by the agent or attorney, if the action or defense is founded upon a written instrument for the payment of money only and the instrument is in the possession of the agent or attorney, or if all the material allegations of the pleadings are within the personal knowledge of the agent or attorney. When the pleading is verified by any other person than the party, he shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the reasons why it is not made by the party. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 490; C. S., s. 530.)

Editor's Note. — This section contemplates only two cases where the affidavit

The verification of the answer in the words following, "The foregoing answer of the defendants is true of his own knowledge, except those matters stated on information and belief, and he believes those to be true," is a substantial compliance with this section. *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900).

A petition in proceedings for contempt which is verified in accordance with the form prescribed by this section is sufficient to give the court jurisdiction of the persons named when the facts set forth in the petition constituting a sufficient basis for judgment of contempt are stated to be within the knowledge of affiant and not upon information and belief. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577 (1947).

Same—Insufficient Verifications. — A verification in the words following: "he has read the foregoing answer and knows the contents thereof; that the facts set forth therein of his own knowledge are true, and that those stated on information and belief he believes to be true," is held insufficient. *Carroll v. McMillan*, 133 N. C. 141, 45 S. E. 530 (1903).

A verification in the words "sworn and subscribed to" is not sufficient in an ordinary action, and a fortiori in a divorce action which the law does not favor. *Martin v. Martin*, 130 N. C. 27, 40 S. E. 822 (1902). See § 50-8.

Subscribing the Verification by Affiant.—This section does not in terms or specifically require that the verification of the pleading shall be subscribed by the affiant, and it need not be so signed unless an affidavit is incomplete and inoperative without it. *Alford v. McCormac*, 90 N. C. 151 (1884). Though the signing by him is commendable. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612 (1924).

Oath—By Whom Administered.—It is sufficient if the oath is administered by one authorized to administer oaths. *Alford v. McCormac*, 90 N. C. 151 (1884).

Cited in *Ragan v. Ragan*, 212 N. C. 753, 194 S. E. 458 (1938); *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941).

may be made by the attorney. The one, when the action is founded upon a writ-

ten instrument for the payment of money only, and such instrument is in the possession of the attorney; and the other, when the material allegations are within the personal knowledge of the attorney. The one or the other of these facts is essential to the validity of a verification by an agent or attorney. See *Hammerslaugh v. Farrior*, 95 N. C. 135 (1886).

Not Applicable to Ancillary Remedies.

—The provisions of this section, requiring that verifications made by agents shall state why they are not made by the principals, and that the material facts are personally known to the agent, apply only to actions in which the responsive pleadings must also be under oath, and not to those ancillary remedies intended merely to secure the fruits of an ultimate recovery, in seeking which greater latitude is allowed. *Bruff v. Stern*, 81 N. C. 183 (1879).

The pleadings of a nonresident may be verified by an agent or attorney, if either one of the two requirements of this section be present. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423 (1892).

Verification by Corporate Officer Need Not State Knowledge, etc.—A verification to a complaint made by an officer of a corporation need not set forth “his knowledge or the grounds of his belief on the subject and the reason why it was made by the party.” A corporation acts only through its officers and agents, and such verification is the verification of the corporation itself. *Bank v. Hutchison*, 87 N. C. 22 (1882). See generally the annotations to the succeeding section.

tions to the succeeding section.

Instances of Good and Defective Verifications by Agents. — A verification to a complaint, made by an agent or attorney of a nonresident, to the effect that the claim sued on is in writing and in his possession for collection, giving facts in his personal knowledge and sources of other information, meets the substantial requirements of this section. *Clark & Co. v. Maxwell*, 87 N. C. 18 (1882).

A verification of a complaint made by an attorney of the plaintiff, setting forth in the affidavit “that the facts set forth * * * as of his own knowledge are true, and those stated on information and belief he believes to be true * * * ; that the action is based on a written instrument for the payment of money, and that said instrument is in his possession, and he therefore makes this verification pursuant to the provisions of this section,” does not comply with the requisites of the statute, and is defective in not stating the grounds of his belief and the reason why the party himself did not make the verification. *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952 (1913).

In a proceeding to restore certain records destroyed by fire, an affidavit by the agent of the petitioner that the facts set forth in the complaint “are true to the best of his knowledge, information and belief,” is an insufficient verification. *Cowles v. Hardin*, 79 N. C. 577 (1878).

Cited in *Nevins v. Lexington*, 212 N. C. 616, 194 S. E. 293 (1937).

§ 1-147. Verification by corporation or the State.—When a corporation is a party the verification may be made by any officer, or managing or local agent thereof upon whom summons might be served; and when the State or any officer thereof in its behalf is a party, the verification may be made by any person acquainted with the facts. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1901, s. 610; Rev., s. 491; C. S., s. 531.)

Cross Reference.—As to service of summons against corporation, see § 1-97, paragraph 1.

Editor's Note. — Formerly it was held that a verification by an “agent” of a corporation was inoperative, and that it must be made by a corporate officer. *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741 (1891); *Phifer v. Traveler's Ins. Co.*, 123 N. C. 405, 31 S. E. 715 (1898). But now, this section in terms provides for verification by “managing or local agent.” To this latter effect, see *Godwin v. Carolina Tel., etc., Co.*, 136 N. C. 258, 48 S. E. 636 (1904). And see § 1-97 and notes thereto.

The managing director of a foreign corporation may verify its pleadings. *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456 (1902).

Knowledge or Ground of Belief of Corporate Agent. — See *Bank v. Hutchison*, 87 N. C. 22 (1882), in the annotations to the preceding section.

The city manager of a municipal corporation is its “managing or local agent” and is authorized to verify the municipality’s answer in an action instituted against it. *Grimes v. Lexington*, 216 N. C. 735, 6 S. E. (2d) 505 (1940).

§ 1-148. Verification before what officer.—Any officer competent to take the acknowledgment of deeds, and any judge or clerk of the superior court,

notary public, in or out of the State, or justice of the peace, is competent to take affidavits for the verification of pleadings, in any court or county in the State, and for general purposes. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; 1891, c. 140; Rev., s. 492; C. S., s. 532.)

Editor's Note. — Many decisions of the Supreme Court had formerly declared that the notaries public authorized to take affidavits for the verification of the pleadings were those of this State and not of some other state. *Benedict, etc., Co. v. Hall*, 76 N. C. 113 (1877); *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201 (1895). But this has now been changed by the express terms of this section which permit verification to be taken by notaries in as well as out of the State. See *Hinton v. Life Ins. Co.*, supra.

And it seems that the phrase "in or out

of the State" immediately succeeding the words "notary public," has reference not only to notaries, but to the other officers designated in the section. Thus in *Hinton v. Life Ins. Co.*, 116 N. C. 22, 21 S. E. 201 (1895), the verification was made before the clerk of the Hustings Court of Richmond, Va., and it was held valid, the court announcing the general rule that courts take judicial notice of the seal of the courts of other states just as they do of the seals of foreign courts of admiralty and notaries public.

§ 1-149. When verification omitted; use in criminal prosecutions.

—The verification may be omitted when an admission of the truth of the allegation might subject the party to prosecution for felony. No pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it. (C. C. P., s. 117; 1868-9, c. 159, s. 7; Code, s. 258; Rev., s. 493; C. S., s. 533.)

No Pleading Can Be Used in Criminal Prosecution.—It is error to permit the solicitor, while cross-examining defendant in a criminal prosecution to read certain allegations of fact in a complaint in a civil action relating to the same subject matter and to ask defendant if he had failed to deny them by answer. *State v. Wilson*, 217 N. C. 123, 7 S. E. (2d) 11 (1940).

Where defendant moved to set aside the verdict on ground that the jury, without defendant's consent, took into its room the complaint in a civil action relating to the subject matter of the prosecution, which had been admitted in evidence without objection, and typed notes of the argument of counsel for the prosecution containing reference to defendant's failure to testify, it was error to permit the jury to take such papers into the jury room and retain same while in its deliberations, and defendant's motion to set aside the verdict should have been allowed. *State v. Stephenson*, 218 N. C. 258, 10 S. E. (2d) 819 (1940).

In a prosecution for embezzlement the admission in evidence over defendant's objection of pleadings in civil actions against defendant, involving the funds he is al-

leged to have embezzled, is erroneous in view of this section. *State v. Ray*, 206 N. C. 736, 175 S. E. 109 (1934).

Corroboration of Witness.—Where testimony of a witness as to her bigamous marriage with defendant is competent, the complaint filed by her in an action to annul the marriage is competent for the purpose of corroborating her testimony. *State v. Phillips*, 227 N. C. 277, 41 S. E. (2d) 766 (1947).

Impeaching Defendant's Testimony.—In prosecution for larceny of an automobile, permitting solicitor to cross-examine defendant in regard to allegation made by defendant in his complaint in a prior civil action for the purpose of impeaching defendant's testimony, by showing defendant had made two contradictory statements about the matter, both of which the solicitor contended were incorrect, was not an impingement upon this section, since the purpose and effect was not to prove the fact alleged in the pleading, but to the contrary. *State v. McNair*, 226 N. C. 462, 38 S. E. (2d) 514 (1946).

Applied in *State v. Dula*, 204 N. C. 535, 168 S. E. 836 (1933).

§ 1-150. Items of account; bill of particulars.—It is not necessary for a party to set forth in a pleading the items of an account alleged in it; but he must deliver to the adverse party, within ten days after a demand therefor in writing, a copy of the account, which, if the pleading is verified, must be verified by his own oath or that of his agent or attorney if within the personal knowledge of the agent or attorney, to the effect that he believes it to be true, or be pre-

cluded from giving evidence thereof. The court or judge may order a further account when the one delivered is defective, and may, in all cases, order a bill of particulars of the claim of either party to be furnished. (C. C. P., s. 118; Code, s. 259; Rev., s. 494; C. S., s. 534.)

Cross References. — For similar provision applicable to proceeding in court of justices of the peace, see § 7-149, rule 10. For provisions for proof of book account of less than sixty dollars, see §§ 8-42 et seq. See also, §§ 1-153, 15-143.

Purpose and Effect of Section. — This section, which, in case of a disregard of the demand, shuts out all proof of the items of the claim coming from any witness (and does not close the mouth of the party making it), is intended to meet the case of a complaint that does not set out the particulars, and confines the evidence at the trial to such as are set forth. Its aim is to supply an omission to give them in the pleadings, and hence, when furnished, they become substantially and in legal effect a part of the complaint itself. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761 (1888).

Indefiniteness as to Dates, Locality, etc. — For indefiniteness of the complaint as to dates, etc., the defendant may ask for a bill of particulars. *Lumber Co. v. Atlantic, etc., R. Co.*, 141 N. C. 171, 53 S. E. 823 (1906). The same rule applies to indefiniteness of locality. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510 (1890); *Fulps v. Mock*, 108 N. C. 601, 13 S. E. 92 (1891); *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897).

Indefinite Statement of Cause. — An uncertain or an indefinite statement of a cause of action may be corrected by an application for a bill of particulars under this section. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850 (1918).

Time of Application for Bill of Particulars. — The application for a bill of particulars should always be made in time to avoid any delay being caused in the trial. If too long delayed, the court will refuse the application. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761 (1888); *State v. Brady*, 107 N. C. 822, 12 S. E. 325 (1890).

Same—Before Trial. — The better practice, for a party who intends to preclude his adversary from proving an account on the ground that he has not complied with a demand or an order for the particulars of such account, is to apply for an order to that effect before the trial, so as to have the question settled before the trial. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761 (1888).

Discretion of Court as to Bill of Particulars. — A motion for a bill of particulars

under this section rests in the discretion of the presiding judge, and its grant or refusal is not reviewable. *State v. Bryant*, 111 N. C. 693, 16 S. E. 326 (1892). While this is true, yet such motions should be liberally allowed by trial courts when made in time to avoid any delay in the trial, unless clearly useless or merely for the purpose of annoyance. *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461 (1895). See also *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569 (1934); *Tickle v. Hobgood*, 212 N. C. 762, 194 S. E. 461 (1938); *Ogburn v. Sterchi Bros. Stores*, 218 N. C. 507, 11 S. E. (2d) 460 (1940); *Moss-Marlow Bldg. Co. v. Jones*, 227 N. C. 282, 41 S. E. (2d) 742 (1947).

The court has the discretionary power to allow an application for a bill of particulars, under this section, or to grant a motion to require a pleading to be made more definite and certain under § 1-153, or to strike out in its discretion orders previously made under the statutes, and no appeal will lie from such discretionary orders. *Temple v. Western Union Tel. Co.*, 205 N. C. 441, 171 S. E. 630 (1933).

Defective Bill of Particulars — How Taken Advantage of. — If the bill of particulars be defective the remedy is not by a demurrer thereto, for its sufficiency or insufficiency rests with the presiding judge, but by an application to the court to order a more definite bill. *Townsend v. Williams*, 117 N. C. 330, 23 S. E. 461 (1895).

Demand for Account Where Bill of Particulars Filed. — A demand for a copy of the account is not warranted where the plaintiff attaches a bill of particulars to his complaint, and has made it a part thereof by reference. *Wiggins v. Guthrie*, 101 N. C. 661, 7 S. E. 761 (1888).

Motion to Make Complaint More Definite. — Under the provision of this section and § 1-153, the superior court judge may, in his sound discretion, allow defendant's motion, after answer filed, to make the complaint more definite and certain as to the grounds upon which the relief is sought, especially when it affects book records and other written data easily accessible to the plaintiff. *Elizabeth City Water, etc., Co. v. Elizabeth City*, 188 N. C. 278, 124 S. E. 611 (1924).

The denial of a motion under § 1-153 to make a pleading more definite does not preclude defendant from applying for a bill

of particulars. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408 (1948).

Evidence Must Relate to Items in Bill.—When a bill of particulars is required or allowed the evidence at the trial must be confined to the specific items set forth in such bill. *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569 (1934); *Beck v. Lexington Coca-Cola Bottling Co.*, 214 N. C. 566, 199 S. E. 924 (1938).

Effect of Destruction of Records by Fire.—Where plaintiff's failure to comply with an order of the court, as provided by this section, to file an itemized statement of the account sued on is due to the fact that his records had been destroyed by fire, plaintiff is not precluded by his failure to comply with the order from establishing

the debt by competent evidence. *Savage v. Currin*, 207 N. C. 222, 176 S. E. 569 (1934).

In Criminal Proceedings.—For the procedure in obtaining a bill of particulars in criminal proceedings, and its similarity to that in civil actions, see *State v. Brady*, 107 N. C. 822, 12 S. E. 325 (1890). See also, § 15-143.

Cited in *Sentelle v. Board of Education*, 198 N. C. 389, 151 S. E. 877 (1930); *State v. Suncrest Lumber Co.*, 199 N. C. 199, 154 S. E. 72 (1930); *Gruber v. Ewbanks*, 199 N. C. 335, 154 S. E. 318 (1930); *Hood v. Love*, 203 N. C. 583, 166 S. E. 743 (1932); *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196 (1934).

§ 1-151. Pleadings construed liberally.—In the construction of a pleading for the purpose of determining its effect its allegations shall be liberally construed with a view to substantial justice between the parties. (C. C. P., s. 119; Code, s. 260; Rev., s. 495; C. S., s. 535.)

Editor's Note.—Under the common-law rules of pleading, the requirement of accuracy and precision was often pushed to the extreme, and the rights of litigants were determined not on the merits of the controversy but on sheer technicalities such as using the verb "to have" in the past tense, instead of in the present. These ideas were entirely abrogated in this country by the Codes of Civil Procedure wherever adopted. In England, after a series of improvements, beginning in 1834, when the celebrated "Rules of Hilary Term" were adopted, the British Parliament has swept them out of the English law also and has introduced the substance of the American Reformed Civil Procedure.

The object of the procedure under the Code is to try cases on their merits and not on technicalities and refined distinctions of the old system of pleading, under which the victory depended too much upon the skill of the pleader, rather than upon the merits of the successful party's case. The present system is far more liberal, and seeks first of all things, to try each case upon its facts and without so much regard to form. Its main purpose is to avoid miscarriages of justice by mere slips in pleadings, and, therefore, it requires that pleadings be construed sensibly, "with a view to substantial justice between the parties," as prescribed in this section.

Common-Law Rule of Construction Modified — Reasonable Construction.—The common-law rule requiring every pleading to be construed against the pleader has been materially modified by this section. *Sexton v. Farrington*, 185 N. C. 339,

117 S. E. 172 (1923). Hence a pleading will be upheld if any part presents sufficient facts; or if such facts may be gathered from the whole pleading by a liberal and reasonable construction, the pleading will be sustained. *Pridgen v. Pridgen*, 190 N. C. 102, 129 S. E. 419 (1925).

Allegations of complaint, when given liberal construction required by this section, held to allege facts sufficient to constitute actionable negligence on the part of demurring defendants. *Cunningham v. Haynes*, 214 N. C. 456, 199 S. E. 627 (1938).

In Favor of Pleader.—The court is required on demurrer to construe the complaint liberally "with a view to substantial justice between the parties," under this section, and, contrary to the common-law rule, every reasonable intendment is to be made in favor of the pleader. *Joyner v. Woodard*, 201 N. C. 315, 160 S. E. 288 (1931); *Bailey v. Roberts*, 208 N. C. 532, 181 S. E. 754 (1935); *Leach v. Page*, 211 N. C. 622, 191 S. E. 349 (1937); *Anthony v. Knight*, 211 N. C. 637, 191 S. E. 323 (1937); *Anderson Cotton Mills v. Royal Mfg. Co.*, 218 N. C. 560, 11 S. E. (2d) 550 (1940).

Pleading must be liberally construed, and every reasonable intendment and presumption must be in favor of the pleader. A pleading must be fatally defective before it will be rejected as insufficient. *Corbett v. Hilton Lbr. Co.*, 223 N. C. 704, 28 S. E. 250 (1943). See *Sandlin v. Yancey*, 224 N. C. 519, 31 S. E. (2d) 532 (1944); *Ferrell v. Worthington*, 226 N. C. 609, 39 S. E. (2d) 812 (1946); *Winston v. Williams, etc., Lbr.*

Co., 227 N. C. 339, 42 S. E. (2d) 218 (1947); *McCampbell v. Valdes Bldg., etc., Ass'n*, 231 N. C. 647, 58 S. E. (2d) 617 (1950).

A demurrer tests the sufficiency of a pleading, liberally construed and admitting the allegations of fact contained therein and relevant inferences of fact necessarily deducible therefrom, and the demurrer will not be sustained unless the pleading is fatally defective. *King v. Motley*, 233 N. C. 42, 62 S. E. (2d) 540 (1950).

Construction in View of Merits. — The pleadings must be liberally construed, with a view to present the case upon its real merits. *Lyon v. Atlantic, etc., R. Co.*, 165 N. C. 143, 81 S. E. 1 (1914).

Statement of Cause of Action. — If the facts alleged are sufficient for a cause of action when liberally construed, however inartificially the complaint may have been drawn, it will be sustained. *Renn v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964 (1915); *Conrad v. Board*, 190 N. C. 389, 130 S. E. 53 (1925). Same rule applies to an answer. *Dixon v. Green*, 178 N. C. 205, 100 S. E. 262 (1919); *Pridgen v. Pridgen*, 190 N. C. 102, 129 S. E. 419 (1925). See also *Farrell v. Thomas, etc., Co.*, 204 N. C. 631, 169 S. E. 224 (1933).

But there should be at least a substantial accuracy in the averments of pleadings, and a compliance therein with the essential rules of pleading so that the real issues may be evolved from the controversy. *New Bern Banking, etc., Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96 (1911).

Upon the inquiry as to whether the complaint states a cause of action, it will be liberally construed with every reasonable intentment therefrom in the plaintiff's favor, however uncertain, defective and redundant its allegations may be drawn. *Elam v. Barnes*, 110 N. C. 73, 14 S. E. 621 (1892); *Foy v. Stephens*, 168 N. C. 438, 84 S. E. 758 (1915); *North Carolina Corp. Comm. v. Harnett County Trust Co.*, 192 N. C. 246, 134 S. E. 656 (1926); *North Carolina Corp. Comm. v. Citizens Bank, etc., Co.*, 193 N. C. 513, 137 S. E. 587 (1927); *Sewell v. Chas. Cole & Co.*, 194 N. C. 546, 140 S. E. 85 (1927); *Enloe v. Ragle*, 195 N. C. 38, 141 S. E. 477 (1928); *Presnell v. Beshears*, 227 N. C. 279, 41 S. E. (2d) 835 (1947). See *Bryant v. Little River Ice Co.*, 233 N. C. 266, 63 S. E. (2d) 547 (1951).

In the construction of a pleading to determine whether or not the allegations meet the requirements laid down by the court, we are directed by statute to construe such allegations liberally with a view

to substantial justice between the parties. *Kemp v. Funderburk*, 224 N. C. 353, 30 S. E. (2d) 155 (1944).

Where a complaint is attacked by a general demurrer asserting that it does not state facts sufficient to constitute a cause of action the complaint is construed to aver all the facts that can be implied by fair and reasonable intentment from the facts expressly stated. *Steele v. Locke Cotton Mills Co.*, 231 N. C. 636, 58 S. E. (2d) 620 (1950).

A complaint cannot be overthrown by a demurrer unless it be wholly insufficient. If in any portion of it, or to any extent, it presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be fairly gathered from it, the pleading will stand, however inartificially it may have been drawn, or however uncertain, defective, or redundant may be its statements, for, contrary to the common-law rule, every reasonable intentment and presumption must be made in favor of the pleader. It must be fatally defective before it will be rejected as insufficient. *Fairbanks, etc., Co. v. Murdock Co.*, 207 N. C. 348, 351, 177 S. E. 122 (1934); *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536 (1936); *Cummings v. Dunning*, 210 N. C. 156, 185 S. E. 653 (1936); *Avery County v. Braswell*, 215 N. C. 270, 1 S. E. (2d) 864 (1939); *Vincent v. Powell*, 215 N. C. 336, 1 S. E. (2d) 826 (1939); *Dickensheets v. Taylor*, 223 N. C. 570, 27 S. E. (2d) 618 (1943), citing *Anderson Cotton Mills v. Royal Mfg. Co.*, 218 N. C. 560, 11 S. E. (2d) 550 (1940).

Although under this section allegations of pleadings are to be construed liberally "with a view to substantial justice between the parties," § 1-122 makes it a necessary requirement that the complaint shall contain "a plain and concise statement of the facts constituting a cause of action," which means that it shall contain a plain and concise statement of all the facts necessary to enable the plaintiff to recover. *Citizens Bank v. Gahagan*, 210 N. C. 464, 187 S. E. 580 (1936).

The material allegations of the complaint are that at the foreclosure sale the land was bought by the secretary and treasurer of the corporate mortgagee, and that this official was "acting in said capacity at the time he purchased said land at the foreclosure sale, and was acting as the agent of said bank," and that this official shortly thereafter conveyed the land to the mortgagee, which thus indirectly purchased at its own sale. Held

that the complaint is not so wholly insufficient that it can be overthrown by a demurrer. *Council v. Greensboro Joint Stock Land Bank*, 211 N. C. 262, 189 S. E. 777 (1937).

In spite of this section, a complaint must allege a cause of action, and the court will not, under this rule, construe into a pleading that which it does not contain. *Jones v. Jones Lewis Furniture Co.*, 222 N. C. 439, 23 S. E. (2d) 309 (1942).

Same—Judged from Whole Pleading.—When it is apparent from the whole pleading that the complaint alleges a good cause of action, it will be sustained under the rule of liberal construction. *Muse v. Ford Motor Co.*, 175 N. C. 466, 95 S. E. 900 (1918); *Dixon v. Green*, 178 N. C. 205, 100 S. E. 262 (1919).

Extent of Liberal Construction Rule.—The rule of liberal construction does not mean that a pleading shall be construed to say what it does not say, but that if it can be seen from its general scope that a party has a cause of action or defense he will not be deprived thereof merely because he has not stated it with technical accuracy. *Chesson v. Lynch*, 186 N. C. 625, 120 S. E. 198 (1923). Nor does it mean that the court shall supply the necessary allegations; nor is it intended thereby to repeal those rules of pleading which are essential to produce certainty of issues. *Turner v. McKee*, 137 N. C. 251, 49 S. E. 330 (1904). See also *Fairbanks, etc., Co. v. Murdock Co.*, 207 N. C. 348, 177 S. E. 122 (1934).

Errors in Language and Use of Words.—A plea that a cause of action did not “arise” within the time prescribed by the statute for the commencement of an action, while not strictly accurate, will be construed under the liberal system of pleading in force under this section, to mean that it did not “accrue” within that time. *Stubbs v. Motz*, 113 N. C. 458, 18 S. E. 387 (1893).

Answer Not Rejected Unless Fatally Defective.—Under the liberal construction provided by this section, an answer must be fatally defective before it will be rejected as insufficient and every reasonable intendment and presumption must be in favor of the pleader. *Commerce Ins. Co. v. McCraw*, 215 N. C. 105, 1 S. E. (2d) 369 (1939).

And an Amended Answer May Sufficiently State Cause of Action.—Where an amendment eliminated the ground upon which the demurrer was interposed, overruling of the demurrer was proper, the amended answer being sufficient to state

a cause of action under the liberal construction provided by this section. *Sohmer v. Felton Beauty Supply Co.*, 214 N. C. 522, 199 S. E. 711 (1938).

Conflicts of Laws.—The rules of construction of the pleadings are governed by the *lex fori*, i. e. by the law of the state in which the cause is being litigated. *McNinch v. American Trust Co.*, 183 N. C. 33, 110 S. E. 663 (1922).

Variances.—Under the liberal principle which this section inculcates, a variance between the pleadings and proof will not be regarded as material unless it misleads the complaining party to his prejudice in maintaining his action upon its merits. *Renn v. Seaboard Air Line R. Co.*, 170 N. C. 128, 86 S. E. 964 (1915); *Muse v. Ford Motor Co.*, 175 N. C. 466, 95 S. E. 900 (1918). And where the variance is not material the judge may direct the fact to be found according to the evidence. *Dorsey v. Corbett*, 190 N. C. 783, 130 S. E. 842 (1925).

A demurrer to the evidence will not be sustained if it is sufficient under a liberal construction to sustain the plaintiff's action. *State v. National Bank*, 193 N. C. 524, 137 S. E. 593 (1927).

Applied in *Toler v. French*, 213 N. C. 360, 196 S. E. 312 (1938).

Cited in *Jeffreys v. Hocutt*, 195 N. C. 339, 142 S. E. 226 (1928); *Virginia-Carolina, etc., Bank v. First, etc., Bank*, 197 N. C. 526, 150 S. E. 34 (1929); *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339 (1929); *Lee v. Caveness Produce Co.*, 197 N. C. 714, 150 S. E. 363 (1929); *Shemwell v. Lethco*, 198 N. C. 346, 151 S. E. 729 (1930); *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930); *Mack Truck Corp. v. Wachovia Bank & Trust Co.*, 199 N. C. 203, 154 S. E. 42 (1930); *Smithwick v. Colonial Pine Co.*, 199 N. C. 431, 154 S. E. 917 (1930); *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210 (1937); *Kirby v. Reynolds*, 212 N. C. 271, 193 S. E. 412 (1937); *Pearce v. Privette*, 213 N. C. 501, 196 S. E. 843 (1938); *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393 (1940); *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911 (1940); *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941); *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308 (1942); *Belk's Department Store v. Guilford County*, 222 N. C. 441, 23 S. E. (2d) 897 (1943) (dis. op.); *Hallow v. Atlantic Coast Line R. Co.*, 222 N. C. 740, 24 S. E. (2d) 633 (1943); *Wilson v. Chastain*, 230 N. C. 390, 53 S. E. (2d) 290 (1949).

§ 1-152. Time for pleading enlarged.—The judge may likewise, in his discretion, and upon such terms as may be just, allow an answer or reply to be made, or other act to be done, after the time limited, or by an order may enlarge the time. (C. C. P., s. 133; Code, s. 274; Rev., s. 512; C. S., s. 536.)

Cross References.—As to amendments to pleadings, see §§ 1-161 et seq. As to power of judge to set aside judgment for mistake, surprise, or excusable neglect, see § 1-220. As to power of judge to enlarge time in case on appeal, see § 1-282.

Editor's Note.—While the line of cases cited under this section refer more particularly to filing answers, no sound reason occurs why the same power does not exist for enlarging the time for filing complaints. *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 179 S. E. 457 (1935).

Inherent Power to Extend Time.—Even independent of this section, and a fortiori under this section, the superior court possesses an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. *Gilchrist v. Kitchen*, 86 N. C. 20 (1882).

Review of Discretion.—It is generally held that whenever the judge is vested with a discretion, his doing or refusal to do the act in question is not reviewable upon appeal. *Beck v. Bellamy*, 93 N. C. 129 (1885); *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456 (1902); *Wilmington v. McDonald*, 133 N. C. 548, 45 S. E. 864 (1903); *United Am., etc., Baptist Church v. United Am., etc., Baptist Church*, 158 N. C. 564, 74 S. E. 14 (1912). This discretion however is not an arbitrary but a legal discretion. *Hudgins v. White*, 65 N. C. 393 (1871).

Ample Power in Questions of Pleading and Practice.—In *Austin v. Clarke*, 70 N. C. 458 (1874), the court said that this section invests the court with ample powers, in all questions of practice and procedure, to be exercised at the discretion of the judge presiding who is presumed to know best what orders and what indulgence will promote the ends of justice in each particular case. With the exercise of discretion we cannot interfere, and it is not the subject of appeal.

Extension Not to Be Encouraged.—After the defendant has failed to file a verified answer, the court may in its discretion extend the time for filing it, though such extension of time is a practice not to be encouraged. *Griffin v. Asheville Light Co.*, 111 N. C. 434, 16 S. E. 423 (1892).

Extension beyond Next Term.—The trial court cannot extend the time for pleading beyond the next term of court,

unless by consent of the parties. *Sheek v. Sain*, 127 N. C. 266, 37 S. E. 334 (1900).

Extension after Supreme Court's Decision.—The trial court cannot permit an answer to be filed after the Supreme Court has decided that judgment should have been entered by default for the plaintiff. *Cook v. American Exch. Bank*, 130 N. C. 183, 41 S. E. 67 (1902).

Enlarging Time for Filing Answer.—The judge of the superior court where a civil action has been brought has the discretionary power to enlarge the time in which an answer may be filed to the complaint beyond that limited before the clerk, upon such terms as may be just, by an order to that effect. *Aldridge v. Greensboro Fire Ins. Co.*, 194 N. C. 683, 140 S. E. 706 (1927). See also *Vann v. Coleman*, 206 N. C. 451, 174 S. E. 301 (1934).

Same—Setting Aside Default.—On an appeal from an order of the clerk of the superior court denying motion to set aside a default judgment the judge of such court has jurisdiction under this section and § 1-276 to set aside the judgment and enlarge the time for filing the defendant's answer. *Acme Mfg. Co. v. Kornegay*, 195 N. C. 373, 142 S. E. 224 (1928), citing *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925).

Upon a proper finding of a meritorious defense and excusable neglect, the judge of the superior court, on appeal from the clerk, has authority under § 1-220 to set aside a judgment rendered by the clerk, against the defendant by default of an answer, to which exception has been duly entered before the clerk, and to permit an answer to be filed under this section. *Dunn v. Jones*, 195 N. C. 354, 142 S. E. 320 (1928).

Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquires jurisdiction of the entire cause and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

At the Time of Trial.—It is in the discretion of the court to allow filing of the answer or demurrer even where the case is reached for trial. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381 (1906).

Allowance to File Answer after Five Years.—In *Mallard v. Patterson*, 108 N. C. 255, 13 S. E. 93 (1891), the defendant filed an unverified answer, the complaint in the action having been verified, and the defendant, after a lapse of five years, asked to be allowed to file a new answer, properly verified, and the court allowed him the leave, though he was not entitled to it as a matter of right. The Supreme Court approved of the order, and declared that the exercise of the discretion by the judge was not reviewable. *Best v. British, etc., Mortg. Co.*, 131 N. C. 70, 42 S. E. 456 (1902).

Irrespective of Laches.—Even if the delay in filing the pleading is due to the pleader's laches, it is in the discretion of the presiding judge to permit it to be filed. *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845 (1893).

Filing Defense Bond.—A trial judge may at any time extend the time for filing a defense bond. *Timber Co. v. Butler*, 134 N. C. 50, 45 S. E. 956 (1903); *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845 (1906).

Delay in Motion for Judgment May Be Considered.—In passing on a motion to file or verify an answer after the time limit, the court may in its discretion consider the delay of the plaintiff in moving for judgment. *Horney v. Mills*, 189 N. C.

724, 128 S. E. 324 (1925).

Answer to Amended Complaint.—The trial judge has the discretionary power conferred on him by this section to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. *Brown v. Hillsboro*, 185 N. C. 368, 117 S. E. 41 (1923).

Effect of § 1-125.—Section 1-125 prohibits the clerk of the court only from extending the time for defendant to answer, and does not impair the broad powers conferred by this section upon the judge. *McNair v. Yarbboro*, 186 N. C. 111, 118 S. E. 913 (1923).

Effect of § 1-140 on Power of Court.—The restrictions in § 1-140 do not impair the discretion of the court in allowing an answer to be filed after the time limited. *Roberts v. Merritt*, 189 N. C. 194, 126 S. E. 513 (1925); *Aldridge v. Greensboro Fire Ins. Co.*, 194 N. C. 683, 140 S. E. 706 (1927).

Applied in *Bailey v. Commissioners*, 120 N. C. 388, 27 S. E. 28 (1897).

Cited in *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 871 (1930); *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336 (1938).

§ 1-153. Irrelevant, redundant, indefinite pleadings.—If irrelevant or redundant matter is inserted in a pleading, it may be stricken out on motion of any person aggrieved thereby, but this motion must be made before answer or demurrer, or before an extension of time to plead is granted. When the allegations of a pleading are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require the pleading to be made definite and certain by amendment. Any such motion to strike any matter out of any pleading may, upon ten days' notice to the adverse party, be heard out of term by the resident judge of the district or by any judge regularly assigned to hold the courts of the district. (C. C. P., s. 120; Code, s. 261; Rev., s. 496; C. S., s. 537; 1949, c. 146.)

Cross References.—As to bill of particulars in certain cases, see § 1-150. As to sham and irrelevant defenses, motion to strike, see § 1-126.

Editor's Note.—The 1949 amendment added the last sentence. For brief comment on the amendment, see 27 N. C. Law Rev. 434.

For discussion of motion to strike pleadings, see 19 N. C. Law Rev. 55; 29 N. C. Law Rev. 3.

The true doctrine to be gathered from all the cases is that, if the substantial facts which constitute a cause of action are stated in the complaint or can be inferred therefrom by reasonable intendment, though the allegations are imperfect, in-

complete and defective, and such insufficiency pertains rather to the form than to the substance, the proper mode of correction is not by demurrer nor by excluding evidence at the trial but by a motion, before the trial, to make the averments more definite by amendment. To this effect see, *Moore v. Edmiston*, 70 N. C. 510 (1874); *Stokes v. Taylor*, 104 N. C. 394, 10 S. E. 566 (1889); *Fulps v. Mock*, 108 N. C. 601, 605, 13 S. E. 92 (1891); *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907); *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850 (1918); *Nye v. Williams*, 190 N. C. 129, 129 S. E. 193 (1925); *Leach v. Page*, 211 N. C. 622, 191 S. E. 349 (1937).

Power to Strike.—Under this section or under § 1-272, the superior court has power to strike out an answer whenever it appears to the satisfaction of the court that it is irrelevant or frivolous. *Commissioners v. Piercy*, 72 N. C. 181 (1875); *Dail & Bro. v. Harper*, 83 N. C. 5 (1880).

Defendant Not Deprived of Any Substantial Right.—Irrelevant, redundant or evidential matter may be stricken from the pleading upon motion of party aggrieved, and the order striking such matter from the pleading does not deprive defendant of any substantial right. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412 (1946).

The Test of Right to Have Allegation Stricken.—Whether evidence in support of an allegation would be competent upon the trial does not determine plaintiff's right to have it stricken out upon motion under this section, the test being whether the allegation is of a probative or of an ultimate fact. *Revis v. Asheville*, 207 N. C. 237, 176 S. E. 738 (1934).

The allegation as to a city carrying accident and liability insurance was an allegation of an evidential and probative fact and not of a material, essential, or ultimate fact, and there was no error in the trial court's ordering it stricken out under this section. *Revis v. Asheville*, 207 N. C. 237, 176 S. E. 738 (1934).

Equitable matters in defense relevant only upon the motion to confirm a foreclosure sale are properly stricken from the answer upon motion, under this section, since plaintiff seeks a legal remedy only and invokes no equitable jurisdiction of the court, and the foreclosure sale cannot be collaterally attacked in plaintiff's action to recover the deficiency after foreclosure. *First Carolina's Joint-Stock Land Bank v. Stewart*, 208 N. C. 139, 179 S. E. 463 (1935).

Power to Make Explicit Ex Mero Motu.—The court has a right ex mero motu to direct that the pleadings shall be more explicit. *Martin v. Goode*, 111 N. C. 288, 16 S. E. 232 (1892); *Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 27 S. E. 76 (1897). Or it may direct the same upon the application of a party interested. *Buie v. Brown*, 104 N. C. 335, 10 S. E. 465 (1889); *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13 (1936).

If defendant desires a more certain and definite statement of the cause of action alleged, the proper remedy is a motion under this section. *Cox v. Jenkins*, 212 N. C. 667, 194 S. E. 119 (1937).

Manner of Correction May Not Be Directed.—While the trial judge is authorized

in the exercise of his discretion to order that a pleading be made more definite under the provisions of this section, he may not direct the manner in which this may be done. *Hensley v. McDowell Furniture Co.*, 164 N. C. 148, 80 S. E. 154 (1913).

Argumentative, Hypothetical or Alternative Pleading.—The proper method of taking advantage of an argumentative, hypothetical or an alternative pleading is not by demurrer but by a motion under this section to make more explicit. *Daniels v. Baxter*, 120 N. C. 14, 26 S. E. 635 (1897).

Discretion of Court.—A motion to make a pleading more definite and certain is addressed to the discretion of the court. *Womack v. Carter*, 160 N. C. 286, 75 S. E. 1102 (1912). See also, *Smith v. Summerfield*, 108 N. C. 284, 12 S. E. 997 (1891); *Conley v. Richmond, etc., R. Co.*, 109 N. C. 692, 14 S. E. 303 (1891); *Allen v. Carolina Cent. R. Co.*, 120 N. C. 548, 27 S. E. 76 (1897); *Temple v. Western Union Tel. Co.*, 205 N. C. 441, 171 S. E. 630 (1933); *Tickle v. Hobgood*, 212 N. C. 762, 194 S. E. 461 (1938).

If the pleader thinks that it is impossible to make the allegations of his pleading more definite, this fact must be addressed to the judge who has a large discretion in such matters, and if it appears to him that such was the case, he will disallow a motion to make such pleading more definite and certain. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850 (1918).

Under this section the superior court is authorized in the exercise of its discretion to strike from a pleading any allegations of purely evidential and probative facts. *Life Ins. Co. v. Smathers*, 211 N. C. 373, 190 S. E. 484 (1937).

If irrelevant or redundant matter is inserted in a pleading it may be stricken out on motion of the aggrieved party, and if made in apt time "it is not addressed to the discretion of the court, but is made as a matter of right." *Herndon v. Massey*, 217 N. C. 610, 8 S. E. (2d) 914 (1940); *Patuxent Development Co. v. Bearden*, 227 N. C. 124, 41 S. E. (2d) 85 (1947). See also, *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794 (1930); *Federal Reserve Bank v. Atmore*, 200 N. C. 437, 157 S. E. 129 (1931); *Patterson v. Southern R. Co.*, 214 N. C. 38, 198 S. E. 364 (1938); *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299 (1942); *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308 (1942).

Ordinarily whether or not the trial judge

grants a motion to make a pleading more definite, as provided in this section, is within his discretion. And where there is nothing on the record to indicate that the motion was denied as a matter of law, it will be presumed the judge denied it in his discretion. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408 (1948).

A motion to strike made before pleading or extension of time to plead, is made as a matter of right, while such motion not made in apt time is addressed to the discretion of the court. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412 (1946).

Motion to Make Pleading More Definite and Certain.—The refusal of the court to grant plaintiff's motion to strike the parts of the reply inartificially setting up a defense, is not reversible error, plaintiff's more appropriate remedy being a motion to make defendant's pleading more definite and certain. *Sayles v. Loftis*, 217 N. C. 674, 9 S. E. (2d) 393 (1940).

If defendant, in a negligent injury action, desires more specific and detailed allegations in the complaint as to the charge of negligence, he must aptly request that the court require the pleading to be made more definite and certain or request a bill of particulars. *Livingston v. Essex Inv. Co.*, 219 N. C. 416, 14 S. E. (2d) 489 (1941).

When a complaint alleges or attempts to allege a good cause of action but is defective in that it does not definitely and sufficiently set out all the essential, ultimate facts, or is inartificially stated, or is in general terms, demurrer will not lie if, when liberally construed, the allegations are sufficiently intelligible to inform the defendant as to what he is required to answer. The remedy is by motion to make the complaint more definite. *Davis v. Rhodes*, 231 N. C. 71, 56 S. E. (2d) 43 (1949).

A demurrer should be sustained only if there is a statement of a defective cause of action; if there is a defective statement of a good cause of action, the remedy is by motion to make the complaint more definite under this section or the court may allow an amendment under § 1-129. *In re Will of York*, 231 N. C. 70, 55 S. E. (2d) 791 (1949).

A demurrer to a defective statement of a good cause of action comes too late after answer. The defendant, by answering to the merits, waives the defect which is not fatal but may be cured by amendment. He may, however, move to make the complaint more definite. *Davis v. Rhodes*, 231 N. C. 71, 56 S. E. (2d) 43 (1949).

Denial of motion to make pleading more definite does not preclude bill of particulars. *Lowman v. Asheville*, 229 N. C. 247, 49 S. E. (2d) 408 (1948).

Allegations to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

Action to Establish Donatio Mortis Causa.—In an action to establish a donatio mortis causa, allegations setting forth facts tending to show motive, the setting, the relationship between the parties, the intention of the donor, and the state of his health and the circumstances surrounding his death, are proper, and defendant administrator's motion to strike such allegation from the complaint is properly denied. *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941).

Waiver or Cure of Defects in Absence of Motion.—If the defect of uncertainty or indefiniteness is not raised by a motion to make more certain, and an answer is filed, such defect will be deemed as waived or cured. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207 (1920).

The defect in the statement of locality may be raised either by a motion for a bill of particulars or a motion under this section to make the pleading more specific. *Lucas v. Carolina Cent. R. Co.*, 121 N. C. 506, 28 S. E. 265 (1897).

Scandalous and Impertinent Matter.—Where "impertinent" matter is introduced into the pleadings, it may be stricken out at the expense of the party introducing it. *Powell v. Cobb*, 56 N. C. 1 (1856).

A party is entitled, as a matter of right, to have irrelevant or redundant matter which is prejudicial to him, or scandalous, stricken from his opponent's pleading upon motion aptly made. *Patterson v. Southern Ry. Co.*, 214 N. C. 38, 198 S. E. 364 (1938).

Application to Justice's Court.—The provision of this section, as to motions to make pleadings more certain, applies to justices' courts as well as to the superior courts. *Wilson v. Batchelor*, 182 N. C. 92, 108 S. E. 355 (1921).

Time of Motion.—Under this section the motion must be made in apt time before answer or demurrer, and if not made within time the granting of the motion

rests within the discretion of the judge. *Hensley v. McDowell Furniture Co.*, 164 N. C. 148, 80 S. E. 154 (1913); *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13 (1936).

Thus, a motion to strike out as a matter of right made after answer and on the day the case is calendared for trial, is properly denied for the reason that it is not made in apt time. But even though a motion to strike out is not made in apt time, the court has discretionary power to allow the motion during the term at which the case is calendared for trial. *Warren v. Virginia-Carolina Joint Stock Land Bank*, 214 N. C. 206, 198 S. E. 624 (1938).

Motion to strike matter from an answer comes too late, when filed after the jury is impaneled. *Roller v. McKinney*, 159 N. C. 319, 74 S. E. 966 (1912).

A motion to strike out alleged improper matter from a complaint will not be considered after an answer to demurrer is filed, or after an order for time to plead. *Lee v. Thornton*, 171 N. C. 209, 88 S. E. 232 (1916).

It was held not an abuse of discretion for the trial court to order the complaint made more definite and certain, although the complaint was filed at October term, 1916, and the motion was made at the December term, 1917, immediately before trial. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850 (1918).

Where a motion is made on the eve of the trial, it should be granted with great caution, if the moving party has been very dilatory. *Bristol v. Carolina, etc., R. Co.*, 175 N. C. 509, 95 S. E. 850 (1918).

A motion to strike out does not challenge sufficiency of the complaint to state a cause of action, but concedes that sufficient facts are alleged, and presents only the propriety, relevancy, or materiality of the allegations sought to be stricken out. *Poovey v. Hickory*, 210 N. C. 630, 188 S. E. 78 (1936).

A motion to strike under this section does not raise the question of the sufficiency of the complaint as a whole to state a cause of action, but such question can be raised only by demurrer. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299 (1934).

"Oratorical" Allegations Are Not Improper.—Although the allegations are made in language which the defendant thinks is somewhat oratorical, this does not make them improper, irrelevant, or immaterial, nor can it be held that as a matter of law the reading of such allegations to the court, in the presence of the

jury, will be prejudicial to the rights of the defendant. *Poovey v. Hickory*, 210 N. C. 630, 188 S. E. 78 (1936).

Allowance of Amendments.—Under this section and § 1-150 when there is a defective cause of action, although in due form, the plaintiff cannot recover unless the court in its discretion, on reasonable terms, allows an amendment. When a good cause of action is set out, but defective in form, the court may require the pleadings to be made definite and certain by amendment. *Bowling v. Fidelity Bank*, 209 N. C. 463, 184 S. E. 13 (1936), citing *Allen v. Carolina Cent. Ry. Co.*, 120 N. C. 548, 27 S. E. 76 (1897).

Motion to Strike Upheld.—In action for damages that part of defendant's answer containing stipulation that plaintiff had taken nonsuit in prior action for same collision and paid costs, together with summons and complaint in former action was properly stricken from pleadings as not being germane to case. *Brown v. Hall*, 226 N. C. 732, 40 S. E. (2d) 412 (1946).

Where defendant has denied a material allegation of the complaint, narration in his "further answer and defense" of evidential matters tending to sustain defendant's denial of the controverted fact is irrelevant, and should be stricken upon motion aptly made. *Chandler v. Mashburn*, 233 N. C. 277, 63 S. E. (2d) 553 (1951).

Motion to Strike Denied.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, motion to strike allegations that the injury was willful, wanton and malicious, is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

Review of Refusal of Motion to Strike.—The refusal of a motion to strike out certain portions of a bill of particulars as irrelevant and immaterial, under this section, will be affirmed where it appears that defendant was not prejudiced thereby, the matter lending itself to an easier determination by correct rulings on the admissibility of evidence offered in support of such allegations. *Pemberton v. Greensboro*, 205 N. C. 599, 172 S. E. 196 (1934); *Scott v. Bryan*, 210 N. C. 478, 187 S. E. 756 (1936).

An appeal will lie immediately from the denial of a motion made as a matter of right under this section, to strike certain paragraphs from the complaint on the ground of irrelevancy and redundancy, but not where motion is addressed to court's discretion. *Parrish v. Atlantic Coast Line*

R. Co., 221 N. C. 292, 20 S. E. (2d) 299 (1942).

On appeal from the denial of a motion to strike made under this section, the duty rests upon the supreme court to sustain the objections which relate to any allegation which is clearly irrelevant or redundant within the meaning of this section and to strike same from the pleading, but caution will be exercised not to put the lower court in trammels upon a doubtful matter when the competency of the allegations objected to may more clearly appear when the case is factually developed on the trial. *Hill v. Stansbury*, 221 N. C. 339, 20 S. E. (2d) 308 (1942).

When Denial of Motion to Strike Matter from Pleading Ground for Reversal.—The denying or overruling of a motion to strike matter from a pleading under the provisions of this section is not ground for reversal unless the record affirmatively reveals these two things: (1) That the matter is irrelevant or redundant; and (2) That its retention in the pleading will

cause harm or injustice to the moving party. *Hinson v. Britt*, 232 N. C. 379, 61 S. E. (2d) 185 (1950).

Applied in *McCarley v. Council*, 205 N. C. 370, 171 S. E. 323 (1933); *In re West*, 212 N. C. 189, 193 S. E. 134 (1937); *Batton v. Atlantic Coast Line R. Co.*, 212 N. C. 256, 193 S. E. 674 (1937); *Heffner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293 (1938); *Parlier v. Drum*, 231 N. C. 155, 56 S. E. (2d) 383 (1949).

Cited in *Cole v. Wagner*, 197 N. C. 692, 150 S. E. 339 (1929); *Tar Heel Hosiery Mill v. Durham Hosiery Mills*, 198 N. C. 596, 152 S. E. 794 (1930); *Ellis v. Ellis*, 198 N. C. 767, 153 S. E. 449 (1930); *Hutchins v. Mangum*, 198 N. C. 774, 153 S. E. 409 (1930); *Yonge v. New York Life Ins. Co.*, 199 N. C. 16, 153 S. E. 630 (1930); *Hood v. Love*, 203 N. C. 583, 166 S. E. 743 (1932); *Duke v. Crippled Children's Comm.*, 214 N. C. 571, 199 S. E. 918 (1938).

§ 1-154. Pleading judgments.—In pleading a judgment or other determination of a court or of an officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but the judgment or determination may be stated to have been duly given or made. If this allegation is controverted, the party pleading must establish, on the trial, the facts conferring jurisdiction. (C. C. P., s. 121; Code, s. 262; Rev., s. 497; C. S., s. 538.)

§ 1-155. How conditions precedent pleaded. — In pleading the performance of conditions precedent in a contract, it is not necessary to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. If this allegation is controverted, the party pleading must establish, on the trial, the facts showing performance. (C. C. P., s. 122; Code, s. 263; Rev., s. 498; C. S., s. 539.)

In Actions upon Insurance Policy.—In *Britt v. Mutual Ben. Life Ins. Co.*, 105 N. C. 175, 10 S. E. 896 (1890), it was held under this section that, in an action upon an insurance policy, the truth of the repre-

sentations in the application as conditions precedent may be averred generally by stating that the party duly performed all the conditions on his part.

§ 1-156. How instrument for payment of money pleaded.—In an action or defense founded upon an instrument for the payment of money only, it is sufficient for the party pleading to give a copy of the instrument, and to state that there is due to him thereon, from the adverse party, a specified sum which he claims. (C. C. P., s. 122; Code, s. 263; Rev., s. 499; C. S., s. 540.)

Editor's Note.—This section does not require that the entire writing be made a part of the complaint, and, a demurrer *ore tenus* does not lie where answer has been filed and no objection taken by demurrer to the jurisdiction of the court or that the

complaint did not state facts sufficient to constitute a cause of action. *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829 (1942).

Applied in *Sossamon v. Oaklawn Cemetery*, 212 N. C. 535, 193 S. E. 720 (1937).

§ 1-157. How private statutes pleaded.—In pleading a private statute or right derived therefrom it is sufficient to refer to the statute by its title or

the day of its ratification, and the court shall thereupon take judicial notice of it. (C. C. P., s. 123; Code, s. 264; Rev., s. 500; C. S., s. 541.)

Public Law Published in Private Laws, and Vice Versa. — Notwithstanding the fact that a public statute is erroneously published in the private laws, the court will take judicial notice thereof without the necessity of its being pleaded. *Hancock v. Norfolk, etc.*, R. Co., 124 N. C. 222, 32 S. E. 679 (1899). And conversely, the fact that a private statute is published among the public statutes will not make it a public statute so as to do away with the necessity of pleading and proving it. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Private Statute with Public Provisions. — A private statute does not assume the character of a public statute because of the fact that it contains public statutory provisions. Upon this principle the charter of a corporation which contains public statutory provisions is not a public statute. *Carrow v. Washington Toll-Bridge Co.*, 61 N. C. 118 (1867); *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891). A fortiori where it does not contain such provisions it must be specifically pleaded. *Corporation Comm. v. Seaboard Air Line System*, 127 N. C. 283, 37 S. E. 266 (1900).

Nature of Statute Is a Question of Law.

§ 1-158. **Pleadings in libel and slander.** — In an action for libel or slander it is not necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose, but it is sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation is controverted, the plaintiff is bound to establish on trial that it was so published or spoken.

The defendant may in his answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he proves the justification or not, he may give in evidence the mitigating circumstances. (C. C. P., ss. 124, 125; Code, ss. 265, 266; Rev., ss., 501, 502; C. S., s. 542.)

Cross Reference. — As to libel and slander generally, see §§ 99-1 et seq.

Editor's Note. — For an article entitled "Restrictions on a Free Press," wherein various phases of rights arising out of libel are discussed, see 4 N. C. Law Rev. 24.

Plea Prerequisite to Evidence of Truth. — A plea of justification or of mitigation is a prerequisite to the allowance of evidence of the truth of the charge. Without it such evidence is incompetent. *Upchurch v. Robertson*, 127 N. C. 127, 37 S. E. 157 (1900); *Dickerson v. Dail*, 159 N. C. 541, 75 S. E. 803 (1912); *Burris v. Bush*, 170 N. C. 394, 87 S. E. 97 (1915); *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1939).

—Whether a statute is public or private is a question of law which the courts must determine in the absence of a statutory enactment declaring and settling its nature. *Humphries v. Baxter*, 28 N. C. 437 (1846); *State v. Wallace*, 94 N. C. 827 (1886).

Qualification of the Rule in Supreme Court. — While the courts will not as a general rule, take judicial notice of a private statute or its terms and will require that it shall be specially pleaded in the manner required by this section, this rule will not be allowed to prevail when a private statute relating to and effectually settling the matter in controversy has, after due notice, been formally brought to the attention of the Supreme Court; for then only an abstract proposition would be left for the court's determination, which will not be entertained. *Reid v. Norfolk Southern R. Co.*, 162 N. C. 355, 78 S. E. 306 (1913).

Proof of Private Statutes. — Private statutes must not only be pleaded as provided by this section, but also proved when they become necessary as evidence. *Durham v. Richmond, etc.*, R. Co., 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Where the truth of words alleged to be slanderous is not specifically pleaded, evidence thereof was held properly rejected. *Elmore v. Atlantic Coast Line R. Co.*, 189 N. C. 658, 127 S. E. 710 (1925).

Thus, when the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1939).

When the defendant in an action for slander denies the allegations of plaintiff as to the slander charges in toto, and tenders no issue as to justification or mitigation as provided in this section, the exclusion of evidence of justification and mitigation is not error, it being required

that such evidence be supported by proper plea. *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1939).

Sufficient Averment.—It is material only to aver in the complaint that the slanderous words were spoken of the plaintiff, the facts which point to them and convey to the hearer the sense in which they are used, are matters of proof before the jury. *Wozelka v. Hettrick*, 93 N. C. 10 (1885).

Sufficient Publication.—Under this section where the complaint in an action for libel alleges that the defendant sent the plaintiff an open post card through the mails containing libelous matter, without an allegation that such matter was read by some third person, the allegation of publication is insufficient. *McKeel v. Latham*, 202 N. C. 318, 162 S. E. 747 (1932).

§ 1-159. **Allegations not denied, deemed true.**—Every material allegation of the complaint not controverted by the answer, and every material allegation of new matter in the answer, constituting a counterclaim, not controverted by the reply is, for the purposes of the action, taken as true. But the allegation of new matter in the answer, not relating to a counterclaim, or of new matter in reply, is to be deemed controverted by the adverse party as upon a direct denial or avoidance, as the case requires. (C. C. P., s. 127; Code, s. 268; Rev., s. 503; C. S., s. 543.)

Editor's Note.—The rule established by this section disposed of the necessity of submitting to the jury matters which the law deems as admitted in the absence of denial.

New Matter Not Amounting to Counterclaim.—If the new matter in the answer does not amount to a counterclaim such matter will be deemed as denied by the operation of law. *McQueen v. People's Nat. Bank*, 111 N. C. 509, 16 S. E. 270 (1892); *Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144 (1896). Thus in an action for the purchase price of land sold, the allegation of defective title is a matter of defense, and not a counterclaim, and hence the burden is on defendant, even though not specifically denied by the operation of law. *Bank v. Loughran*, 122 N. C. 668, 30 S. E. 17 (1898).

When such new matter does not raise issues of fact but presents only questions of law, the court may render judgment on the pleadings, there being no controverted issues of fact for the determination of the jury. *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 536 (1941).

The allegations of the complaint, and every material allegation of new matter constituting a counterclaim in an answer, directly admitted or not denied, have the effect of a finding by a jury. *Bonham v. Craig*, 80 N. C. 224 (1879); *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890).

As a corollary to this general principle

Evidence of Justification under General Issue.—When the defendant pleads the general issue, he may not introduce evidence in justification or mitigation. *Upchurch v. Robertson*, 127 N. C. 127, 37 S. E. 157 (1900).

Where defendants had not pleaded privilege, justification, etc., it was error to withhold case from the jury. *Harrell v. Goersch*, 209 N. C. 741, 184 S. E. 489 (1936).

In the absence of a plea of privilege, justification, or mitigating circumstances, the evidence was sufficient to be submitted to the jury on the question of whether the general manager was acting within the scope of his authority in uttering certain slanderous words in an action therefor against the corporation. *Alley v. Long*, 209 N. C. 245, 183 S. E. 294 (1936).

it follows that new matter in the answer not amounting to counterclaim disposes of the necessity of a replication. *Askew v. Koonce*, 118 N. C. 526, 24 S. E. 218 (1896); *McLamb v. McPhail*, 126 N. C. 218, 35 S. E. 426 (1900); *Wilson v. Brown*, 134 N. C. 400, 46 S. E. 762 (1904); *Smith v. Bruton*, 137 N. C. 79, 49 S. E. 64 (1904).

Admission as Basis for Referee's Finding.—Allegations in a complaint, not denied in the answer, are a sufficient basis for the referee's findings of fact; but allegations not so admitted and not sustained by proof, are not evidence, unless put in evidence. *Stephenson v. Felton*, 106 N. C. 114, 11 S. E. 255 (1890).

Application in Divorce Actions.—Divorces are granted only when the facts constituting a sufficient cause, under a proper construction of the law, are pleaded, proved and found by the jury. *McQueen v. McQueen*, 82 N. C. 471 (1880). The admissions of the parties are not competent evidence, as in other actions, of the truth of the material allegations of the pleadings. *Perkins v. Perkins*, 88 N. C. 41 (1883). But when a defendant demurs to a petition for divorce the court here must consider the demurrer as a concession, not only that the facts alleged are true, but that they can and will be proved, so as to secure the verdict of the jury. *Steele v. Steele*, 104 N. C. 631, 10 S. E. 707 (1889).

In an action for divorce the charge of willful abandonment of defendant by plain-

tiff and the defense of recrimination do not amount to a cross cause, and are deemed controverted by the adverse party. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Admissions as Evidence in Other Actions.—Admissions implied under this section by failure to controvert allegations of the opposite pleading constitute evidence against the party making them in all actions and proceedings against him, wherein they may be pertinent and competent, just as are admissions and declarations of a party made adverse to his right on any occasion. Their weight depends always upon whether or not they were made with deliberation or incautiously, and they are subject to proper explanation. *Mason v.*

McCormick, 85 N. C. 226 (1881); *Adams v. Utley*, 87 N. C. 356 (1882); *Guy v. Manuel*, 89 N. C. 83 (1883); *Brooks v. Brooks*, 90 N. C. 142 (1884); *Smith v. Nimocks*, 94 N. C. 243 (1886); *White v. Beaman*, 96 N. C. 122, 1 S. E. 789 (1887). And the fact that the former action was decided in favor of the party admitting can not affect his admissions as evidence in the subsequent action. *Grant v. Gooch*, 105 N. C. 278, 11 S. E. 571 (1890). See also *Lowder v. Smith*, 201 N. C. 642, 161 S. E. 223 (1931).

Applied in *Little v. Rhyne*, 211 N. C. 431, 190 S. E. 725 (1937).

Cited in *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930).

§ 1-160. **Pleading lost, copy used.**—If an original pleading or paper is lost or withheld by any person, the court may authorize a copy to be filed and used instead of the original. (C. C. P., s. 357; Code, s. 600; Rev., s. 504; C. S., s. 544.)

Before Cause Argued in Supreme Court.—The lost pleading or paper should always be supplied by a copy, before the cause is argued in the Supreme Court. *Blackmore v. Winders*, 144 N. C. 212, 56 S. E. 874 (1907).

Order of Substitution Not Reviewable.—

Judgments of trial courts permitting lost pleadings to be substituted, are not reviewable. *Bray v. Creekmore*, 109 N. C. 49, 13 S. E. 723 (1891); *McIver Park, Inc. v. Brinn*, 223 N. C. 502, 27 S. E. (2d) 548 (1943).

ARTICLE 18.

Amendments.

§ 1-161. **Amendment as of course.**—Any pleading may be once amended of course, without costs, and without prejudice to the proceedings already had, at any time before the period for answering it expires; or it can be so amended at any time, unless it is made to appear to the court that it was done for the purpose of delay, and the plaintiff or defendant will thereby lose the benefit of a term for which the cause is, or may be, docketed for trial; and if it appears to the court or judge that the amendment was made for that purpose, it may be stricken out, and such terms imposed as seem just to the court or judge. (C. C. P., s. 131; Code, s. 272; Rev., s. 505; C. S., s. 545.)

Cross References.—As to enlargement of time in discretion of judge, see § 1-152. As to amendment to make pleading more definite and certain, see § 1-153. As to amendment of pleadings, etc., to correct mistake, to insert material allegations, etc., in discretion of court, see § 1-163.

Editor's Note.—For a discussion of this section, see 25 N. C. Law Rev. 76.

The resultant frustration of justice from the absurd technicalities of the common-law system of pleading and practice aroused from the very early days of its history a liberal movement towards the emancipation of the rules of procedure from needless and cumbersome formalities. The movement originated with the gradual development in England of courts of equity

which "delight to disregard form and look into the substance," and was supplemented by the statute of jeofails which provided for the cure and disregard of formal defects.

In this country this liberal tendency expressed itself in the form of express enactments towards the adaptation of the rules of pleadings and procedure, for the protection of substantive rights and for a speedy and effective administration of justice.

In accord with what one may justly call the "renaissance" of the procedural law, the legislative policy of this State has been so prone to respond to the calls of a more rational administration of justice independent of technicalities and form, that

in this State it may now be well said that "anything may be amended at any time," with the qualifications to be hereafter noted.

These statutory provisions authorizing amendments may generally be classified under two principal categories: (A) Provisions authorizing amendments as a matter of right, and (B) Provisions authorizing amendments within the discretion of the court to subserve the ends of justice.

The former category (A) may be further analyzed by dividing it into (a) amendments made before the time for answering the pleading has expired, and (b) amendments after such time has expired. In the former case there is no limitation or condition upon the right to amend, except the condition that it must be exercised without prejudice to the proceedings already had; in the latter case the right to amend as a matter of course does not exist. See *Commissioners v. Blair*, 76 N. C. 136 (1877); *Kron v. Smith*, 96 N. C. 389, 2 S. E. 532 (1887); *Goodwin v. Caraleigh, etc., Fertilizer Works*, 121 N. C. 91, 28 S. E. 192 (1897). From the doctrine of these cases the inference is deduced that the phrase "or it can be so amended at any time" appearing in the first part of the section, has no reference to the right to amend as a matter of course, and that it simply means that the pleading may be amended after the period for answering it has expired, "without costs and without prejudice to the proceedings already had."

The scope and the extent of the latter category (B) is entirely dependent upon the discretion of the court, which is subject only to the usual limitation upon the exercise of discretionary powers, viz., that it must not be abused.

Time of Amendment as a Matter of Right.—Where the motion to amend is made after the time for answering has expired, and after an answer has been filed, it will be too late to amend as a matter of course; after such time the privilege of amending the pleadings is at the

discretion of the court which is not reviewable. *Commissioners v. Blair*, 76 N. C. 136 (1877); *Kron v. Smith*, 96 N. C. 389, 2 S. E. 532 (1887); *Goodwin v. Caraleigh, etc., Fertilizer Works*, 121 N. C. 91, 28 S. E. 192 (1897); *Biggs v. Moffitt*, 218 N. C. 601, 11 S. E. (2d) 870 (1940).

Practice of Allowing Amendments at All Times Is Becoming Liberal.—Under this and subsequent sections, and under the liberal practice as set out in § 1-151, the court below, in its sound discretion, in furtherance of justice, can amend the pleading, before and after judgment, to conform to the facts proved, keeping in mind always that an amendment cannot change substantially the nature of the action or defense, without consent. The system is broadening and expanding more and more, with the view at all times that a trial should be had on the merits and to prevent injustice. *Lipe v. Citizens' Bank, etc., Co.*, 206 N. C. 24, 173 S. E. 316 (1934).

Where there is a misjoinder of parties and causes of action, plaintiff may move to file a substituted or amended pleading at any time before judgment is entered sustaining the demurrer, but after such judgment is entered the court has no authority to entertain a motion for leave to file a new or amended complaint for the reason that there is no action pending in which the court has jurisdiction to entertain a motion. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345 (1950).

Form and Notice of Motion to Amend.—After the time for answering has expired it has been the uniform practice to apply to the court for permission to amend. This application may be oral or written, but notice of such motion is required unless made during a term of court at which the action stands for trial. *Carolina Discount Corp. v. Butler*, 200 N. C. 709, 158 S. E. 249 (1931).

Cited in *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (1942).

§ 1-162. **Pleading over after demurrer.**—After the decision on a demurrer, the judge shall, if it appear that the demurrer was interposed in good faith, allow the party to plead over upon such terms as may be just. (C. C. P., s. 131; 1871-2, c. 173; Code, s. 272; Rev., s. 506; C. S., s. 546.)

Cross References.—As to procedure after return of judgment upon demurrer, see § 1-131. As to motion for judgment on frivolous demurrer, see § 1-219. See also, § 1-129.

Formerly Section Discretionary — Now Mandatory.—Prior to the act of 1872, it was discretionary with the judge to permit

any amendment the provision being: the judge "may in his discretion" etc. *Matthews v. Copeland*, 80 N. C. 30 (1879). But now the requirement is mandatory under proper circumstances. See *Moore v. Hobbs*, 77 N. C. 65 (1877).

Application to Contracts Prior to C. C. P.—This section, which provides that after

the decision of a demurrer interposed in good faith the judge shall allow the party to plead over, has no application to actions on contracts entered into prior to the ratification of the Code of Civil Procedure. *Matthews v. Copeland*, 80 N. C. 30 (1879).

Not Applicable to Plaintiff.—This section has been often construed to give to the defendant, after a demurrer interposed by him in good faith has been overruled, the right to answer over, but it has never been extended to the plaintiff as a right to amend his complaint. *Barnes v. Crawford*, 115 N. C. 76, 20 S. E. 386 (1894).

Request at the Same Term.—Where a demurrer, being interposed in good faith, is overruled, the defendant is entitled to plead over, if the request to do so is made at that term, and he may also appeal from the overruling of the demurrer. *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554 (1899); *Perry v. Board*, 130 N. C. 558, 41 S. E. 787 (1902).

Demurrer Must Have Been Interposed in Good Faith.—The right to put in an answer after the overruling of a demurrer, as created by this section, is subject to the qualification that it shall appear that the demurrer was interposed in good faith. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411 (1881).

Hence where the demurrer is frivolous,

the plaintiff is entitled to judgment, unless the court in the exercise of a sound discretion permits the defendant to answer over. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381 (1906).

Order sustaining demurrer for failure to state cause of action does not effect a dismissal but merely strikes the complaint, and the cause remains on the docket and should be dismissed only if plaintiff fails to amend or file a new complaint. *Teague v. Siler City Oil Co.*, 232 N. C. 469, 61 S. E. (2d) 345 (1950).

Time of Answering.—Upon the overruling of the demurrer the defendant is entitled under this section to answer, but he must answer at that term, and the allowance of further time is in the discretion of the court. *Gore v. Davis*, 124 N. C. 234, 32 S. E. 554 (1899).

Leave to Amend Must Be Obtained.—Where a demurrer is overruled the party may not as a matter of course answer or reply; but the case is open for judgment, as if the party had made no defense, unless he obtains leave to amend his pleadings by putting in an answer or reply as authorized by this section. *Ranson v. McClees*, 64 N. C. 17 (1870).

Cited in *Morris v. Cleve*, 194 N. C. 202, 139 S. E. 290 (1927); *Gill v. Smith*, 233 N. C. 86, 62 S. E. (2d) 546 (1950).

§ 1-163. Amendments in discretion of court.—The judge or court may, before and after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding, by adding or striking out the name of any party; by correcting a mistake in the name of a party, or a mistake in any other respect; by inserting other allegations material to the case; or when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the fact proved. When a proceeding taken by a party fails to conform to law in any respect, the trial judge may permit an amendment of the proceeding so as to make it conformable thereto. (C. C. P., ss. 132, 133; Code, ss. 273, 274; Rev., ss. 507, 512; C. S., s. 547.)

- I. In General.
- II. Discretionary Powers of the Court.
- III. Introducing New Cause of Action, Defense or Relief.
- IV. Conforming Pleadings to Facts Found.
- V. Amendments of Process.
- VI. Amendments as to Parties.
- VII. Amendments before Justices of the Peace.
- VIII. Specific Instances.

I. IN GENERAL.

Cross Reference.—See notes under §§ 1-129, 1-131.

Editor's Note.—For a discussion of this section, see 25 N. C. Law Rev. 76.

Amplest Powers of Amendment. — In civil actions, the amplest powers of amendment are given to the courts to amend any

process, pleading or proceeding in such actions either in form or substance for the furtherance of justice, on such terms as shall be just, at any time before or after judgment rendered therein. *State v. Vaughan*, 91 N. C. 532 (1884).

Power to Amend Independent of Statute.—Even independently of the Code, the superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time unless prohibited by some statute, or unless vested rights are interfered with, and a fortiori under the liberal provisions of the Code which have uniformly been beneficially construed by the Supreme Court. *Gilchrist v. Kitchen*, 86 N. C. 20 (1882); *Cantwell v. Herring*, 127 N. C. 81, 37 S. E. 140 (1900).

Inherent Power of Amendment. — The

superior courts possess an inherent discretionary power to amend pleadings or allow them to be filed at any time, unless prohibited by some statute, or unless vested rights are interfered with. *Gilchrist v. Kitchen*, 86 N. C. 20 (1882).

To the same effect in *Gilchrist v. Kitchen*, 86 N. C. 20 (1882), the court says: "But, independent of the Code, we hold that the right to amend pleadings in the cause and allow answers or other pleadings to be filed at any time, is an inherent power of the superior courts which they may exercise at their discretion. The judge presiding is presumed to know best what orders and what indulgence as to filing of pleadings will promote the ends of justice as they arise in each particular case, and with the exercise of this discretion this court cannot interfere because it is not the subject of appeal." *Austin v. Clarke*, 70 N. C. 458 (1874); *Woodcock v. Merrimon*, 122 N. C. 731, 30 S. E. 321 (1898).

It has been held that the allowance of amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice. *Bank v. Sherman*, 101 U. S. 403, 25 L. Ed. 866 (1879).

Liberal Allowance on Proper Terms—Exception. — Amendments to pleadings which further justice, speed the trial of controversies or prevent unnecessary circuitry of action and unnecessary expense, should be liberally allowed on proper terms, *Commissioners v. Blair*, 76 N. C. 136 (1877), except when the effect of the amendment is to allege substantially a new cause of action. *Dosenbacher v. Martin*, 170 N. C. 236, 86 S. E. 785 (1915). See post, this note, "Introducing New Cause of Action or Defense", III.

While amendments to process and pleading, under our procedure, in both civil and criminal causes, are liberally allowed by this section, this does not imply that the court has power to change the nature of the offense intended to be charged so as to charge a different offense in substance from that at first intended. *State v. Clegg*, 214 N. C. 675, 200 S. E. 371 (1939). See also, *Clenenger v. Grover*, 212 N. C. 13, 193 S. E. 12 (1937).

In order to facilitate the determination of causes on their merits, in the furtherance of justice, the courts have wide powers with respect to amendments to pleadings. Amendments, which are permitted in order to conform the pleading to the proof, are limited to those which do not change substantially the claim or defense. *Bank of Ashe v. Sturgill*, 223 N. C. 825, 28 S. E. (2d) 511 (1944).

Allowance in the Liberal Spirit of the Code.—The whole scope and design of the new Code is to discountenance all dilatory pleas, and to afford the parties a cheap and speedy trial upon the merits of their matter in controversy. To effect this end it is the duty of all the courts to allow amendments in the liberal spirit clearly indicated in the Code. *Wilson v. Moore*, 72 N. C. 558 (1875).

The power to permit amendments under this section is divided into two categories: First, amendments before trial or during trial when the adverse party is given opportunity to investigate and rebut any new matter, in which case the court may allow the insertion of allegations "material to the case," and second, amendments offered during or after trial, in which case the power to allow amendments is limited to those making the allegations conform to the evidence and does not extend to those bringing in a new cause of action or changing substantially the form of action originally sued on. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

The power of the court to allow amendments "material to the case" as provided in this section is a broad and discretionary power, and the phrase should be construed in connection with § 1-123 so as to permit amendments relating to the cause alleged and to causes of action arising out of the same transaction or transactions dealing with the same subject of action, subject to the limitations that a wholly different cause of action may not be set up by amendment and that inconsistent causes of action may not be joined. In regard to a related new cause of action set up by amendment, the statute of limitations operates as of the time of the amendment and not the institution of the action. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

The word "case" as used in the phrase "material to the case" should be construed ordinarily in its broader, more comprehensive sense, as embracing the relevant facts arising out of or connected with the transactions forming the subject of action declared upon in the complaint. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

"Anything May Be Amended at Any Time."—The scale of amendments is so liberal that it may well be said that "anything may be amended at any time." *Garrett v. Trotter*, 65 N. C. 430 (1871); *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602 (1945).

Power to Make Any Conceivable Amendment. — In *Moore v. Edmiston*, 70 N. C.

510 (1874), the court speaking of this section says: "By a sweeping curative supplement to this most curative system of pleading, this section confers upon the court the power, both before and after judgment, to make almost any conceivable amendment so as to conform the pleadings to the facts proved."

Powers to Be Exercised Freely.—While the court cannot, without the consent of the parties, so amend, change or modify the pleadings in a pending action so as to make it substantially a new one, *Merrill v. Merrill*, 92 N. C. 657 (1885); *McNair v. Board*, 93 N. C. 364 (1885), (see post "Introducing New Cause of Action") its general powers, and especially those expressly conferred by this and the following sections, to allow amendments of the pleadings "in furtherance of justice," are broad and comprehensive, and in all proper cases should be exercised freely by the court, having due regard to fairness and the rights of the parties. *Ely v. Early*, 94 N. C. 1 (1886).

Object to Try Cases upon Their Merits.—It is the policy of our Code system to be liberal in allowing amendments of process, pleadings, and proceedings, so that causes may be tried upon their merits, and to prevent a failure of justice for reasons which may be technical or frivolous, not affecting the substantial rights of the parties. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

This provision and numerous others of the Code of Civil Procedure show that its purpose is to prevent actions from being defeated on grounds that do not affect the merits of the controversy, whenever it can be done by amending such actions. The pervading idea being to settle controversies by one action, and thereby prevent the loss of the labor and money expended in that action, and the necessity for incurring like labor and expense in a second. *Bullard v. Johnson*, 65 N. C. 436 (1871).

The purpose and scope of the new system is to facilitate the trial and disposition of causes upon their merits; and to this end, when necessary, the process and pleadings are liberally reformed by amendments which do not substantially change the claim or defense. *Cheatham v. Crews*, 81 N. C. 343 (1879).

Time of Amendment.—Formerly this section applied only to amendments made before or at the trial, and not at a time subsequent. *Askew v. Capehart*, 79 N. C. 17 (1878). But now it in terms provides for amendments after judgment as well as before.—Ed. Note.

There is no force in the argument, that

an amendment which removes the objections must be made before they are taken, and cannot be made afterwards, since it is precisely for such a purpose the power is conferred to be exercised in furthering the ends of justice, at the discretion of the judge, in order that such as are trivial, and do not affect the substantial and understood matters in controversy, may be removed. *State v. Giles*, 103 N. C. 391, 9 S. E. 433 (1889).

Amendment after Judgment.—If necessary, the pleadings may be reformed even after judgment to conform to the facts proved. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155 (1900).

Same—The Answer.—The court may in its discretion even after judgment allow an answer to be amended to conform to the proof. *Waters v. Waters*, 125 N. C. 590, 34 S. E. 548 (1899).

Amendment after Demurrer.—The trial court has the discretionary power to allow plaintiff to amend his complaint, upon the hearing of defendants' demurrer thereto, so as to allege that the negligence complained of was the proximate cause of the injury. *Bailey v. Roberts*, 208 N. C. 532, 181 S. E. 754 (1935).

Amendment after Verdict.—The court has power to allow an amendment after verdict, so as to supply the omission of an averment in the pleading. *Penny v. Smith*, 61 N. C. 35 (1866); *Pearce v. Mason*, 78 N. C. 37 (1878); *Roberson v. Hodges*, 105 N. C. 49, 11 S. E. 263 (1890).

After Reversal.—Under this section upon the receipt of a certificate of reversal of judgment overruling a demurrer, the lower court may allow an amendment of the summons and complaint in accordance with the opinion. *Commissioner of Banks v. Harvey*, 202 N. C. 380, 162 S. E. 894 (1932).

After Certification of Decision of Supreme Court.—The trial court has discretionary power to allow a party to amend his pleading after certification of the decision of the Supreme Court on appeal to allege facts relied on as an estoppel, and the exercise of such discretion is not subject to review except for palpable abuse. *Carolina Power, etc., Co. v. Bowman*, 231 N. C. 332, 56 S. E. (2d) 602 (1949).

Amendment after Order and Confirmation of Sale.—In *Stafford v. Harris*, 72 N. C. 198 (1875), the court held that the probate court (now the clerk of the superior court) had no authority, after order of sale and confirmation of sale and order to make title, to entertain a motion in the cause on the part of the purchaser to so amend the pleadings as to include another tract

of land not mentioned, and that the judge would have no power to amend the petition upon parol evidence that a tract of land had been omitted therefrom through mistake.

Amendment of Affidavit upon Which Substituted Service Based.—While an affidavit upon which substituted service is based may be amended, and ordinarily in that respect comes under the provisions of this section, such amendment will not validate a prior judgment rendered upon the defective service, which judgment is necessarily void because of want of jurisdiction. *Rodriguez v. Rodriguez*, 224 N. C. 275, 29 S. E. (2d) 901 (1944).

Presumption of Facts Supporting Amendment.—The trial judge will be presumed to have found the facts necessary to support his order allowing an amendment to the pleading, when no facts are stated in the record. *Patterson v. Champion Lumber Co.*, 175 N. C. 90, 94 S. E. 692 (1917).

Relation Back Doctrine. — An amendment when properly allowed will date back to the time of the institution of the suit. *Lefler v. Lane & Co.*, 170 N. C. 181, 86 S. E. 1022 (1915).

An amended summons, under this section, relates back to the commencement of the action unless the amendment changes the cause of action or brings in new parties, in which event the amendment is effective only from the date it was granted. *Lee v. Hoff*, 221 N. C. 233, 19 S. E. (2d) 858 (1942).

In the absence of showing that the rights of innocent third persons would be injuriously affected, an amendment relates back to the commencement of the action. *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602 (1945).

Jurisdiction. — In order to allow an amendment, the court must have jurisdiction of the cause. An amendment presupposes jurisdiction of the case. *Hodge v. Williams*, 22 How. (63 U. S.) 87, 16 L. Ed. 237 (1859).

Power of Clerk of Court.—The clerk of the court acting as and for the court has authority, out of term time, to allow all proper amendments. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889).

Verification of Answer by Amendment.—An unverified answer may be allowed to be verified by amendment in the discretion of the court. *Banks v. Gay Mfg. Co.*, 108 N. C. 282, 12 S. E. 741 (1891).

Void Proceedings Not Curable by Amendment. — If the proceedings are so defective in form and substance that they are void upon their faces, no amendment

can cure them. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

In the Supreme Court.—In proper cases the Supreme Court will allow an amendment to the complaint for the furtherance of justice. *Deligny v. Tate Furniture Co.*, 170 N. C. 189, 86 S. E. 980 (1915). See § 7-13.

On appeal from a motion to dismiss, on the ground of the insufficiency of the complaint to allege a cause of action, where merely a good cause has been defectively stated, the action will not be dismissed in the Supreme Court on motion made there, but if necessary, an amendment will be allowed to conform the pleadings to the facts proved. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207 (1920).

Applied in *Henley v. Holt*, 214 N. C. 384, 199 S. E. 383 (1938); *Smith v. Smith*, 226 N. C. 506, 39 S. E. (2d) 391 (1946); *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

Cited in *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15 (1929); *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929); *Hargett v. Lee*, 206 N. C. 536, 174 S. E. 498 (1934); *Choate Rental Co. v. Justice*, 212 N. C. 523, 193 S. E. 817 (1937); *Silver v. Silver*, 220 N. C. 191, 16 S. E. (2d) 834 (1941); *Whitehurst v. Hinton*, 222 N. C. 85, 21 S. E. (2d) 874 (1942).

II. DISCRETIONARY POWERS OF THE COURT.

Powers Discretionary — When Reviewable.—It has been well settled in this State that no appeal lies to the Supreme Court from the exercise of a discretionary power of the superior court. But if the exercise of a discretion by that court is refused upon the ground that it has no power to grant a motion addressed to its discretion, the ruling of that court is reviewable. *Gilchrist v. Kitchen*, 86 N. C. 20 (1882). See *Life Ins. Co. v. Edgerton*, 206 N. C. 402, 174 S. E. 96 (1934); *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 179 S. E. 457 (1935).

An application for leave to amend a pleading after time for filing has expired is addressed to the sound discretion of the trial court, and its ruling thereon is not reviewable in the absence of abuse of discretion. *Hooper v. Glenn*, 230 N. C. 570, 53 S. E. (2d) 843 (1949).

Where plaintiff learned the facts for the first time when defendant was examined adversely, and over objection was allowed to file an amendment to the complaint, it was held that this was a matter resting in the sound discretion of the trial court.

Hatcher v. Williams, 225 N. C. 112, 33 S. E. (2d) 617 (1945).

Discretionary, with or without Terms.—The judge can, in his discretion, refuse the motion to amend or grant it with or without terms. *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891).

Not Reviewable Except for Palpable Abuse.—The discretion is not reviewable in the absence of palpable abuse. *Gordon v. Pintsch Gas Co.*, 178 N. C. 435, 100 S. E. 878 (1919); *Hogsed v. Pearlman*, 213 N. C. 240, 195 S. E. 789 (1938); *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

A discretionary ruling on a motion to amend pleadings is not reviewable on appeal. *Byers v. Byers*, 223 N. C. 85, 25 S. E. (2d) 466 (1943); *Pharr v. Pharr*, 223 N. C. 115, 25 S. E. (2d) 471 (1943).

Discretion Not Arbitrary but Legal.—This discretion however is not arbitrary, but implies a legal discretion. *Hudgins v. White*, 65 N. C. 393 (1871).

Changing Affidavit into Complaint.—While the action of the trial judge in refusing to permit an amendment to the pleadings is usually a matter within his discretion and not reviewable, it was held error, under the circumstances of the case, for the judge to refuse an amendment in effect to change the affidavit into the form of a complaint. *Mason v. Stephens*, 168 N. C. 369, 84 S. E. 528 (1915).

Verification to an Answer.—It is discretionary with the trial court to allow an amendment of a verification to an answer. *Cantwell v. Herring*, 127 N. C. 81, 37 S. E. 140 (1900).

Amendment Setting Up Statute of Limitation.—It is discretionary with the court whether or not to allow an amendment setting up the statute of limitations. *Smith v. Smith*, 123 N. C. 229, 31 S. E. 471 (1898); *Balk v. Harris*, 130 N. C. 381, 41 S. E. 940 (1902).

Reinstatement of Nonsuited Causes.—Where plaintiff voluntarily amends his complaint by entering a *nol proas* as to certain causes of action, it is a matter of discretion in the court, whether he shall reinstate them. *Grant v. Burgwyn*, 88 N. C. 95 (1883).

Costs.—When the superior court has power to amend, the question of costs is entirely in its discretion. *Robinson v. Willoughby*, 67 N. C. 84 (1872).

III. INTRODUCING NEW CAUSE OF ACTION, DEFENSE OR RELIEF.

Permissible When It Introduces No New Cause.—Unless its effect is to add a new cause of action or change the subject

matter of the original action, no objection can successfully be urged where the amendment is germane to the original action, involving substantially the same transaction and presenting no real departure from the demand as originally stated. *Lefler v. Lane & Co.*, 170 N. C. 181, 86 S. E. 1022 (1915); *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767 (1936).

The judge of the superior court has within his sound discretion the statutory authority to permit the plaintiff to amend his complaint when thereby the ground of the alleged cause is not so substantially changed as to become a new or different cause of action. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131 (1929).

The court in its discretion may allow an amendment to pleadings setting up new matter, even where the transaction occurred after the action was brought, provided it does not assume the role of a new and entirely different claim. *Nassaney v. Culler*, 224 N. C. 323, 30 S. E. (2d) 226 (1944).

Except in proper instances a party to a suit should not be allowed to change his position with respect to a material matter in the course of litigation Especially is this so where the change of front is sought to be made between the trial and appellate courts. *Hylton v. Mount Airy*, 227 N. C. 622, 44 S. E. (2d) 51 (1947).

Amendment by Referee.—It would seem that this section is broad enough to warrant the action of the referee in allowing partner to come in as party plaintiff and adopt complaint previously filed by co-partner. *Sheffield v. Alexander*, 194 N. C. 744, 140 S. E. 726 (1927). See note under § 1-192.

Instances of New Cause Not Introduced.—In an action to recover damages for a conspiracy to prevent the employment by others of a discharged employee, under §§ 14-355, 14-356, the cause of action alleged was not substantially changed by allowing an amendment to the effect that the plaintiff had been employed by the defendant prior to the time of the alleged conspiracy. *Goins v. Sargent*, 196 N. C. 478, 146 S. E. 131 (1929).

An amendment to a complaint in an action to set aside a conveyance of land for fraud is not substantially changed by an amendment allowed the plaintiff in the discretion of the trial court, to allege damages sustained and provable as directly resulting therefrom. *Parker v. Mecklenburg Realty, etc., Co.*, 195 N. C. 644, 143 S. E. 254 (1928).

Where the complaint in an action for nonpayment of draft alleged that defendant failed to pay when it was received, it was held not error to allow an amendment alleging that defendant had in fact accepted the draft by entering it on its books and had held it for more than 24 hours thereafter during which time it failed and refused to return it accepted or nonaccepted. *Morris v. Cleve*, 197 N. C. 253, 148 S. E. 253 (1929).

In a suit by an administratrix against a business associate of her intestate and others for an accounting as to properties purchased, for the joint account of such intestate and such associate, with moneys furnished by plaintiff's intestate for their joint enterprise, an amendment to the complaint, alleging fraud in concealing property purchased for such joint account and failure to account therefor, is allowable as a cause of action arising out of the same transaction and connected with the same subject of action. *Hatcher v. Williams*, 225 N. C. 112, 33 S. E. (2d) 617 (1945).

Plaintiff sued to recover a truck purchased by him which he permitted his brother to drive under a rental agreement. Plaintiff's evidence was to the effect that the truck plus certain rent money and money belonging to plaintiff were used in the swap of the truck for another vehicle. It was held that the trial court had discretionary power to allow plaintiff to amend to assert his right to recover the new vehicle by virtue of a resulting or a constructive trust, since the amendment does not change the nature of the case or add any cause of action. *Baker v. Baker*, 230 N. C. 108, 52 S. E. (2d) 20 (1949).

Same—Amendatory Summons. — Where one administratrix has renounced her right, and a second has been appointed, and the second administratrix has brought action and made her mark to the complaint, the action of the trial judge in correcting a mistake in the summons and complaint by changing the name of the first administratrix to that of the second does not change the cause of action, and does not constitute error. *Hill v. Norfolk So. Ry. Co.*, 195 N. C. 605, 143 S. E. 129 (1928).

Consent Necessary When New Cause Introduced.—The court cannot, except by consent, allow an amendment which changes the pleadings so as to make it substantially a new action, but an amendment which only adds to the original cause of action is not of this nature, and may be allowed. *Ely v. Early*, 94 N. C. 1 (1886).

Instance of New Cause of Action.—In an action by a tenant against his landlord

for selling the leased premises during the term to the tenant's damage, the court has no power to permit an amendment alleging that the parties were engaged in a joint adventure in the operation of the premises, since the new matter alleges a wholly different cause of action arising from a different and distinct legal relationship, and further such cause based upon obligations arising from the relation of joint adventures is inconsistent with and contradictory to the original cause based upon the relationship of landlord and tenant. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

Defective Statement of a Good Cause. —A defective statement of a good cause of action, as distinguished from a failure to state a good cause of action, is a defect which is curable by amendment, even after verdict. *Blalock v. Clark*, 133 N. C. 306, 45 S. E. 642 (1903). To the same effect see also, *Fidelity, etc., Co. v. Jordan*, 134 N. C. 236, 46 S. E. 496 (1904).

Adding New Plea after Appeal Reached Supreme Court.—The power and duty of the judge in respect to amendments after the appeal has reached this court depend on these sections, and there is nothing in these sections requiring the judge to allow a new plea to be put in, though he may do so on payment of all costs up to that time. The Code is liberal in allowing amendments, but the adding of a new plea stands on different grounds from the amending of a formal or even a substantial defect in a plea which does not introduce a substantially new defence. *Hinton v. Deans*, 75 N. C. 18 (1876).

Changing the Form of Action. — In *Oates, etc., Co. v. Kendall*, 67 N. C. 241 (1872), the main objection to the recovery was that the plaintiff, in his complaint, had alleged and set out a case in trover, when the case, as proved on the trial, showed that it should have been in the nature of an assumpsit for money had and received, the court said: "It would be in violation of one of the most important provisions of the new Code to permit a party to defeat a recovery, upon the sole ground that the form of the complaint is not just as it should have been, from the facts established by the proofs in the case. To allow such an objection now to avail a party would be to defeat that great and vital principle of the Code and Constitution which declares that there shall be but one form of action, and it would incorporate into our new system all the mischief and intricacies touching the form of action intended to be obviated by that provision."

No such objection can be permitted to defeat a recovery."

Same—Changing the Cause from Contract to Tort.—It is not error to allow a plaintiff to amend his complaint, assumed to state a cause of action on contract, so as to declare on a tort arising out of the same transaction. *Reynolds v. Mt. Airy, etc., R. Co.*, 136 N. C. 345, 48 S. E. 765 (1904).

Amendment Changing the Relief Sought.—A complaint in an action for the possession of the land under a deed absolute which has been declared to be a mortgage may be so amended as to allow a demand for a judgment of foreclosure of the mortgage. *Robinson v. Willoughby*, 67 N. C. 84 (1872).

Defense May Not Be Substantially Changed.—See *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Statute of Limitation.—Where a distinct cause of action is allowed to be inserted in a complaint, by amendment, it is tantamount to bringing a new action, and the statute of limitation runs to the time when the amendment is allowed; but this rule does not apply when the new matter allowed by the amendment constitutes a part of the original cause of action. *Ely v. Early*, 94 N. C. 1 (1886).

So where, in an action to recover land, the court allowed the plaintiff to amend, so as to set up a mutual mistake in a deed, the statute only runs against the relief demanded by the amended complaint to the time when the action was commenced. *Ely v. Early*, 94 N. C. 1 (1886).

Amendment of Insufficient Affidavit.—The court has the power to allow the amendment of an affidavit upon which a warrant of attachment had issued, although the former affidavit is wholly insufficient. *Brown, etc., Co. v. Hawkins*, 65 N. C. 645 (1871).

IV. CONFORMING PLEADINGS TO FACTS FOUND.

Cross References.—See §§ 1-165, 1-168.

Leave to Amend to Conform Pleadings to Facts.—Under this section and § 1-168, a plaintiff may sue for a horse and recover a cow; but in order to do this, when the variance appears, the plaintiff must obtain leave to amend by striking out "horse" and inserting "cow", or else the jury must find the facts specially or the case must be submitted to the jury "on issues," so that the pleading may be amended and be made to conform to the facts proved on such terms as the judge may deem proper, "unless the amendment affects the merits and substan-

tially changes the claim or defense." *Shelton v. Davis*, 69 N. C. 324 (1873).

The court has discretionary power to allow a pleading to be amended after the introduction of evidence so as to make the pleading conform to the evidence. *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469 (1936).

Wide latitude is given the trial court to permit amendment to the pleading to conform to the evidence, even after verdict, but the allowance of an amendment after verdict in substantial disagreement with the evidence must be held for error. *Cas-stevens v. Casstevens*, 231 N. C. 572, 58 S. E. (2d) 368 (1950).

Evidence Cannot Be Considered Without Amendment.—Where, in an action for the alleged conversion of money, the complaint did not state that funds were received by the person charged with the conversion as trustee or agent, evidence tending to show that they were so received cannot be considered in the absence of an amendment, under this section, conforming the complaint to the evidence. *Parker v. Harden*, 121 N. C. 57, 28 S. E. 20 (1897).

In *Dickens v. Perkins*, 134 N. C. 220, 46 S. E. 490 (1904), the court said: "If the plaintiffs were unable to show by their proof that the contract was made as alleged, and by the evidence established a different agreement, they could have availed themselves of the latter and have enforced the same only by an amendment, provided the cause of action was not thereby substantially changed."

Conforming Complaint to Facts Found by Referee.—Under this section the trial court may, upon the coming in of a referee's report, permit an amendment to the complaint to conform to the facts found if the amendment does not change substantially the cause of action. *Nims Mfg. Co. v. Blythe*, 127 N. C. 325, 37 S. E. 455 (1900).

V. AMENDMENTS OF PROCESS.

Generally.—If the paper bear internal evidence of its official origin, and of the purpose for which it was issued, it comes within the definition of original process, and the broad discretion with which judges are clothed by this section may be freely exercised, subject only to the restriction that the alteration shall not disturb or impair any intervening rights of third parties. *Thomas v. Womack*, 64 N. C. 657 (1870); *Cheat-ham v. Crews*, 81 N. C. 343 (1879); *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

For an elaborate review of the author-

ities upon amendments of the process, particularly as to the signature and seal thereof, see *Henderson v. Graham*, 84 N. C. 496 (1881).

Not Permissible as to Prejudice Acquired Interest.—Amendments of process are not admissible when the effect will be to prejudice acquired interests or take away any defense which could be made to an action begun at the time of the amendments. *Phillips v. Holland*, 78 N. C. 31 (1878); *Henderson v. Graham*, 84 N. C. 496 (1881).

Defects Curable by General Appearance Amendable.—With reference to the amendment of a process, it is held that whether a summons should be amended is a discretionary matter and not reviewable (*Henderson v. Graham*, 84 N. C. 496 (1881)). From this is to be deduced the rule, in regard to the amendment of process, that any defect or omission of a formal character, which would be waived or remedied by a general appearance or answer upon the merits, may be treated as a matter which can be remedied by amendment at the discretion of the court, when the rights of other persons are not affected and no protection withdrawn from the officer. *Jackson v. McLean*, 90 N. C. 64 (1884).

Absence of Clerk's Signature.—Under this section the absence of the clerk's signature on a summons is a defect of a formal character which may be waived by general appearance and is therefore remediable by amendment. *Hooker v. Forbes*, 202 N. C. 364, 162 S. E. 903 (1932).

Where a clerk of the superior court received and docketed summons and complaint in a civil action, affixed the seal of court to the summons and sent the papers with necessary fees to the sheriff of another county for service, and the papers were properly served and returned to the clerk issuing same, who then signed the summons, upon motion of defendant to dismiss upon special appearance, the court has power, in its discretion, to allow the summons to be amended by affixing thereto the signature of the clerk. *North Carolina Joint Stock Land Bank v. Aycock*, 223 N. C. 837, 28 S. E. (2d) 494 (1944).

The Seal.—But, unless there is something upon the face of the paper which stamps upon it unmistakably an official character, it is not a defective summons, but no summons at all—no more than one of the usual printed blanks kept by the clerks of the courts. The seal of the court is evidence throughout the State of the fact that a paper to which it is attached

emanates from the tribunal to which it belongs, and though the clerk's signature is the prescribed evidence of genuineness as to all process to be served in the county in which his court is held, yet, if he issue to such county a summons in the usual form, attested by his official seal, but not subscribed, and containing his name only as printed in the body of the paper, the court has the power, after the defendant has entered an appearance, to amend by allowing the clerk to sign his name. *Henderson v. Graham*, 84 N. C. 496 (1881); *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

On the other hand, where a summons is issued to an adjacent county, signed by the clerk of the superior court, but not attested by the seal, and served upon the defendant, it was held that, after an appearance by virtue of such service, the court might, in its discretion, allow the seal to be attached, as it could also to final process upon which property had been sold in another county, and after it had been returned by the officer who sold. *Seawell v. Bank*, 14 N. C. 279 (1831); *Purcell v. McFarland*, 23 N. C. 34 (1840); *Clark v. Hellen*, 23 N. C. 421 (1841); *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

The seal, though not required, or the signature, though not imparting authenticity in the county to which the summons issues, is evidence of the fact that the clerk has approved the prosecution bond or permitted the issuance on a proper affidavit; and when the defendant waives the informality or irregularity by appearing, the curative power of amendment may be invoked, but not when there is nothing upon the face of the paper to give assurance that it received the sanction of the clerk before it was delivered to the sheriff to be served. *Redmond v. Mullenax*, 113 N. C. 505, 18 S. E. 708 (1893).

Same—Process Issued Out of County.—By amendment a seal may be affixed to a process issued out of the county after its return. *McArter v. Rhea*, 122 N. C. 614, 30 S. E. 128 (1898).

Informalities Cured.—Informalities in the process may be cured by amendment, if allowed by the court. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

Summons Issued under Erroneous Name.—In a civil action, where summons is issued and served and complaint filed against defendant under an erroneous name, and such defendant, on special appearance, moves to dismiss for want of jurisdiction on that ground, and plaintiff

files a motion to amend summons and complaint to conform to defendant's true name, there is no error in allowing the motion to correct the mistake. *Propst v. Hughes Trucking Co.*, 223 N. C. 490, 27 S. E. (2d) 152 (1943).

Middle Initial Incorrect. — In an action instituted against husband and wife on a note signed by them as makers, the names of defendants in the summons and return were correct except for the middle initial. It was held that upon the hearing of defendants' motion to dismiss for want of jurisdiction, the court had discretionary power to permit the officer to testify that in fact the summons was served on defendants, and to permit plaintiff's motion to amend the summons and to correct the officer's return to show the correct names of defendants. *Lee v. Hoff*, 221 N. C. 233, 19 S. E. (2d) 858 (1942).

Amendment to Give Effectual Jurisdiction.—Where process is erroneously made returnable before the clerk, instead of to the term of the court, the court at term, having acquired jurisdiction, may make all necessary amendments of the process and proceedings in order to give it effectual jurisdiction, if no intervening and vested right is injuriously affected, and when the process is thus amended, it justifies the original service of any official action previously taken under it. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

Amendment in Attachment Proceedings.—Amendment under this section may not be permitted where the rights of third persons are injuriously affected. And where the surety on defendant's undertaking has executed a bond in a substantial sum, in accordance with § 1-457 (now § 1-440.39), to discharge the lien on property which has been attached by virtue of a warrant based solely on an unfounded allegation in the affidavit, the allowance of an amendment thereafter to set up a new ground of attachment would have the effect of imposing on the surety an obligation which he did not assume. *Rushing v. Ashcraft*, 211 N. C. 627, 191 S. E. 332 (1937).

Allegations as to Value Supplied. — Where in an action of claim and delivery of personal property, the allegation as to the value was omitted in the summons, the justice of the peace properly allowed a motion to amend by filling in the blank left for such allegation. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212 (1893).

Applied in *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

VI. AMENDMENTS AS TO PARTIES.

Generally.—The power of the judge to make additional parties to an action is settled, especially when the amendment did not change the cause of action, nor work any injustice to the opposing party. *Mills v. Callahan*, 126 N. C. 756, 36 S. E. 164 (1900); *North Carolina Bank, etc., Co. v. Williams*, 209 N. C. 806, 185 S. E. 18 (1936).

As a general rule the trial court has the discretionary power to make new parties, especially when necessary in order that there may be a full and final determination and adjudication of all matters involved in the controversy. *Service Fire Ins. Co. v. Horton Motor Lines*, 225 N. C. 588, 35 S. E. (2d) 879 (1945).

Limitation on Operation of Rule.—The court has the power to make additional parties plaintiff or defendant. However, when the court makes a new party plaintiff it constitutes a new action against the defendant as to the new party and the action as to him does not relate back to the date of the institution of the original cause so as to deprive the defendants of the right to plead the statute of limitations in bar of recovery in such action. *Home Real Estate, etc., Co. v. Locker*, 214 N. C. 1, 197 S. E. 555 (1938).

Discretionary and Not Reviewable.—It very rarely happens that the making of additional parties prove prejudicial, and hence orders making such parties are discretionary with the trial court, and are not reviewable upon appeal. *State v. Arrington*, 101 N. C. 109, 7 S. E. 652 (1888); *Maggett v. Roberts*, 108 N. C. 174, 12 S. E. 890 (1891); *Burrell v. Hughes*, 116 N. C. 430, 21 S. E. 971 (1895); *Tillery v. Candler*, 118 N. C. 888, 24 S. E. 709 (1896); *Bernard v. Shemwell*, 139 N. C. 446, 52 S. E. 64 (1905); *Wilmington v. Board of Education*, 210 N. C. 197, 185 S. E. 767 (1936).

New Parties to a Pending Action. — By amendment proper new parties may be brought into a pending action. *Dobson v. Southern Ry. Co.*, 129 N. C. 289, 40 S. E. 42 (1901).

Making Parties after Judgment. — In a proper case additional parties can be made even after judgment. *Bird v. Gilliam*, 125 N. C. 76, 34 S. E. 196 (1899).

Joint Payees—Statute of Limitation. — Where a note is made to the husband and his wife as joint payees, and the action thereon is brought by the husband alone, an amendment joining the wife as a party to the action, after the running of the statute of limitations is in effect the bringing

of a new action, which also will be barred. *Fishell v. Evans*, 193 N. C. 660, 137 S. E. 865 (1927).

Correcting Misnomer or Mistake in Name of Party.—Under the broad discretionary powers of the trial court to permit amendment of process and pleading, the court may allow amendment to correct a misnomer or mistake in the name of a party provided the amendment does not amount to a substitution or entire change of parties. *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785 (1915).

Disintegrating Misjoined Parties.—Where there has been a misjoinder of parties as well as causes of action, it is within the discretion of the trial judge at any time before verdict or adverse decision, to permit the withdrawal of one of the parties, leaving the action to proceed singly as to the other, and to allow a proper amendment of the pleadings as to the remaining cause, where the defendant has asked no affirmative relief and his defense cannot be prejudiced; but the defendant is entitled to recover his cost against the party retiring from the case. *Campbell v. Washington Light, etc., Co.*, 166 N. C. 488, 82 S. E. 842 (1914).

Withdrawal of One of Joint Plaintiffs—Statute of Limitation.—Where damages are sought by joint plaintiffs upon the alleged negligence of the defendant, the cause of action is such negligence; and where one of them is permitted to withdraw and the other to amend, owing to a mistaken construction of a contract as to the joint ownership of the property damaged, the amendment referring to the same alleged negligent act does not create a new cause of action, but, being upon the same cause, relates back to the issuance of the summons, and when that was done in time the statute of limitations will not have run against it. *McLaughlin v. Raleigh, etc., R. Co.*, 174 N. C. 182, 93 S. E. 748 (1917). See "Introducing New Cause of Action, Defense or Relief," III.

Striking One of Several Plaintiffs.—Under this section the court, in its discretion, may allow the motion of one of the several plaintiffs to strike out his name, and the exercise of such discretion, whether by refusing or granting the motion, is not re-

viewable. *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272 (1890).

Refusal to Strike Discretionary.—The refusal or granting of a motion to strike out the name of a party is a matter of discretion and not reviewable, unless the refusal is placed on the want of power, in which case an appeal lies. *Henderson v. Graham*, 84 N. C. 496 (1881); *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272 (1890).

Substituting a Stranger for a Party.—In *Bullard v. Johnson*, 65 N. C. 436 (1871), the question whether, under the broad power of amending, the superior court in an action by A could strike out the name of A and insert that of B, a stranger to the controversy, either directly or indirectly, as by first adding the name of B as co-plaintiff, and then striking out the name of A, was raised but was not decided.

Substitution of Corporation for President Thereof.—The trial judge has the power to allow the substitution of the company as the party plaintiff for the president of the company, the character or nature of the action not being substantially changed thereby. *Street v. McCabe*, 203 N. C. 80, 164 S. E. 329 (1932).

Administrator Made Party in Individual Capacity.—Where, in proceedings to sell lands to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereupon agreed that the matters in controversy should be heard by the judge without a jury upon an agreed statement of facts, and that the judge might find such additional facts as he may consider necessary to complete determination of the matters in controversy, the proceeding is converted by consent into an administration suit, and petitioner is precluded by the agreement from objecting to an order requiring her to be made a party in her individual capacity, and to account for certain money paid to her either individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is limited to the matters submitted. *Edney v. Mathews*, 218 N. C. 171, 10 S. E. (2d) 619 (1940).

Making Trustee Party.—Where money is borrowed to pay off a prior mortgage and the lender takes another mortgage to secure the money so borrowed which is later declared invalid for improper acknowledgment, and the lender brings action to foreclose under the first mortgage

under the doctrine of equitable subrogation: Held, the trustee can be made a party by amendment if it should be necessary. *Investment Securities Co. v. Gash*, 203 N. C. 126, 164 S. E. 628 (1932).

Making New Parties upon Appeal to Superior Court.—A connecting line of carriers had been sued in a justice's court for the statutory penalty in failing to transport the shipment within a reasonable time, and appealed to the superior court from an adverse judgment. It was held proper for the court, in its discretion to order the other carrier to be made a party therein, though the amount involved was less than \$200, without the necessity of remanding the case to the justice's court for that purpose. *Sellars Hosiery Mills v. Southern R. Co.*, 174 N. C. 449, 93 S. E. 952 (1917).

Substitution of Plaintiff upon Appeal to Superior Court.—In *Bullard v. Johnson*, 65 N. C. 436 (1871), and *State v. Cauble*, 70 N. C. 62 (1874), a new plaintiff was allowed to be substituted in a warrant issued by a magistrate after it reached the superior court by appeal. *Cheatham v. Crews*, 81 N. C. 343 (1879).

Mistake in Designating Parties Defendant.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785 (1915).

Correction of Mistake in Name Authorized.—The correction of a mistake in the name of a party after judgment is expressly authorized by this section and does not come within the limitation of "one year after notice thereof" prescribed by § 1-220. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667 (1894).

Descriptio Personae.—In a summons against A. H. B., the words "President of Southern Improvement Company," are mere descriptio personae and do not make the company a party to the proceeding, but the court can allow an amendment making the company a party either with its consent or by service of such amended summons upon the corporation. *Plemmons v. Southern Improve. Co.*, 108 N. C. 614, 13 S. E. 188 (1891).

To Show Real Parties.—Upon the facts in this case, it is held, on appeal, that the trial court properly allowed the plaintiffs to amend their complaint to allege that some of the plaintiffs had acquired the interests of the others in a policy of insurance against loss by fire, in furtherance of justice, under the provisions of this sec-

tion. *Redmon v. Netherlands Fire, etc., Ins. Co.*, 184 N. C. 481, 114 S. E. 753 (1922).

VII. AMENDMENTS BEFORE JUSTICES OF THE PEACE.

Generally.—A justice of the peace has power to amend any warrant, process, pleading or proceeding in any action pending before him, either civil or criminal, either in form or substance. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212 (1893).

Before the adoption of the Code there was no statute investing the court with the power of amending process, proceedings, etc., had before justices of the peace. The only legislation on that subject was that "no process issued by a justice of the peace shall be set aside for the want of form if the essential matters are set forth therein." This embraced civil as well as criminal process, but gave no power to amend in matters of substance. *State v. Vaughn*, 91 N. C. 532 (1884).

Nature of Pleadings—Ample Power to Amend.—The pleadings in a justice's court need not be in any particular form or drawn with technical accuracy, but are sufficient if they "enable a person of common understanding to know what is meant," and they may not "be quashed or set aside for want of form, if the essential matters are set forth therein," and ample powers are given the court to amend either in substance or form, at any time before or after judgment in furtherance of justice. *Aman v. Dover, etc., R. Co.*, 179 N. C. 310, 102 S. E. 392 (1920).

Amendment to Show Jurisdiction.—In a proceeding before a justice's court, if the averment of value is omitted from the summons by mistake or inadvertence, an amendment may be allowed even on the trial in the superior court, to make it appear that the justice's jurisdiction was not improperly exercised. *Cox v. Grisham*, 113 N. C. 279, 18 S. E. 212 (1893).

VIII. SPECIFIC INSTANCES.

Setting Up Mistake in Deed.—In an action to recover land, the court may allow an amendment so as to set up a mistake in a deed. *Ely v. Early*, 94 N. C. 1 (1886).

A petition to lay out roads is within the meaning of this section authorizing the court to amend pleadings in any action, etc. *Pridgen v. Anders*, 52 N. C. 257 (1859).

Express Contract of Complaint on Quantum Meruit.—Upon a complaint broad enough to set out an action on the quantum meruit, the plaintiff will not be con-

fined to the express contract, and if not broad enough, the court may allow an amendment after a verdict making it so. *Roberts v. Deming Woodworking Co.*, 111 N. C. 432, 16 S. E. 415 (1892).

Increasing Amount of Demand. — In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. *Warrington v. Hardison*, 185 N. C. 76, 116 S. E. 166 (1923).

To Allege Warranty. — Where the plaintiff seeks to recover damages upon the allegation that the defendant falsely and knowingly induced him to purchase an automobile upon false representations, it is within the sound discretion of the trial judge to permit an amendment alleging a warranty, in addition to the allegations in the original complaint; and where the statute of limitations has not run as to the latter, the amendment cannot be construed to have a different result. *Wiggins v. Landis*, 188 N. C. 316, 124 S. E. 621 (1924).

After Plea of Contributory Negligence. — Where, in an action involving the issue of negligence, contributory negligence is pleaded in substance by defendant, an

amendment allowed defendant to make his allegation more specific is not held reversible error. *Gholson v. Scott*, 200 N. C. 429, 157 S. E. 64 (1931).

Petition Omitting Portion of Land. —

When lands of a deceased person are sold in a partition proceeding and it appears from the pleadings and evidence that it was the manifest intention of all parties that the entire lands of decedent were included in the sale, but by mistake a tract of 1.3 acres was omitted from the specific description in the petition, although announced at the sale as included, a motion in the cause by the purchaser, or his assignee, is the proper procedure to have the mistake corrected by amendment *nunc pro tunc*, and the court may make its decree conform thereto. *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602 (1945).

In an action by a tenant against his landlord for selling the leased premises during the term to the tenant's damage, the court may permit an amendment that the landlord covenanted not to sell the premises during the term of the lease and that he breached the covenant by selling during the term to a bona fide purchaser, since the allegations of the amendment are relevant and germane to the subject of the action set out in the complaint. *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

§ 1-164. Amendment changing nature of action or relief; effect. — When the complaint is so amended as to change the nature of the action and the character of the relief demanded, the judgment rendered does not operate as an estoppel upon any person acquiring an interest in the property in controversy prior to the allowance of the amendment. (1901, c. 486; Rev., s. 508; C. S., s. 548.)

Cited in *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929); *Perkins v. Langdon*, 233 N. C. 240, 63 S. E. (2d) 565 (1951).

§ 1-165. Unsubstantial defects disregarded. — The court or judge shall, in every stage of the action, disregard any error or defect in the pleadings or proceedings which do not affect the substantial rights of the adverse party; and no judgment may be reversed or affected by reason of such error or defect. (R. C., c. 3, ss. 5, 6; C. C. P., s. 135; Code, s. 276; Rev., s. 509; C. S., s. 549.)

Cross Reference. — As to variance, material and immaterial, between pleading and proof, see § 1-168.

Under this section the form of the prayer for judgment is not material. It is the facts alleged that determine the nature of the relief to be granted. *Bolich v. Prudential Ins. Co.*, 206 N. C. 144, 173 S. E. 320 (1934).

Trial of Causes upon Their Merits. — It is manifest from this and other sections of

the Code that the new system, in its whole structure and scope, looks to a trial of a cause upon its merits, and discountenances objections for defects which may be corrected and removed when made in apt time, and will not entertain them after trial and verdict. *Halstead v. Mullen*, 93 N. C. 252 (1885).

Clerical errors shall be disregarded under the provisions of this section. See *Clawson v. Wolfe*, 77 N. C. 100 (1877);

Patterson v. Walton, 119 N. C. 500, 26 S. E. 43 (1896).

A warrant in attachment, in substantial conformity with the statute, and, in fact, executed by the deputy sheriff of the proper county, was held valid when verified by a proper agent, though by apparent clerical error it was stated in its beginning to have been made by a member of the firm, the power of the trial judge to allow amendments being plenary under the provisions of this section. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227 (1923).

Defective Return of Process—Defect in Name.—A defective or informal return of process will be cured after judgment. *Crawford v. Bank*, 61 N. C. 136 (1867); so will also a defect in the name of a defendant in the summons. *Clawson v. Wolfe*, 77 N. C. 100 (1877).

Mistake in Name.—Names are used to designate persons, and where the identity is certain a variance in the name is immaterial, and hence will be disregarded. *Pat-*

terson v. Walton, 119 N. C. 500, 26 S. E. 43 (1896).

By the Supreme Court.—The Supreme Court will disregard errors or defects in the pleadings or proceedings in the superior court, which are immaterial and where no substantial rights of the appellant will be injuriously affected thereby. *Ricks v. Brooks*, 179 N. C. 204, 102 S. E. 207 (1920).

The interpretation put upon a similar section in New York is that such defects as would be remediable by amendment that does not change substantially the claim or defense, will not sustain an application to dismiss the action. *Halstead v. Mullen*, 93 N. C. 252 (1885).

Quoted in *Bailey v. McPherson*, 233 N. C. 231, 63 S. E. (2d) 559 (1951).

Cited in *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15 (1929); *Pierce v. Mallard*, 197 N. C. 679, 150 S. E. 342 (1929); *Brewer v. Brewer*, 198 N. C. 669, 153 S. E. 163 (1930).

§ 1-166. **Defendant sued in fictitious name; amendment.**—When the plaintiff is ignorant of the name of a defendant the latter may be designated in a pleading or proceeding by any name; and when his true name is discovered, the pleading or proceeding may be amended accordingly. (C. C. P., s. 134; Code, s. 275; Rev., s. 510; C. S., s. 550.)

Cross Reference.—As to amendment in the discretion of the court for correcting a mistake in the name of any party, etc., see § 1-163.

Discretion of Court.—Where a mistake has been made in designating the parties defendant to the action it is within the discretionary power of the superior court to allow the plaintiff to correct the mistake, both in the process and pleadings. *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86

S. E. 785 (1915).

Middle Name or Initial.—When the identity of a party is established a variation in name, and especially a difference in the middle initial, as H. instead of J., is immaterial. In *Words and Phrases* (Second Series), it is said that the common law recognizes but one Christian name, and a middle initial may be dropped or changed at pleasure. *Evans v. Brendle*, 173 N. C. 149, 91 S. E. 723 (1917).

§ 1-167. **Supplemental pleadings.**—The plaintiff or defendant respectively may be allowed on motion to make a supplemental complaint, answer or reply, alleging facts material to the case occurring after, or of which the party was ignorant when his former pleading was filed. Either party may set up by a supplemental pleading, the judgment or decree of any court of competent jurisdiction, rendered since the commencement of an action, determining all or any part of the matter in controversy in said action, and if the judgment is set up by the plaintiff, it shall be without prejudice to any provisional remedy theretofore issued or other proceedings had in the action on his behalf. Such motions may be made before the clerk of the superior court of the county in which the action is pending, by filing with the clerk the original and one copy of the proposed amended pleading and motion, which copy shall be forwarded to the opposing party or counsel and in which motion the clerk shall name a day and time of not less than ten days, unless by consent, to hear any objection to same; from the determination of the clerk, either party may have the matter sent to the judge of, or holding courts in the judicial district in which the matter is pending, by giving notice thereof to the clerk and opposing party or counsel within ten days from such date of hearing by the clerk: Provided, such motion

shall be made at least thirty days before the convening of a term of court at which the cause may be calendared for trial. (C. C. P., s. 136; Code, s. 277; Rev., s. 511; C. S., s. 551; 1929, c. 95.)

Editor's Note.—At common law defendant could take advantage of a defense arising after the commencement of the action by a plea puis darrein continuance if it occurred after the plea was filed. *Williams v. Hutton, etc., Co.*, 164 N. C. 216, 80 S. E. 257 (1913). The supplemental answer prescribed by this section takes the place of the former plea puis darrein continuance.

The 1929 amendment added the third sentence and proviso to this section.

It is within the discretionary power of the trial court to allow the filing of a supplemental complaint. *Speas v. Greensboro*, 204 N. C. 239, 167 S. E. 807 (1933).

Plea of Puis Darrein Waived Previous Pleas.—At common law such a plea confesses the matter which was before in dispute between the parties, and is therefore a waiver of all the pleas previously pleaded. But in this State a plea of puis darrein continuance is in no case construed as a relinquishment of any plea or pleas previously entered. *Morgan v. Cone*, 18 N. C. 234 (1835).

Truth of Plea of Puis Darrein.—A plea of puis darrein continuance will be refused unless the court is satisfied of its truth. *McNaughton & Co. v. Naylor*, 2 N. C. 180 (1795).

Same—When Allowance Discretionary.—Where a petition to be allowed to file a plea puis darrein continuance does not set forth facts which, if true, would be a bar to a recovery, its allowance is discretionary with the court. *Balk v. Harris*, 130 N. C.

381, 41 S. E. 940 (1902).

Release Puis Darrein.—A release to party to a suit, made during its pendency and after the issues are joined, cannot operate as a defense, unless it be pleaded specially since the last continuance. *Smithwick v. Ward*, 52 N. C. 64, 75 Am. Dec. 453 (1859).

Defect of Title Raised by Plea Puis Darrein.—While a plaintiff cannot recover upon the title accruing after the commencement of an action to recover land, a defendant will be permitted by an amendment to his answer in the nature of a plea since last continuance to plead defects in the plaintiff's title, or matter validating his own, which accrued since the action began. *Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2 (1892).

When Supplemental Complaint or Answer Required of New Parties.—A supplemental complaint or answer is required from new parties only when the previous record of the cause does not show how they are connected with the controversy or interested in its result; but where the death of the original party and the relationship of the new parties to him are ascertained, there seems to be no necessity for supplemental pleading. *Hughes v. Hodges*, 94 N. C. 56 (1886).

When a nonsuit has been entered, it is too late to file a supplemental answer containing a counterclaim. *Sydnor Pump, etc., Co. v. Rocky Mount Ice Co.*, 125 N. C. 80, 34 S. E. 198 (1899).

§ 1-168. **Variance, material and immaterial.**—1. No variance between the allegation in a pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action upon the merits. Whenever it is alleged that a party has been so misled, that fact and in what respect he has been misled must be proved to the satisfaction of the court; and thereupon the judge may order the pleading to be amended upon such terms as shall be just.

2. Where the variance is not material as herein provided, the judge may direct the fact to be found according to the evidence, or may order an immediate amendment without costs. (C. C. P., ss. 128, 129; Code, ss. 269, 270; Rev., ss. 515, 516; C. S., s. 552.)

Cross Reference.—As to error or defect in pleadings or proceedings which does not affect substantial rights, see § 1-165.

Editor's Note.—Under this section two situations may present themselves: (1) If the variance is not material, the court may direct the facts to be found according to the evidence; (2) if the variance is material and the adverse party has been taken by surprise or been misled, the court may allow

an amendment upon such terms as may be just. *Brown v. Morris*, 83 N. C. 252 (1880); *Wills v. Branch*, 94 N. C. 142 (1886); *Deligny v. Tate Furniture Co.*, 170 N. C. 189, 86 S. E. 980 (1915).

Hence, when the proof materially departs from the allegation, there can be no recovery without an amendment. *McKee v. Lineberger*, 69 N. C. 217 (1873); *Brittain v. Daniels*, 94 N. C. 781 (1886); *Pendleton*

v. Dalton, 96 N. C. 507, 2 S. E. 759 (1887); Faulk v. Thornton, 108 N. C. 314, 12 S. E. 998 (1891); Hunt v. Vanderbilt, 115 N. C. 559, 20 S. E. 168 (1894); Green v. Biggs, 167 N. C. 417, 83 S. E. 553 (1914); Talley v. Harriss Granite Quarries Co., 174 N. C. 445, 93 S. E. 995 (1917).

Difference of the Old and New Rule on Variances.—The only observable difference between the old and the new rule is that a variance, so slight and unimportant that the adverse party cannot have been misled by it is deemed immaterial and the court will either order an amendment without terms, or will consider the pleading as if amended, and permit evidence to be given under it. And even in the case of a material variance, so substantial that the adverse party may have been misled by the averments, still, if the proofs have an apparent relation to and connection with the allegations, the court will allow an amendment, though, upon terms. But where the proof establishes a case wholly different from the one alleged and inconsistent therewith, then no amendment is permitted, but the cause of action must fail. *Carpenter v. Huffsteller*, 87 N. C. 273 (1882).

Uniformity of Allegata et Probata Not Wholly Dispersed.—The liberal construction given to pleadings under the Code system does not avoid the necessity that the proof must correspond with the allegation, for proof without allegation is as unavailing as allegation without proof; and where the difference between the allegation of the pleading and the proof is substantial, so as to grossly mislead the other party, amounting to alleging one cause of action and proving another, it is not allowed. *Willis v. Branch*, 94 N. C. 142 (1886); *Talley v. Harriss Granite Quarries Co.*, 174 N. C. 445, 93 S. E. 995 (1917).

The chief purpose of pleading is to enable the parties to litigate their rights intelligently and fairly and prevent shifts and undue advantage. It is a well-settled rule that there must be *allegata et probata*. It follows that the court should not receive evidence that is not pertinent in some aspect of material allegations in the complaint, nor should it receive evidence to prove a cause of action not alleged. *McKee v. Lineberger*, 69 N. C. 217 (1873); *McLaurin v. Cronly*, 90 N. C. 50 (1884); *Brittain v. Daniels*, 94 N. C. 781 (1886); *Greer v. Herren*, 99 N. C. 492, 6 S. E. 257 (1888); *Faulk v. Thornton*, 108 N. C. 314, 12 S. E. 998 (1891).

Evidence Not Rejected unless Party Misled.—Even though there be a variance between the allegations of the complaint

and the evidence adduced, the evidence should not be rejected unless the variance will mislead the other party to his prejudice. *Mode v. Penland*, 93 N. C. 292 (1885); *Morgan v. First Nat. Bank*, 93 N. C. 352 (1885).

Accordingly it is held that where a railroad company is sued by a passenger for a wrongful ejection from its train alleged to have been at a certain one of its stations, and upon the trial the evidence of both parties relates with unanimity to a certain other of its stations, the variation will not be deemed as material. *Edwards v. Southern R. Co.*, 162 N. C. 278, 78 S. E. 219 (1913).

Leave to Amend in Case of Substantial Variance.—Where there is a substantial variance between the allegations of the pleading and the proof, the proper procedure is to ask leave to amend the pleading to conform to the proof, (which will be allowed without cost) and it cannot be maintained that the judge should disregard the variance and give judgment according to the proof irrespective of the allegations of the pleading. *Haughton v. Newberry*, 69 N. C. 456 (1873).

Objection to Be Taken in Apt Time.—An objection to a variance between the allegations of the pleadings and the proof, when prejudicial and misleading, etc., should be taken in apt time. *Patterson v. Champion Lumber Co.*, 175 N. C. 90, 94 S. E. 692 (1917).

Defendant Must Pursue Remedy Prescribed.—In the case of a variance between the allegations of the complaint and the proof upon the trial, the defendant must pursue the remedy prescribed in this section or the variance, under our liberal practice of construction, will be deemed immaterial. *Simmons v. Roper Lumber Co.*, 174 N. C. 220, 93 S. E. 736 (1917). See also, *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (1942) (dis. op.).

The adverse party must allege that he was misled, and must prove that fact "to the satisfaction of the court," and show wherein he was misled, and the only penalty and remedy prescribed is an amendment upon such terms as the court may deem just. There is no penalty allowed of dismissal of the action or loss of substantial rights by either party. The sole object is that the case shall be tried and decided upon its merits. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 51 S. E. 55 (1905).

Allegations of time and place are not in general material, and hence a variance between them and the proof shall be disre-

garded. *Pegram v. Stoltz*, 67 N. C. 144 (1872).

Variance Immaterial unless Party Misled.—Even though it may be taken for granted that the evidence offered did not correspond in all respects with the allegations of the complaint, the resultant variance must be adjudged immaterial where it did not actually mislead defendant to his prejudice in maintaining his defense upon the merits. *Spivey v. Newman*, 232 N. C. 281, 59 S. E. (2d) 844 (1950).

Where the difference between the allegation and proof is not substantial and could not mislead the other party, as where plaintiff declares on an express contract and seeks to recover on an implied agreement arising out of the same transaction, the variance is not fatal. *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528 (1950).

Examples of Immaterial Variances.—In an action against a street car company for injuries sustained, the plaintiff alleges that at the time of his injury he was using an iron rod to replace the derailed car on the track, and that he first connected the rod with the car and then with the rail, and he was permitted to prove that he first connected the rod with the rail and then with the car. This was held to be a variance but not such as to mislead the defendant, and therefore immaterial. *Dellinger v. Charlotte Elect. R. Co.*, 160 N. C. 532, 76 S. E. 494 (1912).

Where the complaint against a telegraph company for damages for delay in the delivery of a message alleges that the defendant received the telegram sued on at its office at A., and the evidence tends to show that it was received at B., a nearby point, and telephoned to A., by the defendant's agent there, and there is nothing to indicate

that the defendant was misled or was unprepared to meet the evidence introduced, or was thereby prejudiced. Held, the variance between the allegation and the proof was neither material nor fatal. *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290 (1915).

Where the answer averred a mutual understanding between the intestate and feme defendant, that an adequate compensation should be provided in the former's will, "to the extent of \$2,000 at least," while the verdict establishes a fixed and definite sum, it was held that this did not constitute a material variance. *Lawrence v. Hester*, 93 N. C. 79 (1885).

Where the allegations of the complaint set forth a promissory note, and the evidence introduced proved the instrument to be a bond, the variance was, in view of the circumstances of the case, held to be an immaterial one which should be disregarded. *Lilly v. Baker*, 88 N. C. 151 (1883).

Where a plaintiff, in his complaint, alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held, that the plaintiff was entitled to recover, notwithstanding the variance. *Oates, etc., Co. v. Kendall*, 67 N. C. 241 (1872).

In an action for the recovery of the possession of personal property where the proof revealed that the defendant did not have the possession of such property, though he had converted it, the complaint may be so amended as to change the relief sought from that for the possession of the property to that for the recovery of the value thereof, since the defendant will not be misled thereby. *Haughton v. Newberry*, 69 N. C. 456 (1873); *Webb v. Taylor*, 80 N. C. 305 (1879).

§ 1-169. **Total failure of proof.**—Where the allegation of the cause of action or defense to which the proof is directed is unproved, not in some particular or particulars only, but in its entire scope and meaning, it is not deemed a case of variance, but a failure of proof. (C. C. P., s. 223; Code, s. 397; Rev., s. 517; C. S., s. 553.)

No Amendment Where Proof Wholly Different from Allegations.—No amendment of pleadings will be allowed where the cause of action proved is wholly different from that alleged. *Grant v. Burgwyn*, 88 N. C. 95 (1883).

Same—Relief.—A plaintiff cannot sue upon one contract and prove another essentially different contract. This is more than a mere variance; it is a failure of proof. But if he sues for specific relief, to

which he is not entitled, upon facts which show him entitled to other and different relief, he may be adjudged to have that relief to which he is in law entitled. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 51 S. E. 55 (1905).

Cited in *Whichard v. Lipe*, 221 N. C. 53, 19 S. E. (2d) 14, 139 A. L. R. 1147 (1942) (dis. op.); *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528 (1950).

SUBCHAPTER VII. PRE-TRIAL HEARINGS; TRIAL AND ITS INCIDENTS.

ARTICLE 18A.

Pre-Trial Hearings.

§ 1-169.1. **Pre-trial dockets and cases placed thereon; pre-trial orders; time for hearings and matters for consideration.**—The clerk of the superior court of every county shall maintain a pre-trial docket. Upon written request of counsel for any party, filed with the clerk and served upon counsel for all other parties after issue has been joined and not less than ten days prior to the term at which the case is to be tried, a civil case, except a case specified in § 1-169.5, shall be placed on this docket. The judge holding court in the district or the presiding judge, at any time after issue has been joined, may, in his discretion, order that any civil case except a case specified in § 1-169.5, be placed on the pre-trial docket. Except by order of the presiding judge, no case on this docket shall be tried until a pre-trial order has been entered therein in conformity with this article, but this shall not be construed to prohibit the calendaring of any case for trial prior to the pre-trial hearing or the entry of such order.

Pre-trial hearings in the cases on the pre-trial docket shall be held on the first day of every term of superior court for the trial of civil cases only, preference being given to those cases on such docket which are calendared for trial at the same term. The attorneys for the parties shall appear before the presiding judge to consider:

1. Motions to amend or supplement any pleading.
2. The settling of the issues.
3. The advisability or necessity of a reference of the case, either in whole or in part.
4. The possibility of obtaining admissions of facts and of documents which will avoid unnecessary proof.
5. Facts of which the court is to be asked to take judicial notice.
6. The determination of any other matters which may aid in the disposition of the case.
7. In the discretion of the presiding judge, the hearing and determination of any motion, or the entry of any order, judgment or decree, which the presiding judge is authorized to hear, determine, or enter at term.

Following the hearing the presiding judge shall enter an order reciting the stipulations made and the action taken. Such order shall control the subsequent course of the case unless in the discretion of the trial judge the ends of justice require its modification.

After the entry of the pre-trial order, the case shall stand for trial and may be tried at the same term in which the pre-trial hearing is held or at a subsequent term, as ordered by the judge. (1949, c. 419, s. 1.)

Editor's Note.—For comment on this article, see 27 N. C. Law Rev. 430; 28 N. C. Law Rev. 375.

§ 1-169.2. **Time allotted to hearings; summoning of jurors.**—The presiding judge may devote any additional day or days of the term to pre-trial hearings as he may find necessary or desirable. In the event pre-trial hearings, herein provided for, do not consume the whole of the first day of the term, the presiding judge may proceed to the consideration of the motion docket or any other matters not requiring the intervention of a jury. At the time jurors are to be summoned for the first week of the term, the clerk of the superior court shall determine whether it is probable that the pre-trial docket and other matters not requiring the intervention of a jury will consume the first day of the term

and, in accordance with such determination, shall direct the sheriff to summon the jurors for the first or second day of the term. (1949, c. 419, s. 2.)

§ 1-169.3. Hearings out of term and in or out of the county or district.—Upon agreement of counsel for all parties to any civil case, the resident judge or the regular judge holding the courts in the district may hold pre-trial hearings out of term and in or out of the county or district. At any such hearing the authority of the judge shall be the same as at pre-trial hearings conducted at term time. (1949, c. 419, s. 3.)

§ 1-169.4. Disposition of pre-trial docket at mixed terms.—At terms of the superior court devoted to both civil and criminal matters, the pre-trial docket shall be the order of business after the criminal docket has been disposed of, or may be considered earlier in the discretion of the presiding judge. (1949, c. 419, s. 4.)

§ 1-169.5. Application of article.—The provisions of this article shall not apply to uncontested divorce cases or to proceedings after judgment by default, and shall apply to special proceedings only after transfer to the civil issue docket. (1949, c. 419, s. 5.)

§ 1-169.6. Hearings in county and municipal courts, etc.—Effective October 1, 1949, the judge of every court, other than the superior court, having jurisdiction to try civil cases beyond the jurisdiction of a justice of the peace, may in his discretion, upon not less than five days' notice, direct the attorneys in any civil case at issue in his court, including those in which issue was joined prior to October 1, 1949, to appear before him for a pre-trial hearing for consideration of the matters set forth in § 1-169.1. Upon request for pre-trial hearing by the attorney for any party to a civil case at issue in his court, the judge shall, upon not less than five days' notice to the attorneys for the other parties, order such a pre-trial hearing. After each such pre-trial hearing, the judge shall enter an order as contemplated by § 1-169.1. (1949, c. 419, s. 7.)

ARTICLE 19.

Trial.

§ 1-170. Defined.—A trial is the judicial examination of the issues between the parties, whether they be issues of law or of fact. (C. C. P., s. 223; Code, s. 397; Rev., s. 526; C. S., s. 554.)

Summary Proceedings.—In construing the section of the Ohio Code which is identical with this section, the court, in *Railway v. Thurstin*, 44 O. S. 523, says: "It seems clear that the issues here referred to are those which arise upon the pleadings and do not relate to controversies

involved in summary proceedings like the one now under consideration, although the pendency of the action in which it is involved depends upon the disposition of it by the court."

Quoted in *Dunn v. Tew*, 219 N. C. 286, 13 S. E. (2d) 536 (1941).

§ 1-171. Joinder of issue and trial.—Pleadings shall be made up and issues joined before the clerk. After pleadings have been so made up and issues joined, the clerk shall forthwith transmit the original papers in the cause to the court at term for trial upon the issues, when the case shall be proceeded with according to the course and practice of the court, and on appeal with the same procedure as is now in force. (1919, c. 304, s. 8; C. S., s. 555; Ex. Sess. 1921, c. 92, s. 13.)

Editor's Note.—This section was reenacted without change by the 1921 amendment.

Trial Procedure Before Passage of This Section.—Prior to this act the practice, con-

cisely stated, was as follows: the summons was returnable to a regular term of the superior court to be held in the county from which it was issued; the complaint was to be filed in the clerk's office on or before

the third day of the term to which the action was brought, and at the same term the defendant was to appear and demur or answer; if the defendant failed to appear the plaintiff, if not entitled to a judgment by default final, was authorized to take a judgment by default and inquiry. The inquiry was to be executed at a succeeding term for the obvious reason, if for no other, that the defendant's right to answer precluded such inquiry at the return term. *Hill v. Huffines Hotel Company*, 188 N. C. 586, 125 S. E. 266 (1924).

This section has reference to the clerk and was not intended to impair the broad powers conferred on the judge, who "may in his discretion and upon such terms as may be just allow an answer or reply to be made, or other act done, after the time limited or by an order to enlarge the time,"

§ 1-172. **How issue tried.**—An issue of law must be tried by the judge or court, unless it is referred. An issue of fact must be tried by a jury, unless a trial by jury is waived or a reference ordered. Every other issue is triable by the court, or judge, who, however, may order the whole issue, or any specific question of fact involved therein, to be tried by a jury, or may refer it. (C. C. P., ss. 224, 225; Code, ss. 398, 399; Rev., s. 527; C. S., s. 556.)

Cross References.—As to reference: by consent of parties, see § 1-188; by direction of the court, see § 1-189. As to waiver of jury trial, see § 1-184 and the North Carolina Constitution, Art. IV, § 13.

Entitled to Jury Trial.—In all actions under the Code of Civil Procedure, where legal rights are involved and issues of fact are joined by the pleadings, the plaintiff is entitled to a trial by jury, and cannot be deprived of this right except by his consent. *Andrews v. Pritchett*, 66 N. C. 387 (1872), approving *Hatchell v. Odom*, 19 N. C. 302 (1837).

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356 (1950).

Methods of Waiving Jury Trial.—There are three modes of waiving a jury trial: 1, by default; 2, by written consent; and 3, by oral consent, entered on the minutes of the court. *Armfield v. Brown*, 70 N. C. 27 (1874).

When Issues of Fact Tried by Judge.—The duty of trying issues of fact cannot be imposed on the judge except when, by consent of the parties, the judge is substituted for the jury. *Lee v. Pearce*, 68 N. C. 76 (1873), overruling *Goldsborough v. Turner*, 67 N. C. 403 (1872).

What the evidence would have been had

under § 1-152. *Smith v. New York Life Ins. Co.*, 208 N. C. 99, 179 S. E. 457 (1935).

Transferring Papers Where No Answer Filed.—If this section were interpreted as providing that original papers can be transferred to the docket for trial in term only after an answer is filed, some difficulty might be encountered in assessing damages in cases where no answer is filed. *Hill v. Huffines Hotel Company*, 188 N. C. 586, 125 S. E. 266 (1924).

Cause Transmitted by Operation of Law.—Where defendant failed to file his answer to complaint within the proper time, but did file the answer before the clerk entered a default judgment the cause was, in effect, transmitted by operation of law to the superior court when the answer was filed. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

a jury been impaneled could not be anticipated by the court, and the court was without jurisdiction under this section to try the issues of fact which arose upon the pleadings. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265 (1934).

Judge May Disregard Agreement to Waive Jury Trial.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived or that a reference shall be made of issues other than those of fact in an action upon contract. *Lumber Company v. Lumber Company*, 137 N. C. 431, 49 S. E. 946 (1905). As to waiver, see § 1-184 and notes thereto.

Right to Jury Trial When Case Referred.—Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory, the excepting party has the right to have all issues of fact which arise on the pleadings, submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. *Armfield v. Brown*, 70 N. C. 27 (1874); *State v. Askew*, 94 N. C. 194 (1886).

Equitable Element Cannot Defeat Right to Jury Trial.—A party has a right to a jury trial of an issue of fact, as well when it involves an equitable as a legal element entering into the merits of the controversy. *Worthy v. Shields*, 90 N. C. 192 (1884).

Submission of Evidential Issues Error.

—The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, and when found by the jury, only furnish facts which would be evidence to prove the main issue, should never be submitted. *Patton v. Western, etc., R. Co.*, 96 N. C. 455, 1 S. E. 863 (1887).

Jury Impaneled but No Evidence Adduced.—On the trial of a civil action when the jury were sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury were discharged without verdict it was held,

(1) That the parties stood at issue on the pleadings just as they were before the

jury were sworn.

(2) That in such case the judge has no right to pass upon the issues, except upon a waiver of jury trial in accordance with section 1-184. *Chasteen v. Martin*, 81 N. C. 51 (1879).

Appeal.—Where the parties waive a jury trial and agree to trial by the court, the court's findings of fact from the evidence are binding and conclusive upon appeal. *Berry v. Payne*, 219 N. C. 171, 13 S. E. (2d) 217 (1941).

Quoted in *Berry v. Payne*, 219 N. C. 171, 13 S. E. (2d) 217 (1941).

Cited in *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144 (1896); *Grimes v. Home Ins. Co.*, 217 N. C. 259, 7 S. E. (2d) 557 (1940); *Lockhart v. Lockhart*, 223 N. C. 123, 25 S. E. (2d) 465 (1943).

§ 1-173. Issues of fact.—Every issue of fact joined on the pleadings, and inquiry of damages ordered to be tried by a jury, must be tried at the term of the court next ensuing the joinder of issue or order for inquiry, if the issue was joined or order made more than ten days before such term, but if not, they may be tried at the second term after the joinder or order: Provided, that uncontested cases in which no answer has been filed may be tried at any term after the time for filing answers has expired. (C. C. P., s. 226; Code, s. 400; Rev., s. 528; C. S., s. 557; 1923, c. 54; 1925, c. 5; 1945, c. 989.)

Editor's Note.—Prior to the 1923 amendment the time specified by this section was thirty days before the term. The amendment also substituted "may" for "must" in the provision relating to trial at the second term after the joinder or order.

The 1925 amendment corrected an error in the amending act of 1923.

The 1945 amendment added the proviso.

Power of Judge to Compel Party to Proceed.—The judge is without authority to compel a party to an action to proceed with the trial of a cause transferred to the civil issue docket when the issue has been joined within ten days from the commencement of the term. *Cahoon v. Everton*, 187 N. C. 369, 121 S. E. 612 (1924).

Amended Answer Raising Additional Is-

§ 1-174. Issues of fact before the clerk.—All issues of fact joined before the clerk shall be transferred to the superior court for trial at the next succeeding term, and in case of such transfer neither party is required to give an undertaking for costs. (Rev., s. 529; C. S., s. 558.)

Denial of Good Faith in Condemnation Proceedings.—When in proceedings by a railroad company to condemn lands, the answer denies the intention of the petitioner in good faith to construct the proposed railroad, the pleadings, in this respect, do not raise an issue of fact to be transferred to and tried by the superior court in term, under the provisions of this section. *Madison County R. Co. v. Gaha-*

sue.—Where, at trial term, an amended answer to an amended complaint raises additional issues of fact, the defendant is entitled to a continuance. *Dobson v. Southern Ry. Co.*, 129 N. C. 289, 40 S. E. 42 (1901).

Issue of Insanity.—In an indictment for murder, there being no allegation that the prisoner was insane at the time of the trial, no issue as to insanity need be submitted. *State v. Spivey*, 132 N. C. 989, 43 S. E. 475 (1903).

Cited in *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 12 S. E. 54 (1890); *Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554 (1942); *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

gan, 161 N. C. 190, 76 S. E. 696 (1912).

Review of Clerk's Decisions.—The rulings or decisions of the clerks of the court must, as stated in this section, be transferred for trial to the next succeeding term of the superior court, if determinative issues arise on the pleadings in a procedure where the adversary rights of litigants are presented; and if there be issues of law or material questions of fact decided by

the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this

is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551 (1912).

§ 1-175. Continuance before term; affidavit.—A party to an action may apply to the court in which it is pending, or to the judge thereof, by affidavit, thirty days before the trial term, and after three days' notice in writing to the adverse party, to have the trial continued to a term subsequent to that in which it is regularly triable. The court or judge may continue the trial as asked for, on such terms as may be just, if satisfied—

1. That the applicant has used due diligence to have his case ready for trial.

2. That by reason of circumstances beyond his control, which he must set forth, he cannot have a fair trial at the regular trial term. If the application is made by reason of the expected absence of a witness, it must state the name and residence of the witness, the facts expected to be proved by him, the grounds for the expectation of his nonattendance, and that the applicant expects to procure his evidence at or before some named subsequent term. The applicant must in all cases pay the costs of the application. (C. C. P., s. 227; Code, s. 401; Rev., s. 530; C. S., s. 559.)

Continuance Lies in Discretion of Judge.

—The matter of granting or refusing a continuance of a cause for trial rests in the discretion of the trial judge, and the exercise of such discretion is not reviewable on appeal, in the absence of gross abuse. *Piedmont Wagon Company v. Bostic*, 118 N. C. 758, 24 S. E. 525 (1896).

Continuances Not Favored by Law.—

§ 1-176. Continuance during term.—The judge at any time during the term at which an action is triable may continue the trial on the application of either party, and on such terms as shall be just, if satisfied—

1. That the applicant has used due diligence to be ready for trial.

2. That he cannot have a fair trial at that term, by reason of circumstances stated, and if the ground of application is the nonattendance of a witness, the affidavit must contain the particulars required by subdivision two of § 1-175. Unless the applicant also sets forth in his affidavit that the facts upon which his application is grounded occurred or came to his knowledge too late to allow him to apply as prescribed in § 1-175, and that his application is made as soon as it reasonably could be after the knowledge of those facts, the continuance shall not be granted, except on the payment of the costs in the action for the term. (R. C., c. 31, s. 57; C. C. P., s. 228; Code, s. 402; Rev., s. 531; C. S., s. 560.)

Continuances are not favored, as a general rule, and ought not to be granted unless the reasons therefor are fully established. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

Continuance Discretionary with Judge.—

The granting or refusing a continuance is entirely discretionary with the presiding judge, and cannot be assigned for error on appeal, in the absence of gross abuse. *Dupree v. Va. Home Ins. Co.*, 92 N. C. 418 (1885); *Piedmont Wagon Co. v. Bostic*, 118 N. C. 758, 24 S. E. 525 (1896); *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196 (1906); *Watson v. Black*

Continuances are not favored by the law. One of the immortal provisions of the Magna Charta is that justice shall neither be delayed nor denied, and these are coupled together, for a delay of justice is often a denial of justice. *Piedmont Wagon Company v. Bostic*, 118 N. C. 758, 24 S. E. 525 (1896).

Mountain R. Co., 164 N. C. 176, 80 S. E. 175 (1913); *In re Bank*, 202 N. C. 251, 162 S. E. 568 (1932); *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

The absence of a party or witness must be accounted for before a cause will be continued on these grounds. *Crites v. Lanier*, 1 N. C. 110 (1799).

Attorney Son of Trial Judge.—The fact that an attorney in an action is the son of the trial judge is not a ground for continuance. *Allison v. So. R. Co.*, 129 N. C. 336, 40 S. E. 91 (1901).

Sickness of members of a defendant's family may be a ground on which the

judge, in his discretion, may grant a continuance. *Skinner v. Bryce*, 75 N. C. 287 (1876).

Insanity of Defendant.—Where defendant becomes insane pending an action against her for divorce, the action should be continued if there is any hope of recovery. *Stratford v. Stratford*, 92 N. C. 297 (1885).

Continuance to Prepare Defense.—Where the record fails to show that a requested continuance would have enabled defendant and his counsel to obtain additional evidence or otherwise present a stronger defense, the denial of the motion is not prejudicial. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948), discussed in 27 N. C. Law Rev. 544.

To Prove Bad Character of Witnesses.—Where defendant has asked for a continuance under this section without complying with the requirements and the purpose given for seeking the continuance is to secure depositions as to the bad character of the State's witnesses when defendant has already been permitted to cross-examine the witnesses and they admitted being prosecuted for criminal offenses, refusal of the trial judge to grant the continuance is not an abuse of discretion. *State v. Banks*, 204 N. C. 233, 167 S. E. 851 (1933).

Amendment of Pleadings.—Refusal of a continuance on a defendant filing on the day of trial, an answer substantially like that of the other defendants, and raising

no additional issue, is not an abuse of discretion. *Slingluff v. Hall*, 124 N. C. 397, 32 S. E. 739 (1899).

But where an amendment is such as to cause surprise, it is cause for continuance. *Sams v. Price, etc., Co.*, 119 N. C. 572, 26 S. E. 170 (1896); *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558 (1902); and ordinarily an amendment which changes the issues or the parties causes such surprise as will authorize the continuance. *Watson v. Black Mountain R. Co.*, 164 N. C. 176, 80 S. E. 175 (1913); and it has been held that the allowance of an amendment alleging fraud, if such as to take defendant by surprise, entitles him to a continuance. *Dockery v. Fairbanks Morse Co.*, 172 N. C. 529, 90 S. E. 501 (1916). See also, note of *Dobson v. Southern Railway Co.*, 129 N. C. 289, 40 S. E. 42 (1901), under § 1-173. Likewise if an allegation of time and place is made, and a party has prepared his evidence, based wholly upon such allegation, and is surprised at the trial by the evidence of another time or place, he should be given another opportunity to meet such evidence. *Brown v. Western Union Tel. Co.*, 169 N. C. 509, 86 S. E. 290 (1915).

An application for a continuance should be supported by an affidavit showing sufficient grounds for the continuance, and this section contemplates that this is to be done. *State v. Gibson*, 229 N. C. 497, 50 S. E. (2d) 520 (1948).

§ 1-177. Counter affidavits as to continuance.—It is competent in all civil cases only for the opposing side to controvert the allegations of fact in applications for continuance, and to offer counter affidavits to that end. The judge shall not allow the continuance unless satisfied, after thorough examination of the evidence aforesaid, that the ends of justice demand it. (1885, c. 394; Rev., s. 532; C. S., s. 561.)

In General.—As the two preceding sections, in the judgment of the legislature, were not sufficient to protect against the "laws delay," this section was passed. *Piedmont Wagon Co. v. Bostic*, 118 N. C.

758, 24 S. E. 525 (1896).

Judge Must Be Satisfied.—If the judge is left in doubt he must refuse the continuance. *Piedmont Wagon Co. v. Bostic*, 118 N. C. 758, 24 S. E. 525 (1896).

§ 1-178. Order of business.—The criminal calendar must be first disposed of, unless, by consent of counsel, or for reasons satisfactory to the judge, particular criminal actions may be deferred. The issue on the civil calendar must be disposed of in the following order, unless, for the convenience of parties or the dispatch of business, the court otherwise directs:

1. Issues of fact to be tried by a jury.
2. Issues of fact to be tried by the court.
3. Issues of law.

(C. C. P., s. 229; Code, s. 403; Rev., s. 533; C. S., s. 562.)

Cross Reference.—As to civil cases at criminal terms, see § 7-72.

Generally.—While placing a case on the civil issue docket usually indicates a trial

by jury of issues of fact, this does not necessarily follow, nor compel the conclusion that the legislature so intended, as there may be, and frequently are, issues of law

and questions of fact, triable by the judge, which properly find their way to this docket. *State v. Willis Barber, etc., Shop*, 219 N. C. 709, 15 S. E. (2d) 4 (1941).

§ 1-179. **Separate trials.**—A separate trial between a plaintiff and any of several defendants may be allowed by the court when, in its opinion, justice will thereby be promoted. (C. C. P., s. 230; Code, s. 407; Rev., s. 534; C. S., s. 563.)

Severance Not a Matter of Right.—It is within the sound discretion of the court, on motion of the defendants, or any of them, to allow severance and a separate trial as to each defendant if thereby justice will be promoted. However it was error for the court to hold that the defendants had a right to demand it, and a judgment rendered upon such holding will be reversed. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510 (1890).

Division Allowed in Case of Misjoinder.—Where there is a misjoinder of causes of

action, the court may allow the action to be divided; or, where there is a misjoinder of parties, the court in its discretion can do the same. *Pretzfelder, etc. v. Merchants' Ins. Co.*, 116 N. C. 491, 21 S. E. 302 (1895).

Result of Order of Severance.—An order of severance is equivalent to dividing the action into several suits, with all the usual provisions for costs, etc., incident thereto. *Bryan v. Spivey*, 106 N. C. 95, 11 S. E. 510 (1890).

§ 1-180. **Judge to explain law, but give no opinion on facts.**—No judge, in giving a charge to the petit jury, either in a civil or criminal action, shall give an opinion whether a fact is fully or sufficiently proven, that being the true office and province of the jury, but he shall declare and explain the law arising on the evidence given in the case. He shall not be required to state such evidence except to the extent necessary to explain the application of the law thereto; provided the judge shall give equal stress to the contentions of the plaintiff and defendant in a civil action, and to the State and defendant in a criminal action. (1796, c. 452, P. R.; R. C., c. 31, s. 130; C. C. P., s. 237; Code, s. 413; Rev., s. 535; C. S., s. 564; 1949, c. 107.)

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I. IN GENERAL.

Editor's Note.—The 1949 amendment rewrote this section. It did not alter the provision prohibiting the judge from stating an opinion on the facts. But it changed the rest of the section, which formerly read "but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." See 27 N. C. Law Rev. 435, containing a discussion of the change made by the amendment. This change should be borne in mind in considering the cases referred to in this note.

However, the duty of the court to declare and explain the law arising on the evidence remains unchanged by the present provisions of this section as rewritten by the amendment. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212 (1951).

"The policy of the State differs from the federal rule and the rule in most states, and the section has been the subject of much criticism." *Caldwell v. Southern Ry. Co.*, 218 N. C. 63, 10 S. E. (2d) 680 (1940) (con. op.).

II. OPINION OF JUDGE.

A. General Consideration.

Purposes and Effect of Section.—The necessity of judges, in obedience to the statute, avoiding any expression, however inadvertent or well intentioned, which may be reasonably construed by a jury, quick to perceive the judge's point of view, as more favorable to one side than the other, has never been better expressed than by Mr. Justice Walker in *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855 (1907). He quotes, from Chief Justice Taylor in *Reel v. Reel*, 9 N. C. 63 (1822), as follows: "Upon considering the whole of the charge, it appears to us that its general tendency is to preclude that full and free inquiry into the truth of the facts which is contemplated by the law, with the purest intentions, however, on the part of the worthy judge, who, receiving a strong impression from the testimony adduced, was willing that what he believed to be the very justice of the case should be administered. We are not unaware of the difficulty of concealing all indications of the conviction wrought on the mind by evidence throughout a long and complicated cause; but the law has spoken, and we have only to obey."

Mr. Justice Walker, continues in his own language as follows: "What these eminent jurists have so well said about the duty of the trial judge under our statute, and the consequence of a violation of it, will, if it is properly heeded, conduce to the more perfect and satisfactory trial of causes. The judge should be the embodiment of even and exact justice. He should at all times be on the alert lest in an unguarded moment something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge,' and the equally unbiased mind of a properly instructed jury. This right can neither be denied nor abridged." *Starling v. Selma Cotton Mills*, 171 N. C. 222, 88 S. E. 242 (1916). See *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29 (1947).

In *State v. Jones*, 181 N. C. 546, 106 S. E. 817 (1921), the court said: "This court has always been very careful to enforce the provision of the statute which prohibits a judge from expression of opinion in the trial of causes before the jury, this section, extending the inhibition to such expression in the hearing of the jury at any

time during the trial, and whether the objectionable comments may be towards the testimony offered, the witness testifying, or the litigant and the cause he is endeavoring to maintain."

An expression of an opinion by the judge as to an essential fact involved in an issue is condemned by this section. *Abernethy v. State Planters' Bank, etc., Co.*, 202 N. C. 46, 161 S. E. 705 (1932).

The slightest intimation from a judge as to the strength of the evidence, or as to credibility of the witness, will always have great weight with the jury, and, therefore, we must be careful to see that neither party is unduly prejudiced by any expression from the bench which is likely to prevent a fair and impartial trial. *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29 (1947), citing *State v. Ownby*, 146 N. C. 677, 61 S. E. 630 (1908).

The provisions of this section are mandatory. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107 (1925); *State v. Evans*, 211 N. C. 458, 190 S. E. 724 (1937).

Two Provisions Are of Equal Dignity.—This section proscribes the judge in charging the jury from expressing an opinion as to the weight and credibility of the evidence, and prescribes that he declare and explain the law arising upon the evidence, and the two provisions are linked together and are of equal dignity, and the failure to observe either is error. *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (1941).

This section was intended to keep inviolate the line between the functions of court and jury—the one as dispenser of the law, the other as triers of the facts—and thus to preserve the integrity of trial by jury. But it does more. It provides a co-operative program by which these parts of the court may work together as a single intelligent agency in judicial investigation and determination. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892 (1949).

A Substantial Right of Litigants.—This section gives the parties to the action a substantial right. The jury has the sole and exclusive function of finding the facts from the evidence under the law thus given them, and it is not their duty, in any event, to determine what is the law. *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834 (1925); *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (1941).

This section confers a substantial legal right upon litigants, and "calls for instructions as to the law upon all substantial features of the case." *McNeill v. McNeill*, 223 N. C. 178, 25 S. E. (2d) 615 (1943).

Cannot Be Extended.—The North Carolina statute being a restriction upon the almost universal rule, cannot be extended beyond its terms. *State v. Baldwin*, 178 N. C. 687, 100 S. E. 348 (1919); *State v. Pugh*, 183 N. C. 800, 111 S. E. 849 (1922).

Evidence Must Be Stated Impartially.—It has been accepted as the proper construction and meaning of the act of this section, though it goes beyond the words: that a judge in charging a jury shall state the evidence fairly and impartially, and that he shall express no opinion on the weight of evidence. *State v. Jones*, 67 N. C. 285 (1872).

This section forbids the judge to intimate his opinion in any form whatever, it being the intent of the law to insure to each and every litigant a fair and impartial trial before the jury. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378 (1946).

Where Law Gives Testimony Artificial Weight.—It is only where the law gives to testimony an artificial weight that the judge is at liberty to express an opinion upon its weight. *Bonner v. Hodges*, 111 N. C. 66, 15 S. E. 881 (1892).

Section Not Confined to Charge.—In terms, this statute refers to the charge, but it has always been construed as including the expression of any opinion, or even an intimation by the judge, at any time during the trial which is calculated to prejudice either of the parties. And when once expressed such opinion or intimation cannot be recalled. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107 (1925); *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936).

Section Applies Throughout Trial.—This section applies to any expression of opinion by the judge in the hearing of the jury at any time during the trial. *State v. Cook*, 162 N. C. 586, 77 S. E. 759 (1913); *Thompson v. Angel*, 214 N. C. 3, 197 S. E. 618 (1938).

It was considered so essential to protect the right of trial by jury that this section was broadly worded and was among the earliest of our remedial enactments, and while it refers in terms to the charge, it has always been construed as including the expression of any opinion, or even an intimation of the judge, at any time during the trial, calculated to prejudice either of the parties. *Morris v. Kramer Bros. Co.*, 182 N. C. 87, 108 S. E. 381 (1921).

This section proscribes the court from expressing an opinion upon the weight or credibility of the evidence in any manner either in the course and conduct of the

trial or in its instructions to the jury. *Bailey v. Hayman*, 220 N. C. 402, 17 S. E. (2d) 520 (1941).

A statement of the court, made prior to the time the case was called for trial, indicating that he would not try the case until defendants were apprehended, does not violate this section, since this section relates only to the expression of opinion during the trial of the case. *State v. Lipard*, 223 N. C. 167, 25 S. E. (2d) 594 (1943).

Motive of Judge Immaterial.—The probable effect or influence upon the jury, and not the motive of the judge, determines whether the party whose right to a fair trial has been impaired is entitled to a new trial. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107 (1925); *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936).

What Remarks Presumed Correct.—The remarks of the trial judge in discharging a jury after verdict, or in impressing upon jurors and the public the duty of jurors in their conduct, are prima facie presumed on appeal to be correct. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849 (1922).

Province of Court and Jury.—It is not for the judge to pass upon the intensity of the proof. That is a matter which lies solely within the province of the jury. The verdict may be set aside by the court, if found to be against the weight of the evidence, but the right of the plaintiff to have it submitted to the jury can not be denied provided there is some evidence tending to establish the plaintiff's contention. The jury should be instructed that the evidence must be clear and satisfactory in cases to which that principle applies, but it is for them to say whether the evidence is of that convincing character. *Avery v. Stewart*, 136 N. C. 426, 48 S. E. 775 (1904).

Weight and Sufficiency of Evidence Question for Jury.—Whether there be any evidence is a question for the judge. Whether it is sufficient evidence is a question for the jury. *State v. Moses*, 13 N. C. 452 (1830); *Wittkowsky v. Wasson*, 71 N. C. 451 (1874); *State v. Hardee*, 83 N. C. 619 (1880); *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855 (1907).

A judge is prohibited by this section from expressing an opinion upon the weight of the evidence, and could not instruct the jury that this was or was not clear, strong, and convincing. *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49 (1904).

It is the province of the jury to ascertain the facts from the evidence, the weight

and credibility thereof being exclusively for its determination. In re Will of Bergeron, 196 N. C. 649, 146 S. E. 571 (1929).

And Final Decision of Facts Rests with Jury.—The jury must not only unanimously concur in the verdict, but must be left free to act according to the dictates of their own judgment. The final decision upon the facts rests with them, and any inference by the court tending to influence them into a verdict against their convictions is irregular and without the warrant of law. The judge is not justified in expressing to the jury his opinion that the defendant is guilty upon the evidence adduced. *State v. Maxwell*, 215 N. C. 32, 1 S. E. (2d) 125 (1939).

Credibility of Witnesses Is for Jury.—No judge at any time during the trial of a cause is permitted to cast doubt upon the testimony of a witness or to impeach his credibility. The cold neutrality of an impartial judge should constantly be observed, as the slightest intimation from the bench will always have great weight with the jury. *State v. Auston*, 223 N. C. 203, 25 S. E. (2d) 613 (1943). See *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378 (1946); *State v. McNeill*, 231 N. C. 666, 58 S. E. (2d) 366 (1950).

The trial court may not by remarks or questions impeach the credibility of a witness or in any manner convey to the jury the impression that the testimony of a witness, in the opinion of the court, is probably unworthy of belief. *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774 (1950).

Judge Cannot Withdraw Case.—A judge cannot pass upon the weight of evidence and withdraw a case from the jury when it appears to him that the evidence is not clear, strong, and convincing. *Lehew v. Hewett*, 138 N. C. 6, 50 S. E. 459 (1905).

May Explain Law of Concurrent Negligence as Applied to Evidence.—In *Harvell v. Wilmington*, 214 N. C. 608, 200 S. E. 367 (1939), it was held that, the law of concurrent negligence being applicable to the conflicting evidence in the case, the plaintiff had a right to rely thereon, and it was the duty of the court to apply such law to the evidence and to declare and explain, in the manner contemplated by this section, the law of concurrent negligence as it applied to the evidence.

Nonsuit.—It is the duty of the judge to nonsuit, when the evidence is not legally sufficient to justify a verdict for the plaintiff. *Kearns v. R. Co.*, 139 N. C. 470, 52 S. E. 131 (1905).

But he cannot enter a judgment of nonsuit on the grounds of plaintiff's con-

tributory negligence without deciding an issue of fact. *Osborne v. Southern R. Co.*, 160 N. C. 309, 76 S. E. 16 (1912).

Directing a Verdict.—Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by this section. *United States Railroad Administration v. Hilton Lumber Co.*, 185 N. C. 227, 117 S. E. 50 (1923).

Even in cases where the evidence justifies an instructed verdict, the credibility of the evidence is for the sole determination of the jury, and therefore a recapitulation of the evidence may be necessary. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892 (1949).

Court Cannot Direct Affirmative Finding.—Where the party upon whom the burden of proof rests offers no evidence to prove the issue the trial judge should direct a negative finding; but in no case, however strong and uncontradictory the evidence is in support of this issue, should the court withdraw the issue from the jury and direct an affirmative finding. *Anniston Nat. Bank v. School Committee*, 121 N. C. 107, 28 S. E. 134 (1897); *Cable v. Southern R. Co.*, 122 N. C. 892, 29 S. E. 377 (1898).

The correct form of an instructed verdict is that if the jury "find from the evidence the facts to be as all the evidence tends to show you will answer the issue" rather than a direction as to how the jury should find the issue, since the credibility of the evidence remains the function of the jury. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892 (1949).

Evidence Insufficient to Justify Instructed Verdict.—In an action to quiet title, the evidence was not so unequivocal and not so clear in its inferences as to justify an instructed verdict in plaintiffs' favor. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892 (1949).

Examination of Witnesses Discretionary.—The manner of conducting the examination of witnesses is left largely to the discretion of the judge and can but seldom be the subject of review, even when not entirely approved by this court. *State v. Brown*, 100 N. C. 519, 6 S. E. 568 (1888).

Dissertation upon Moral Questions.—This section does not prohibit a judge, in his charge to the jury, from pronouncing a dissertation upon such moral questions as are suggested by the incidents of the trial,

provided the language used is without prejudice to either party. *Stilley v. McCox*, 88 N. C. 18 (1883).

A Venire de Novo for Violation.—Under this section the trial judge is restricted to stating plainly and correctly the evidence and declaring and explaining the law arising thereon; and when his peculiar emphasis, or language, or manner in presenting or arraying the evidence indicates his opinion upon the facts, or conclusion of facts, a venire de novo will be ordered. *Withers v. Lane*, 144 N. C. 184, 56 S. E. 855 (1907).

Exceptions after Verdict.—Where a remark or question by the court amounts to an expression of opinion, an exception thereto need not be taken at the time but may be taken after verdict. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107 (1925); *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774 (1950). But see *State v. Brown*, 100 N. C. 519, 6 S. E. 568 (1888).

A broadside exception to the charge will not be considered, but appellant must point out wherein the charge failed to comply with the provisions of this section. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Record on Appeal Must Show Error.—If an appeal is taken on the ground that the judge, by his manner or emphasis intimated an opinion upon the facts, the record must allege the tone, emphasis or manner. *Davis v. Blevins*, 125 N. C. 433, 34 S. E. 541 (1899), citing *State v. Jones*, 67 N. C. 285 (1872); *State v. Wilson*, 76 N. C. 120 (1877).

An assignment of error to a charge should state wherein the charge fails to comply with this section. *Switzerland Co. v. North Carolina State Highway, etc.*, Comm., 216 N. C. 450, 5 S. E. (2d) 327 (1939); *State v. Jones*, 227 N. C. 402, 42 S. E. (2d) 465 (1947).

Where there is no assignment of error in the record for failure of the court to state the evidence and declare and explain the law arising thereon, exceptions on this ground will not be considered on appeal. *State v. Spivey*, 230 N. C. 375, 53 S. E. (2d) 259 (1949).

Correctness of Instructions Will Be Presumed.—Upon review by certiorari of the denial of defendant's motion for a new trial on the ground that he was denied due process of law in the trial resulting in his conviction, it will be presumed that the trial court correctly instructed the jury as to the facts of the case, in the absence of suggestion to the contrary. *State v. Cheson*, 228 N. C. 259, 45 S. E. (2d) 563 (1947).

Applied in *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 171 S. E. 862 (1933); *Rand v. Home Ins. Co.*, 206 N. C. 760, 174 S. E. 749 (1934); *Lamm v. Lamm*, 206 N. C. 905, 173 S. E. 309 (1934); *Wilson v. Inter-Ocean Cas. Co.*, 210 N. C. 585, 188 S. E. 102 (1936); *State v. Batts*, 210 N. C. 659, 188 S. E. 99 (1936); *In re Evans' Will*, 223 N. C. 206, 25 S. E. (2d) 556 (1943); *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211 (1946); *State v. Ellison*, 226 N. C. 628, 39 S. E. (2d) 824 (1946); *State v. Correll*, 228 N. C. 28, 44 S. E. (2d) 334 (1947); *State v. McMahan*, 228 N. C. 293, 45 S. E. (2d) 340 (1947); *Barringer v. Barringer*, 228 N. C. 790, 46 S. E. (2d) 849 (1948); *Wyatt v. Queen City Coach Co.*, 229 N. C. 340, 49 S. E. (2d) 650 (1948).

Cited in *Hunsinger v. Carolina, etc., Ry.*, 194 N. C. 679, 140 S. E. 608 (1927); *State v. Newsome*, 195 N. C. 552, 143 S. E. 187 (1928); *Bridgeman v. Pilot Life Ins. Co.*, 197 N. C. 599, 150 S. E. 15 (1929); *Bostwick v. Jackson*, 197 N. C. 785, 148 S. E. 925 (1929); *American Exch. Nat. Bank v. Winder*, 198 N. C. 18, 150 S. E. 489 (1929); *State v. Sawyer*, 198 N. C. 459, 152 S. E. 153 (1930); *Brown v. Postal Telegraph-Cable Co.*, 198 N. C. 771, 153 S. E. 457 (1930); *Moss v. Brown*, 199 N. C. 189, 154 S. E. 48 (1930); *Pyatt v. Southern R. Co.*, 199 N. C. 397, 154 S. E. 847 (1930); *Nelson v. Jefferson Standard Life Ins. Co.*, 199 N. C. 443, 154 S. E. 752 (1930); *Rogers v. Ray*, 199 N. C. 577, 155 S. E. 253 (1930); *State v. Johnson*, 205 N. C. 839, 171 S. E. 926 (1933); *Jones v. Metropolitan Life Ins. Co.*, 206 N. C. 916, 175 S. E. 162 (1934); *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Noland Co. v. Jones*, 211 N. C. 462, 190 S. E. 720 (1937); *Owens v. Blackwood Lbr. Co.*, 212 N. C. 133, 193 S. E. 219 (1937); *Leonard v. Pacific Mut. Life Ins. Co.*, 212 N. C. 151, 193 S. E. 166 (1937); *In re Worsley*, 212 N. C. 320, 193 S. E. 666 (1937); *Farrow v. White*, 212 N. C. 376, 193 S. E. 386 (1937); *Lewis v. Hunter*, 212 N. C. 504, 193 S. E. 814 (1937); *Rooks v. Bruce*, 213 N. C. 58, 195 S. E. 26 (1938); *State v. Robinson*, 213 N. C. 273, 195 S. E. 824 (1938); *State v. Epps*, 213 N. C. 709, 197 S. E. 580 (1938); *State v. Hall*, 214 N. C. 639, 200 S. E. 375 (1939); *State v. Johnson*, 218 N. C. 604, 12 S. E. (2d) 278 (1940); *Nichols v. York*, 219 N. C. 262, 13 S. E. (2d) 565 (1941); *State v. Wells*, 221 N. C. 144, 19 S. E. (2d) 243 (1942); *Moyle v. Hopkins*, 222 N. C. 33, 21 S. E. (2d) 826 (1942); *State v. Shine*, 222 N. C. 237, 22 S. E. (2d) 447 (1942); *Sample v. Spencer*, 222 N. C. 580, 24 S. E. (2d) 241 (1943); *State*

v. DeGraffenreid, 223 N. C. 461, 27 S. E. (2d) 130 (1943); Daughtry v. Cline, 224 N. C. 381, 30 S. E. (2d) 322 (1944) (con. op.); State v. Harrill, 224 N. C. 477, 31 S. E. (2d) 353 (1944); Kearney v. Thomas, 225 N. C. 156, 33 S. E. (2d) 871 (1945); State v. Bullins, 226 N. C. 142, 36 S. E. (2d) 915 (1946); Perry v. First Citizens Nat. Bank, etc., Co., 226 N. C. 667, 40 S. E. (2d) 116 (1946); Brown v. Loftis, 226 N. C. 762, 40 S. E. (2d) 421 (1946); Nichols v. Wachovia Bank, etc., Co., 231 N. C. 158, 56 S. E. (2d) 429 (1949); Hill v. Atlantic Coast Line R. Co., 231 N. C. 499, 57 S. E. (2d) 781 (1950); Combs v. Porter, 231 N. C. 585, 58 S. E. (2d) 100 (1950); Merchants, etc., Bank v. Sherrill, 231 N. C. 731, 58 S. E. (2d) 741 (1950); Collingwood v. Winston-Salem Southbound Ry. Co., 232 N. C. 192, 59 S. E. (2d) 584 (1950); Fleming v. Carolina Power, etc., Co., 232 N. C. 457, 61 S. E. (2d) 364 (1950); State v. Lambe, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

B. What Constitutes an Opinion.

In General.—This section has been interpreted to mean that no judge, in giving a charge to the jury or at any time during the trial, shall intimate whether a fact is fully or sufficiently proved. State v. Mitchell, 193 N. C. 796, 138 S. E. 166 (1927), citing State v. Hart, 186 N. C. 582, 120 S. E. 345 (1923); State v. Kline, 190 N. C. 177, 129 S. E. 417 (1925). See Speed v. Perry, 167 N. C. 122, 83 S. E. 176 (1914).

The judge who tries a cause has no right to intimate in any manner his opinion as to the weight of the evidence, nor to express an opinion on the facts. Powell v. Wilmington, etc., R. Co., 68 N. C. 395 (1873).

A correct charge of the court upon the evidence in a case will not be held for error as containing an expression of opinion prohibited by this section, when nothing of this character appears from a careful perusal of the charge on appeal that could bias a mind of ordinary firmness and intelligence. Keller v. Caldwell Furniture Co., 199 N. C. 413, 154 S. E. 674 (1930).

Test of Violation.—It is a violation of this section for a judge at any time in the progress of a trial (as well as during his charge to the jury) to express an opinion as to the weight of evidence or to use language which, fairly interpreted, would make it reasonably certain that it would influence the minds of the jury in determining a fact. State v. Browning, 78 N. C. 555 (1878).

Direct Language Not Necessary to Constitute Error.—The judge may indicate to

the jury what impression the evidence has made on his mind, or what deductions he thinks should be drawn therefrom, without expressly stating his opinion in so many words. This may be done by his manner or peculiar emphasis or by his so arraying and presenting the evidence as to give one of the parties an undue advantage over the other; or, again the same result may follow the use of language or from an expression calculated to impair the credit which might not otherwise and under normal conditions be given by the jury to the testimony of one of the parties. State v. Woolard, 227 N. C. 645, 44 S. E. (2d) 29 (1947), citing State v. Benton, 226 N. C. 745, 40 S. E. (2d) 617 (1946).

Where an intimation as to whether any fact is sufficiently proved is reasonably inferred from the manner of the judge or his peculiar emphasis of the evidence, or in his presentation thereof or his form of expression, or by the tone or general tenor of the trial, giving advantage to the appellee thereby, such as to impair the credit which might otherwise, under normal conditions be given by the jury to the testimony, it comes within the prohibition of this section. State v. Hart, 186 N. C. 582, 120 S. E. 345 (1923); State v. Rhinehart, 209 N. C. 150, 183 S. E. 388 (1936).

No assumption of fact or opinion expressed or fairly inferable from the charge respecting the credibility of the testimony can be made by the trial court without violating this section. State v. Love, 229 N. C. 99, 47 S. E. (2d) 712 (1948).

Taking Witness into Custody in Presence of Jury.—In the prosecution of defendant for willful failure to support his illegitimate child, the action of the court, in the presence of the jury, in ordering the sheriff to take defendant's witness into custody immediately after the witness had testified for defendant that he had had intercourse with prosecutrix, was held to be prejudicial error as disparaging or impeaching the credibility of the witness in the eyes of the jury. State v. McNeill, 231 N. C. 666, 58 S. E. (2d) 366 (1950).

Possibility of Unfair Inference Insufficient.—It is not sufficient to show, that what the judge did or said might have had an unfair influence, or that his words, critically examined and detached from the context and the incidents of the trial, were capable of a construction from which his opinion on the weight of testimony might be inferred; but it must appear, with ordinary certainty, that his manner of arraying and presenting the evidence was unfair, and likely to be prejudicial, or that his language, when fairly interpreted, was

likely to convey to the jury his opinion on the weight of the testimony. *State v. Jones*, 67 N. C. 285 (1872).

Section Applies to Issues.—The facts on which this section restrains the judge from expressing an opinion to the jury are those respecting which the parties take issue or dispute and on which, as having occurred or not occurred, the imputed liability of the defendant depends. *Long v. Byrd*, 169 N. C. 659, 86 S. E. 574 (1915), citing *State v. Angel*, 29 N. C. 27 (1846).

Language Subject to Misapprehension.—When there is a conflict of testimony which leaves a case in doubt before the jury, and the judge uses language which may be subject to misapprehension and is calculated to mislead, the Supreme Court will order a venire de novo. *State v. Rogers*, 93 N. C. 523 (1885).

Remarks Made in Mere Plesantry.—Remarks made in mere pleasantry by the trial judge in the presence of the jury, in relation to irrelevant testimony of a witness he had theretofore been patiently endeavoring to properly confine, will not be held for reversible error as an expression of his opinion forbidden by statute, when it could not reasonably have had any appreciable effect upon the jury, and could only have been regarded by them in the manner in which it was uttered. *State v. Jones*, 181 N. C. 546, 106 S. E. 817 (1921).

Remark That Fact Is "Sufficiently Proved."—The judge is not permitted to express an opinion as to whether a fact, is sufficiently proved, in his charge to the jury. *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. 800 (1896).

In an action for wrongful death, an instruction that, according to the mortuary table, testate's age being a stated number of years, his life expectancy was a certain number of years, is error as being an expression of opinion by the court as to the sufficiency of the proof of the fact of age and the life expectancy, contrary to this section. *Sebastian v. Horton Motor Lines*, 213 N. C. 770, 197 S. E. 539 (1938).

The mortuary tables (see § 8-46), are but evidence of life expectancy, to be taken in connection with other evidence of health, constitution, and habits, and an instruction that intestate's life expectancy was so many years, based upon the tables, violates this rule and the rule against an expression of opinion by the court as to whether a fact is sufficiently proven. *Wachovia Bank, etc., Co. v. Atlantic Greyhound Lines*, 210 N. C. 293, 186 S. E. 320 (1936).

Charge Predicated on Jury Findings.—Where the trial judge predicates his state-

ments in his charge upon what the jury may find the facts to be, it is not an expression of opinion forbidden by this section. *Ivie v. King*, 167 N. C. 174, 83 S. E. 339 (1914).

Positive and Negative Testimony.—It is not error, as a general proposition, for a judge to say that positive testimony is entitled to more weight than negative. *Henderson v. Crouse*, 52 N. C. 623 (1860).

Assumption of Truth of Fact.—An instruction which assumes the truth of controverted facts is erroneous, as invading the province of the jury. *Bradley v. Ohio River, etc., R. Co.*, 126 N. C. 735, 36 S. E. 181 (1900); *Pigford v. Norfolk, etc., R. Co.*, 160 N. C. 93, 75 S. E. 860 (1912).

Assumption of Non-Existence of Facts.—A new trial will be awarded, where the charge of the court assumed that certain facts had not been proved, thus taking the questions from the jury. *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395 (1873).

Admitted Facts.—An instruction is not erroneous in assuming an admitted fact. *Crampton v. Ivie*, 124 N. C. 591, 32 S. E. 968 (1899).

Uncontroverted Evidence.—Where the defense is based on the uncontradicted testimony of a witness, it is proper for the court to instruct the jury to find for defendant if they believe such witness. *Chemical Co. v. Johnson*, 101 N. C. 223, 7 S. E. 770 (1888); *Purifoy v. Richmond, etc., R. Co.*, 108 N. C. 100, 12 S. E. 741 (1891); *Love v. Gregg*, 117 N. C. 467, 23 S. E. 332 (1895).

However, this principle does not apply where the evidence, if true, is susceptible of more than one deduction. *Armour Fertilizer Works v. Cox*, 187 N. C. 654, 122 S. E. 479 (1924).

Submission to Jury.—Where issues are submitted to the jury, an instruction that plaintiff cannot recover cannot be granted. *Witsell v. West Asheville, etc., R. Co.*, 120 N. C. 557, 27 S. E. 125 (1897); *Bradley v. Ohio River, etc., R. Co.*, 126 N. C. 735, 36 S. E. 181 (1900).

Instruction That There Is No Evidence.—If any testimony, however slight or insufficient, is given, which tends to establish the issue, it is error to instruct the jury that there is none. *State v. Allen*, 48 N. C. 257 (1855).

Failure of Proof.—Where there is no evidence to prove the affirmative of an issue, the jury may be instructed to answer it in the negative if they believe the evidence. *Woodbury v. Evans*, 122 N. C. 779, 30 S. E. 2 (1898); *Newsome v. Western Union Tel. Co.*, 144 N. C. 178, 56 S. E. 863 (1907).

Hypothetical Statements by Judge.—Merely hypothetical instructions are erroneous, and should not be indulged in, as they proceed on an assumption of facts. *State v. Benton*, 19 N. C. 196 (1836); *State v. Collins*, 30 N. C. 407 (1848); *State v. Murph*, 60 N. C. 129 (1863); *Johnson v. Bell*, 74 N. C. 355 (1876).

It is not error to refuse any instruction asked on a hypothetical state of facts. *Wilson v. Holley*, 66 N. C. 408 (1872).

Applies to Inferences of Fact.—Whether a fact is sufficiently proved is within the province of the jury to determine, upon which the court may not intimate an opinion, and this inhibition extends not only to the ultimate facts, but to all the essential inferences of fact arising from the testimony upon which the ultimate facts necessarily depend. *Phillips v. Giles*, 175 N. C. 409, 95 S. E. 772 (1918).

Remarks Must Be Prejudicial.—Unless it appears with ordinary certainty that the rights of either party have been in some way prejudiced by the remark or conduct of the court, it cannot be treated as error. *State v. Browning*, 78 N. C. 555 (1878).

A remark or question by the court during the progress of the trial, even though it amount to a prohibited expression of opinion by the court, will not entitle defendant to a new trial when the matter, considered in the light of all the facts and attendant circumstances, is not of such prejudicial nature as could reasonably have had an appreciable effect on the result of the trial. *State v. Perry*, 231 N. C. 467, 57 S. E. (2d) 774 (1950).

To constitute reversible error, an expression of opinion on the part of the court must be prejudicial to the interest of the appellant. *State v. Puett*, 210 N. C. 633, 188 S. E. 75 (1936).

Appellant may not maintain an exception to the charge on the ground that it contained an expression of opinion by the court in violation of this section when the alleged error is in favor of appellant and is therefore harmless as to him. *Vaughn v. Booker*, 217 N. C. 479, 8 S. E. (2d) 603 (1940).

The use of the convenient formula "the evidence tends to show" is not considered expression of an opinion upon the evidence in violation of the prohibition of this section. *Thompson v. Davis*, 223 N. C. 792, 28 S. E. (2d) 556 (1944); *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858 (1948).

It is not error, as commenting on the weight of evidence, to use in instructions the phrases "the evidence tends to show" and "evidence tending to show." *Lewis v. Norfolk*, etc., R. Co., 132 N. C. 382, 43 S.

E. 919 (1903); *State v. Jackson*, 199 N. C. 321, 154 S. E. 402 (1930); *State v. Harris*, 213 N. C. 648, 197 S. E. 142 (1938).

Remarks to Counsel.—Remarks of the judge, made, not in his charge but to counsel during the introduction of the evidence, are not a ground for a new trial, unless it reasonably appears that a party is prejudiced in the minds of the jury by such remarks. *Williams v. Crosby Lumber Co.*, 118 N. C. 928, 24 S. E. 800 (1896).

Reprimand of Spectators.—A reprimand of spectators is not a violation of this section. *State v. Robertson*, 121 N. C. 551, 28 S. E. 59 (1897).

Credibility of Witnesses.—Where there is a disputed fact depending for its proof upon the testimony of witnesses, the credibility of the witnesses is always a question for the jury, and this is so though the testimony may be all on one side. In this case, the judge may charge the jury, if they find the facts to be as testified by the witnesses, to answer the issue in a certain way; but not upon the evidence, so to answer it. *Smith v. Cashie*, etc., *Lumber Co.*, 140 N. C. 375, 53 S. E. 233 (1906); *Dobbins v. Dobbins*, 141 N. C. 210, 53 S. E. 870 (1906).

Appearance and Manner of Witness.—The presiding judge should not state to the jury his estimate of the appearance and manner of a witness. *Crutchfield v. Richmond*, etc., R. Co., 76 N. C. 320 (1877).

Time Spent in Outlining Evidence of One Party.—Where the State has a number of witnesses and only defendant testifies for the defense, the fact that the court necessarily consumes more time in outlining the evidence for the State than that of defendant does not support defendant's contention that the court expressed an opinion upon the facts by laying undue emphasis on the contentions of the State. *State v. Cureton*, 218 N. C. 491, 11 S. E. (2d) 469 (1940).

Instructing Plaintiff to Reopen Case and Supply Deficiency in Record.—Where the record disclosed that at the conclusion of all the evidence the court ruled favorably on defendant's motion to nonsuit and stated that there was a serious defect in the record and that if plaintiff wished to reopen the case and supply the deficiency the court would permit him to do so, that there followed a 10-minute recess after which the court told plaintiff he had not introduced the summons which was very material, and that upon plaintiff's request the deficiency in the record was supplied, it was held that the remarks of the court did not constitute an expression of opinion upon the evidence inhibited by this section,

but were within the court's sound discretion in discharging its duty to see to it that each side has a fair and impartial trial. *Miller v. Greenwood*, 218 N. C. 146, 10 S. E. (2d) 708 (1940).

Remark Complimentary to Witness.—A remark of the trial judge complimentary to the character of one who was a witness in the cause, made before the jury is empaneled, is not forbidden by this section. *State v. Howard*, 129 N. C. 584, 40 S. E. 71 (1901).

Mathematical computations in a charge on the measure of damages is not a usurpation of the powers of the jury, where the court charges they are used merely as an example. *Speight v. Seaboard, etc., Railway*, 161 N. C. 80, 76 S. E. 684 (1912).

Remarks Made in Directing Nonsuit of One of Several Defendants.—It is error for the judge in the presence of the jury, to nonsuit one of several defendants upon the evidence he did not participate in the offense charged against them all in the indictment, when the judge's remarks intimated that the appealing defendants had committed the offense. *State v. Sullivan*, 193 N. C. 754, 138 S. E. 136 (1927).

C. Illustrative Cases.

1. Remarks Held Not Erroneous.

a. Remarks Concerning a Party to the Trial.

Parties as Witnesses.—Where plaintiff and defendant are the principal witnesses, and the former testifies distinctly to one contract and its breach by defendant, who testifies as distinctly to another and a different contract, it is not error to charge that, if the jury find that plaintiff has stated the contract correctly, they will find for him, but, if defendant stated it correctly, then the verdict should be for him. *Barringer v. Burns*, 108 N. C. 606, 13 S. E. 142 (1891).

Remarks During Former Trial.—The remarks of the judge in sentencing a prisoner during the previous week cannot be held as improper for the trial of another defendant for participating in the same offense tried during the next week. *State v. Baldwin*, 178 N. C. 687, 100 S. E. 348 (1919).

Remark That Prisoner Would Escape.—A remark of the judge before trial began, that the jailer had informed him the prisoner "would escape if he had the opportunity" is not an expression of opinion upon the facts. *State v. Jacobs*, 106 N. C. 695, 10 S. E. 1031 (1890).

Statement That Judge Did Not Understand Claim.—Where the judge in charg-

ing the jury said, "I am not sure, and I frankly confess that I am not sure, that I understand fully the claim upon which the plaintiff based the eleven thousand and some odd dollars," it was held that this was not an expression of opinion prohibited by this section. *McDonald v. MacArthur Bros. Co.*, 154 N. C. 11, 69 S. E. 684 (1910).

b. Remarks Concerning Witnesses.

Defendant Not Prejudiced by Remarks During Cross-Examination of State's Witness.—Remarks of the court in the presence of the jury which tend to discredit a witness will be held for reversible error upon appeal of the injured party, but when such remarks are made during defendant's cross-examination of a State's witness, defendant cannot be prejudiced thereby and his exception thereto cannot be sustained. *State v. Puett*, 210 N. C. 633, 188 S. E. 75 (1936).

Remark Concerning Emotion of Witness.—On a trial for rape a remark by the judge concerning the mother of the prosecutrix, that "some allowance must be made for the woman, as she is overcome with emotion," was held not to be error. *State v. Laxton*, 78 N. C. 564 (1878).

Statement as to Corroboration Witness.—A recitation that the testimony of a witness corroborated the testimony of another witness is not an expression of opinion. *State v. Mitchell*, 193 N. C. 796, 138 S. E. 166 (1927).

A charge that ". . . and the State contends that the evidence in the case" is sufficient to establish guilt beyond a reasonable doubt and that upon the testimony of the main witness for the State "and other evidence which corroborates this testimony" the jury should return a verdict of guilty, is not an expression of opinion that "the other evidence" did corroborate the witness since it is clear that both phrases related to the statement of contentions of the State. *State v. McKnight*, 226 N. C. 766, 40 S. E. (2d) 419 (1946).

Remark That Witness Has Fully Answered Question.—Where the same witness has several times fully answered a question it is within the discretion of the trial judge to relieve the witness from answering substantially the same question; and his statement before the jury that the witness had already fully answered, is not an expression of his opinion upon the credibility of the witness. *State v. Mansell*, 192 N. C. 20, 133 S. E. 190 (1926).

Where court was of the opinion that State's witness on cross-examination by defendant's counsel had answered inter-

rogations sufficiently, and that witness said she had tried to tell the truth and did not recall all the particulars of the evidence given by her in the former trial, the remark was not an expression of opinion by the court as to the truthfulness of the witness, but was solely to suggest to counsel that her answers to his question were complete, in the discharge of the court's right and duty to control the cross-examination. *State v. Stone*, 226 N. C. 97, 36 S. E. (2d) 704 (1946).

Referring to Eyewitnesses.—Upon the trial under an indictment for assault and larceny, where some of the State's witnesses were eyewitnesses and some were not, and the defendant had admitted he was present at the time, an instruction as to the first class "now that is the testimony of eyewitnesses," followed by correct instructions as to the second class, is not objectionable as an expression of opinion by the trial judge forbidden by this section. *State v. Boswell*, 195 N. C. 496, 142 S. E. 583 (1928).

Statement that court would strike evidence unless it corroborated witness, and failure to strike it out, was not expression of opinion on weight of evidence. *State v. Starnes*, 218 N. C. 539, 11 S. E. (2d) 553 (1940).

c. Remarks Concerning Weight and Credibility of Testimony.

Instruction Based on Law.—Where there is evidence of fraud and undue influence in the making of a will, and it appears that it was by a woman who derived the property from her first husband, of which marriage there was one child, and she had given this property to the children of her second marriage, an instruction to the jury that, in the absence of some reasonable ground for such preference, this would constitute what the law calls an unreasonable will, which may be considered with the other evidence in the case as evidence upon the question of mental capacity and of undue influence, is not objectionable as an expression of opinion by the judge. *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667 (1924).

Statement That Phases of Case Were Admitted.—A trial judge in an action for damages who stated to the jury that there were phases of the case apparently admitted by the defendant's counsel and if not, to be passed upon by the jury, did not violate this section. *Means v. Carolina Cent. R. Co.*, 126 N. C. 424, 35 S. E. 813 (1900).

Statement Concerning Admission.—It is not a violation of this section for the

judge to tell the jury that the evidence that the defendant had admitted execution of a bond, if believed by the jury to be true, is entitled to more weight than the opinion of experts to the genuineness of the signature, and that such opinions should be received with caution. *Buxly v. Buxton*, 92 N. C. 479 (1885).

Reference to Testimony of One Witness.—Where the court was evidently stating the contentions of the parties as to the force of the evidence taken as a whole, his reference to the testimony of one witness is not improper as tending to restrict the consideration of the jury to it alone. *Wheeler v. Cole*, 164 N. C. 378, 80 S. E. 241 (1913).

Charge Based on Uncontradicted Testimony.—A charge by the court for the jury to return a verdict of guilty if they believed or found as true the testimony of an uncontradicted witness (capable of only one meaning), is not an expression of the court's opinion upon the weight and credibility of the evidence. *State v. Moore*, 192 N. C. 209, 134 S. E. 456 (1926).

Remark on Evidence of Character of Defendant.—An instruction that "there was evidence tending to show that he (the defendant) is a man of bad character," said while stating the contentions of the State, cannot be held for error as an expression of opinion by the court on the weight or credibility of the testimony in violation of this section. *State v. Sims*, 213 N. C. 590, 197 S. E. 176 (1938).

Statement That Evidence Satisfies "Beyond Reasonable Doubt."—Where the trial court instructed the jury "all the evidence tends to show a homicide committed in the perpetration of a robbery," and that the State has offered evidence, "which, it contends, tends to show, and which should satisfy you, gentlemen, beyond a reasonable doubt," etc.: Held, the charge will not be held for error on defendant's exception on the ground that it contained an expression of opinion by the court in violation of this section. *State v. Johnson*, 207 N. C. 273, 176 S. E. 581 (1934).

Statement as to Evidence on Handwriting.—An instruction of the court in stating the evidence that the propounder had offered three witnesses, beside herself, who had testified that they were familiar with the handwriting of deceased, and had compared the handwriting of the purported will, and had given it as their opinion that the paper writing and every part thereof is in the handwriting of the deceased, is not erroneous as an expression of the opinion by the court on the weight of the evidence, it appearing that the court, prior to

this instruction, went into detail in citing caveators' testimony. In *re Williams' Will*, 215 N. C. 259, 1 S. E. (2d) 857 (1939).

d. Miscellaneous Remarks.

The use of the word "killing," in referring to the degrees of homicide cognizable under the bill of indictment in a prosecution for manslaughter, is not harmful error where its use could not be interpreted as an expression of opinion by the court, considering the charge as a whole and the connection in which the word was used. *State v. Scoggins*, 225 N. C. 71, 33 S. E. (2d) 473 (1945).

Where Court Is Merely Identifying Exhibits.—A remark of the court that it would allow the introduction of fingerprints as found at the scene of the alleged offense and the fingerprints of defendant for the purpose of identification will not be held for error as an expression of opinion that the fingerprints were actually taken from the scene, it being obvious that the court was merely identifying the exhibits offered by the State. *State v. Hooks*, 228 N. C. 689, 47 S. E. (2d) 234 (1948).

Reference to Document as Will of Deceased.—In a caveat proceeding reference in the court's charge to a paper-writing as the will of the deceased was held not reversible error as an expression of opinion in contravention of this section where it appeared that the court was only following the example set by counsel for caveators in the examination of some of the witnesses, and the jury understood that they were trying a caveat filed to the paper-writing which had been probated in common form as the will of the deceased, and because of the caveat it was then being offered for probate in solemn form. In *re Will of McDowell*, 230 N. C. 259, 52 S. E. (2d) 807 (1949).

Reference to Effect on Verdict of Notations on Issues Submitted to Jury.—Although a trial judge should not express an opinion before jurors whom he proposes to poll in regard to the influence written notations on the margin of the issues submitted to the jury may have had on the verdict, such remarks do not come within the ban of this section. *Call v. Stroud*, 232 N. C. 478, 61 S. E. (2d) 342 (1950).

Where Defense Not Applicable to Issue.—Where the testimony of all the officers of a bank conversant with the facts that the bank was an indorsee for value and a holder in due course of the note sued on was not contradicted, and the maker relied solely on the fraud of the payee in procuring the note, the court properly charged that if the jury believed the evi-

dence, the verdict should be for the bank. *First Nat. Bank v. Griffin*, 153 N. C. 72, 68 S. E. 919 (1910).

Gambling Nature of Device.—A charge that a punchboard and a tip book are the same under the statute and "that if you find this defendant guilty" will not be held for error as an expression of opinion on the evidence when the phrase is immediately followed by an instruction that in order to convict, the jury must find beyond a reasonable doubt that the tip boards were gambling devices and were in defendant's possession. *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272 (1940).

A reference in the charge to "these gambling devices" will not be held prejudicial as an expression of opinion on the evidence when it is apparent that the charge referred to the devices mentioned in the warrant and not to those about which evidence had been taken. *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272 (1940).

Comment upon Admission of Confession in Evidence.—The comment of the trial court upon the admission of defendant's confession in evidence that the court had held the confession competent because it appeared that it was taken without hope of reward or without extortion or fear, after defendant had been duly warned of his rights, amounts to no more than stating that the confession had been admitted in evidence and the reasons for admitting it, and will not be held for error as an expression of opinion by the court prohibited by this section. *State v. Fain*, 216 N. C. 157, 4 S. E. (2d) 319 (1939).

Statement to Jury.—Where the jury has returned for further instructions which the court fairly and impartially gives, his statement to them that they should reconcile the evidence if they could and that if they could not, the court would "have to do something else," is not an intimation as to whether "any fact has been fully and sufficiently proved." *Nixon v. Buckeye Cotton Oil Mill*, 174 N. C. 730, 94 S. E. 410 (1917).

Comment on Jury's Duty.—Where the jury has failed up to that time to agree upon a verdict in a criminal action, an instruction by the judge that in effect it was a matter of indifference to him, but it was their duty to agree if they could do so without violence to their consciences; that they must find for conviction beyond a reasonable doubt, uninfluenced by prejudices, etc., was held, not to be an expression of opinion by the judge upon the evidence. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849 (1922).

Question as to Verdict.—The question of

the court as to whether the verdict of guilty referred to first degree burglary held to be an inquiry and not an expression of opinion. *State v. Walls*, 211 N. C. 487, 191 S. E. 232 (1937).

Statement after Verdict Excusing Jurors for Term.—When the trial judge has stated to a jury after rendering a verdict in a criminal action, that from their verdict their attention was evidently attracted by important business matters at home, and therefore he would excuse them for the term, it cannot be construed as an expression of opinion forbidden by this section though one of the same jurors sat upon this case. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849 (1922).

Remark Concerning Recall of Witness.—A remark by a judge, when he permitted a witness to be recalled, and asked a question to impeach his credibility, that if he had known the counsel intended to ask that question he would not have allowed the witness to be recalled, is not an expression of opinion about the facts. *DeBerry v. Carolina Cent. R. Co.*, 100 N. C. 310, 6 S. E. 723 (1888).

Question to Counsel.—Where the judge asked defendant's counsel in the hearing of the jury, if he thought that an objection to certain proof in the case "would be fair," it was held that the remark of the judge was no violation of this section. *State v. Brown*, 100 N. C. 519, 6 S. E. 568 (1888).

Response to Request of Counsel.—Where the prisoner's counsel called attention to the judge's failure to state in his summary that the prosecutrix had said that she did not know a certain woman, to which the judge said, "Yes, I believe that she did say that," it was held, that such remarks were a sufficient response to the request of the prisoner's counsel, and did not convey an opinion of the judge in violation of this section. *State v. Freeman*, 100 N. C. 429, 5 S. E. 921 (1888).

Suggestion of Method of Settlement.—In an action for the purchase price of a horse, defended upon the ground of a breach of warranty, a suggestion by the judge, that a good test would be for each party to select a man and drive the horse sufficiently to see what his condition was, is not an expression of opinion. *Long v. Byrd*, 169 N. C. 658, 86 S. E. 574 (1915).

Matters Subject to Mathematical Calculation.—Where the answers to the issues as to the amounts recoverable, in case the defendants were found liable to the plaintiffs, is merely a matter of mathematical calculation, peremptory instructions in regard thereto do not constitute prejudicial

or reversible error under this section. *State v. Gant*, 201 N. C. 211, 159 S. E. 427 (1931).

Opinion on One Count Applies to Others.—Where the verdict of the jury has acquitted the defendant under a count charging an unlawful sale of intoxicating liquors, but has convicted him of having the unlawful possession of the liquor for the purpose of sale, an expression of his opinion by the trial judge upon the evidence that the defendant had made the unlawful sale, applies also to the count charging that he had the unlawful possession for the purposes of sale, and constitutes error. *State v. Sparks*, 184 N. C. 745, 114 S. E. 755 (1922).

2. Remarks Held Erroneous.

a. Remarks Concerning a Party to the Trial.

Character of Accused.—It was held to be error for a judge to tell the jury that, "in a plain case, a good character would not help the prisoner; but in a doubtful case, he had a right to have it cast into the scales and weighed in his behalf"; the true rule being that in all cases a good character is to be considered. *State v. Henry*, 50 N. C. 66 (1857).

Motive.—A charge, "While it is permissible to show a motive as a circumstance to be considered by the jury, it is not necessary. All the State has to do is to satisfy the jury beyond a reasonable doubt that the defendants did the acts charged in the indictment," was held to be error under this section. *State v. Morgan*, 136 N. C. 628, 48 S. E. 670 (1904).

Comment on Absence of Defendants.—Where the trial judge has questioned a witness as to the absence of the defendants from court, where their deed was being attacked for fraud, his remark that their absence was a circumstance that a fraud had been committed is an expression of opinion forbidden by this section. *Greene v. Newsome*, 184 N. C. 77, 113 S. E. 569 (1922).

Ordinary Care.—An instruction, that if a porter, injured in getting on a train, could have got on in safety by using both hands, his failure to do so was not the exercise of ordinary care, was erroneous. *Sanders v. Atlantic, etc., R. Co.*, 160 N. C. 526, 76 S. E. 553 (1912).

"Proverbial Slowness of Messenger Boy."—In an action against a telegraph company it is error for the court to refer in its charge to the "proverbial slowness of the messenger boy." *Meadows v. Western Union Tel. Co.*, 131 N. C. 73, 42 S. E. 534 (1902).

Corporation Benefits.—In an action against a corporation the judge recited the benefits conferred by corporations upon the citizens, without mentioning the benefits they received in return, and intimated that he would not permit a verdict rendered upon “guesswork, sympathy, pity, or prejudice,” etc., the charge was held to be an expression of opinion. *Starling v. Selma Cotton Mills*, 171 N. C. 222, 88 S. E. 242 (1916).

Identification of Defendant.—Where the only evidence connecting the defendant with operating a still was a coat found there with a receipt with defendant’s name on it in one of the pockets, an instruction that the name on the receipt was sufficient evidence that it was the property of defendant, is an expression of an opinion. *State v. Allen*, 190 N. C. 498, 130 S. E. 163 (1925).

Where the State relied upon testimony that tracks had been followed from the scene of the crime to the defendant’s room, but did not prove them to be the defendant’s, the expression of the court, “You tracked the defendant to whose house?” was held prejudicial, and especially so as the evidence of the State was circumstantial. *State v. Oakley*, 210 N. C. 206, 186 S. E. 244 (1936).

Remark Concerning Plaintiff as Witness.—In an action of claim and delivery for a horse, an instruction by the trial judge, that in passing upon the credibility of the plaintiff as a witness the jury should consider the fact that he had \$50 of the defendant’s money in his pocket and refused to give it to him, amounts to an expression of an opinion upon the facts. *Faulkner v. King*, 130 N. C. 494, 41 S. E. 885 (1902).

Time Plaintiff Would Live.—In an action to recover damages for a permanent injury alleged to have been negligently inflicted, an expression in the charge as to the presumed time the plaintiff would live, and the consequent diminution of his earning capacity, falls within the inhibition of our statute. *Cogdill v. Boice Hardwood Co.*, 194 N. C. 745, 140 S. E. 732 (1927).

b. Remarks Concerning Witnesses.

Remarks Having Effect of Impeaching Witnesses.—Where questions propounded by the court have the effect of impeaching witnesses they are in violation of this section and defendants’ exceptive assignments of error thereto must be sustained. *State v. Winckler*, 210 N. C. 556, 187 S. E. 792 (1936).

Remark That Witness Was “Admirably Lucid.”—The expression of the opinion of the court as to the “admirably lucid” testimony of a medical expert witness consti-

tuted reversible error. *State v. Horne*, 171 N. C. 787, 88 S. E. 433 (1916).

Comments on Witnesses.—The expression, “This witness has the weakest voice or the shortest memory of any witness I ever saw”, is clearly susceptible of the construction that the testimony of the witness was at least questioned by the court, if not unworthy of credit. *State v. Bryant*, 189 N. C. 112, 126 S. E. 107 (1925).

In a prosecution for carnal knowledge of a female child over twelve and under sixteen years of age, the repeated remark of the court in directing the sheriff to quiet the spectators, made immediately after cross-examination of prosecutrix to impeach her testimony, that “you people cannot laugh at the predicament of this poor little girl; the only difference between you and she is that you have not been caught,” was held to violate this section, as tending to invoke sympathy for prosecutrix and thereby bolster her testimony and as tending to impair the effect of defendant’s plea of not guilty. *State v. Woolard*, 227 N. C. 645, 44 S. E. (2d) 29 (1947).

In prosecution for having carnal knowledge of female under sixteen years of age the disparagement of the defendant’s witness and the expression of opinion that prosecutrix was not a delinquent, though inadvertently made in the presence of the jury, entitles defendant to another hearing. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378 (1946).

Questioning Nonresident as to Professional Ethics.—In an action to recover damages for personal injury, where a release from liability is set up, it is an ineradicable error for the judge, during the trial and in the presence and hearing of the jury, to stop the testimony of the defendant’s witness, a nonresident attorney who had procured the release, and question him upon the professional ethics involved and the standard in his own state, of such conduct; which reflected on the witness. *Morris v. Kramer Bros. Co.*, 182 N. C. 87, 108 S. E. 381 (1921).

Witness Included in Same Indictment.—Where there is a severance on the trial of defendants, and another party charged in the bill testifies in behalf of the accused, it is error, as indicating the opinion of the court on the facts, to charge that the very fact that the witness is included in the same indictment will impair his testimony, and that the same should not be placed on the same plane or footing with that of a witness of undoubted character who is disinterested. *State v. Jenkins*, 85 N. C. 544 (1881).

Interest of Witness.—It is error to charge the jury that they are bound to believe a witness who is unimpeached and uncontradicted. Though he tells a credible story, his connection with the parties may shake the jury's confidence. *Noland v. McCracken*, 18 N. C. 594 (1836).

Minister as Witness.—Where a judge charged that, because a witness was clergyman, his testimony was therefore entitled to more weight, it is sufficient ground for a new trial. *Sneed v. Creath*, 8 N. C. 309 (1821).

Statement That "Both Witnesses Are Gentlemen."—For the judge, where the testimony of two witnesses conflicted, to tell the jury: "Both witnesses are gentlemen. It is a matter of memory"—was erroneous, as interfering with the province of the jury to determine the credibility. *McRae v. Lawrence*, 75 N. C. 289 (1876).

c. Remarks Concerning Weight and Credibility of Testimony.

Contentions of the Parties.—The manner of stating the contentions of the parties, if indicative of the court's opinion, is within the prohibition of this section, and where court in stating State's contentions in regard to the disinterestedness of officers who testified and the weight to be given the testimony of a doctor as an expert witness, together with a later statement that the evidence was "rather clear" was held error as an expression of opinion by court upon weight of the evidence. *State v. Benton*, 226 N. C. 745, 40 S. E. (2d) 617 (1946).

Remarks as to Testimony of Officer.—Where an officer purchased liquor in order to obtain evidence against a suspect, and voluntarily testified for the prosecution, an instruction which left the impression that his credibility was enhanced by the fact that he was an officer in the performance of his duty, and that he was protected from prosecution by § 18-8, was held erroneous as an expression of opinion on the credibility of the testimony. *State v. Love*, 229 N. C. 99, 47 S. E. (2d) 712 (1948).

Remark That Circumstance Was a "Strong Badge of Fraud."—Where a creditor postponed taking judgment because the debtor alleged that he was making arrangements to borrow the money, but before the expiration of the extended time the debtor made an assignment, preferring other creditors, an instruction that the circumstance was a strong badge of fraud was held to be error. *Bonner v. Hodges*, 111 N. C. 66, 15 S. E. 881 (1892).

Instruction as to Former Marriage.—In an indictment for bigamy an instruction that the weight of the evidence was that

there had been no first marriage, is a violation of this section. *State v. Parker*, 106 N. C. 711, 11 S. E. 517 (1890).

Determination of Preponderance.—A request in a civil action that, "when the minds of the jury are in doubt, they must find for the defendant," is error. *Willis v. Atlantic, etc., R. Co.*, 122 N. C. 905, 29 S. E. 941 (1898).

Instruction That Evidence Rebutts a Prima Facie Case.—When the plaintiff makes out a prima facie case, then to instruct the jury that the evidence rebuts it and overcomes it, is to invade the province of the jury and violates this section. *Sherill v. Western Union Tel. Co.*, 116 N. C. 655, 21 S. E. 429 (1895).

Instruction That Guilt Is Established.—This section prohibits the court in its charge to the jury from expressing any opinion as to the weight and credibility of the evidence, and, defendant having pleaded not guilty, it is error for the court to charge the jury in effect that the fact of guilt is established by the evidence, even though the evidence be uncontradicted and even though the fact of guilt may be inferred from defendant's own testimony, since the credibility of the evidence is in the exclusive province of the jury. *State v. Blue*, 219 N. C. 612, 14 S. E. (2d) 635 (1941).

Statement That Evidence Left Matter Unproved.—Where the judge presiding at a trial said that, while there was some evidence to go to the jury, it was a bare scintilla, leaving the matter not proved, it was held error. The evidence was competent or it was not, and should have been withdrawn from the jury or submitted without expression of opinion. *Boing v. Raleigh, etc., R. Co.*, 87 N. C. 360 (1882).

Concerning Corroboration of Defendant's Testimony.—Where the defendant, charged with homicide, testified as to his version of the fatal killing upon his contention of self-defense, and narrated the actions of himself, his oldest son, and the deceased, and where upon the conclusion of his testimony the court by interrogation objected to by defendant's counsel, brought out the fact that the son was seventeen years old, and was present in the courtroom, the charge of the court which set forth as the contention of the State that defendant's testimony could not be relied upon because uncorroborated, notwithstanding the fact that defendant's oldest son, who saw what happened, was present in the courtroom was held to constitute reversible error. *State v. Bean*, 211 N. C. 59, 188 S. E. 610 (1936).

Concerning Value of Book as Testimony.

—For the judge to say that a book on farriery, which had been read by counsel, was entitled to as much authority as a witness who had been examined as an expert in the science of diseases of horses, is a clear violation of this section. *Melvin v. Easley*, 46 N. C. 386, 62 Am. Dec. 171 (1854).

Concerning Map.—Where a certain location is material and a surveyor had testified and his map was put in evidence, it is reversible error for the trial judge to instruct the jury that they must be guided in their judgment, not from the map, but from the testimony of the surveyor and other witnesses. *Swain v. Clemons*, 172 N. C. 277, 90 S. E. 193 (1916).

Concerning Location and Acreage.—The weight of the circumstance that one claimed location would give the acreage called for by the deed, while the other would give a greater acreage, being for the jury, it was error to charge that the acreage was not of great value to aid the jury in determining the location. *May v. Manufacturing, etc., Co.*, 164 N. C. 262, 80 S. E. 380 (1913).

Instruction as to Value of Deed.—In an action for ejectment it was error to instruct the jury that the deed was sufficient to vest the title in the grantees, where plaintiff's right to recover was dependent upon evidence that the defendant's grantor was estopped to claim the land, as the credibility of the witnesses was a matter for the jury. *Campbell v. Everhart*, 139 N. C. 503, 52 S. E. 201 (1905).

Instruction as to Age of Prosecutrix.—Where in prosecution under § 14-26, the court, in summarizing the contentions of defendant, charged that defendant insisted that the jury should not find beyond a reasonable doubt that the prosecutrix was under sixteen years of age, "whereas the Biblical records and the testimony of her father and mother should satisfy you beyond a reasonable doubt that she is under sixteen years of age," the instruction constitutes an expression of opinion on an essential element of the crime charged, prohibited by this section, and the error is not mitigated by construing the charge as a whole, nor may it be upheld as charging that the jury should find that the prosecutrix was under sixteen years of age, if they believed the uncontradicted testimony. *State v. Wyont*, 218 N. C. 505, 11 S. E. (2d) 473 (1940).

Where the charge on the issue of testamentary capacity, read from the text-book, is that where the testator's sickness is wholly physical, proof of his condition as

to lethargy, unconsciousness, etc., "is entitled to little consideration," and that the courts will "scrutinize efforts by witnesses to infer mental weakness or insanity from mere physical decrepitude," and that "the will of an aged person should be regarded with great tenderness" when not procured by fraud, etc., is held as reversible error under this section. *In re Will of Bergeron*, 196 N. C. 649, 146 S. E. 571 (1929).

d. Miscellaneous Remarks.

Instruction Not Based on All Elements.

—An instruction which states that, if the jury find certain facts grouped in the instruction, there was no negligence, is objectionable, unless all the material elements of the case are included. *Ruffin v. Atlantic, etc., R. Co.*, 142 N. C. 120, 55 S. E. 86 (1906).

Inference from Evidence.—An instruction charging the jury that, if they believed the evidence, they should find certain evidential facts to be true and that thereupon, certain other facts must be true, is error. *Kinney v. North Carolina R. Co.*, 122 N. C. 961, 30 S. E. 313 (1898).

Instruction as to Uncorroborated Testimony in Perjury Trial.—While the uncorroborated testimony of one witness might convince the jury, beyond a reasonable doubt, of the guilt of accused in a criminal trial for perjury, it is not sufficient in law; and instructions, therefore, that if the jury is so satisfied from the evidence, beyond a reasonable doubt, they should return a verdict of guilty, is erroneous as failing to comply with this section. *State v. Hill*, 223 N. C. 711, 28 S. E. (2d) 100 (1943).

Charge Based on Contradicted Witness.

—It is error in the judge to designate a single witness who is contradicted by other witnesses, and to instruct the jury that if they believe the testimony of such witness, then the prisoner is guilty. *State v. Rogers*, 93 N. C. 523 (1885).

On Conflicting Evidence.—Where the evidence was conflicting, an instruction, "if the jury believe the evidence, the answer to the first issue should be no," is a violation of this section. *Leak v. Covington*, 99 N. C. 559, 6 S. E. 241 (1888); *Rickert v. Southern R. Co.*, 123 N. C. 255, 31 S. E. 497 (1898).

Where the case is tried upon special issues, an instruction that plaintiffs are not entitled to recover if the jury believe the evidence is improper. *Baker v. Brem*, 103 N. C. 72, 9 S. E. 629 (1889); *Jones v. Balsley*, 154 N. C. 61, 69 S. E. 827 (1910). See *Cauley v. Dunn*, 167 N. C. 32, 83 S. E. 16 (1914).

Assumption of Conflicting Fact.—Where defendant railway claimed that decedent found on its tracks was already dead when struck by the train, and the evidence on this point was in sharp conflict, an instruction which assumed that decedent was killed by the train was erroneous under this section. *Hunsinger v. Carolina, etc., Ry.*, 194 N. C. 679, 140 S. E. 608 (1927).

Remark That "We Are Not Informed."—Where there is any evidence to the contrary, it is erroneous in the judge to say, "We are not informed" of the fact upon which it is for the jury to pass. *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395 (1873).

Degree of Crime.—Although the defendant in a trial for murder introduced no evidence, and all the evidence for the State tended to show only murder in the first degree, it was error to instruct the jury that if they believed the evidence they should find the defendant guilty of murder in the first degree. *State v. Gadberry*, 117 N. C. 811, 23 S. E. 477 (1895).

When No Presumption at Law.—A trial judge cannot say to the jury that any fact proved or admitted, that does not in law raise a presumption of the truth of the allegation of fraud, is a strong circumstance tending to establish it. *National Bank v. Gilmer*, 116 N. C. 684, 22 S. E. 2 (1895).

Arguing Law to Jury.—For the judge to charge that a case cited by counsel for plaintiff, and relied on to establish his position, was an authority directly against that position, and that counsel knew or ought to have known it, was held to be error. *Perry v. Perry*, 144 N. C. 328, 57 S. E. 1 (1907).

Trial for Attempted Rape.—On a trial of an indictment for an assault with intent to commit rape, where there was evidence that the defendant had been found on the six-year-old child, while on her back with her clothes up, it was held to be error for the court in its charge to the jury to remark with emphasis, "Why was she on her back, and why was he on her?" *State v. Dancy*, 78 N. C. 437 (1878).

Insurance.—A requested charge that, if insured was more than 55 years of age when he applied for membership, the association was not liable on the policy, "as the same was procured under a misrepresentation of the age" of insured, was properly refused as an expression of opinion upon the facts. *Tillery v. Royal Ben. Soc.*, 165 N. C. 262, 80 S. E. 1068 (1914).

Regarding Duty of Railroad to Build Culvert.—It was held error in a trial judge to instruct the jury that it was the duty of a railroad company to build a culvert over

a certain ravine, and it was also held error to express the opinion that the said branch, regarding which there was conflicting evidence, was not a natural water-course. *Fleming v. Wilmington, etc., R. Co.*, 115 N. C. 676, 20 S. E. 714 (1894).

Effect of Easement on Adjoining Land.—In a proceeding to assess compensation for the taking of an easement over respondent's land for a high voltage transmission line, where the court in ruling upon the admissibility of evidence stated that the steel towers on the land and the power lines running over the land did not affect the value of the land outside the easement, it was held that the remarks of the court constituted a determination, as a matter of law, of an issue of fact within the province of the jury in violation of this section. *Nantahala Power, etc., Co. v. Carringer*, 220 N. C. 57, 16 S. E. (2d) 453 (1941).

Validity of Lien.—In an action involving the validity of a lien on certain crops, an instruction that the lien is void, because it was recorded in one county, while the debtor resided in another, involves an expression of opinion as to the facts of the case. *Weisenfield v. McLean*, 96 N. C. 248, 2 S. E. 56 (1887).

Bills and Notes.—In an action on a note, where defendant testified that he signed as surety, with the knowledge of the payee, and the payee testified to the contrary, it was error to instruct the jury that if they believed the evidence they should find that the payee knew that defendant signed as a surety. *Harris v. Carrington*, 115 N. C. 187, 20 S. E. 452 (1894).

Title to Land.—Plaintiffs and defendant claimed the locus under respective State grants. Defendant contended that plaintiffs' grant could not be accurately located and that, if located, covered only a portion of the locus. The court held that an instruction that by the two grants introduced in evidence title had been shown out of the State, must be held for error as an expression of opinion that the grant under which plaintiffs' claim was valid and that it had been located to cover the land in question. *Davis v. Morgan*, 228 N. C. 78, 44 S. E. (2d) 593 (1947).

Value of Property.—In an action for damages plaintiff testified that the property destroyed was worth a specified sum, and defendant introduced as a witness the tax lister who testified that plaintiff stated that a much lower valuation was too high for purposes of taxation, it was held, that instructions that the jury had the uncontradicted evidence of plaintiff as to the value of the property destroyed was erroneous, as withdrawing from the considera-

tion of the jury the testimony of the tax lister. *Dodson v. Southern R. Co.*, 132 N. C. 900, 44 S. E. 593 (1903).

III. EXPLANATION OF LAW AND EVIDENCE.

A. General Consideration of the Charge.

Editor's Note. — When the Supreme Court in *Hinshaw v. Raleigh, etc.*, R. Co., 118 N. C. 1047, 24 S. E. 426 (1896), overruled *Emry v. Raleigh, etc.*, R. Co., 109 N. C. 589, 14 S. E. 352 (1891), and modified the broad rule laid down in *State v. Boyle*, 104 N. C. 800, 10 S. E. 696 (1889), in a series of adjudications that followed it, it was not intended that the jury should be left to grope in utter darkness, unless counsel were sufficiently diligent to draw fire from the court by prayers for instruction. *McCracken v. Smathers*, 119 N. C. 617, 26 S. E. 157 (1896).

The Object of Instructions.—The chief object contemplated in the charge of the judge is to explain the law of the case, to point out the essentials to be proved on the one side and the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Bird v. United States*, 180 U. S. 356, 21 S. Ct. 403, 45 L. Ed. 570 (1901). See *State v. Friddle*, 223 N. C. 258, 25 S. E. (2d) 751 (1943).

The chief purposes of the charge are clarification of the issues, elimination of extraneous matters, and declaration and application of the law arising upon the evidence. *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858 (1948).

The chief purpose of a charge is to aid the jury clearly to comprehend the case, and to arrive at a correct verdict, and this statute imposes upon the trial judge the positive duty of instructing the jury as to the law upon all of the substantial features of the case. If the mandatory requirements of this section are not observed, there can be no assurance that the verdict represents a finding by the jury under the law and the evidence presented. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

A charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

Benefits to Be Derived from Charge.—The principal benefit to be derived from a charge to the jury is not a statement of law but the elimination of irrelevant matters. *Irvin v. Southern R. Co.*, 164 N. C. 5, 80 S. E. 78 (1913).

Theory as to Evidence.—Much confusion as to proceeding with evidence, when a prima facie showing has been made, is eliminated by a proper application of this section. Under our system the trial court, during the production of the evidence, must necessarily proceed upon the theory that the jury has a right to find as true all the evidence submitted by either party. *Hunt v. Eure*, 189 N. C. 482, 127 S. E. 593 (1925).

Charge Must Be Considered as a Whole.

—The charge to a jury must be considered as a whole in the same connected way in which it was given, and upon the presumption that the jury did not overlook any portion of it. If, when so considered, it presents the law fairly and clearly to the jury, it will afford no ground for reversing the judgment, though some of the expressions, when standing alone, might be regarded as erroneous. *Gilliland v. Board*, 141 N. C. 482, 54 S. E. 413 (1906); *In re Will of Hardee*, 187 N. C. 381, 121 S. E. 667 (1924).

The charge must be considered contextually and not disjointedly. *Riverview Milling Co. v. State Highway Comm.*, 190 N. C. 692, 130 S. E. 724 (1925), and cases cited therein.

In determining whether a charge comes up to the statutory requirements it must be considered as a whole. *Gore v. Wilmington*, 194 N. C. 450, 140 S. E. 71 (1927). See *State v. Moore*, 197 N. C. 196, 148 S. E. 29 (1929).

The charge of the trial court will be construed as a whole, and if, upon such construction, it fully charges the law applicable to the facts and does not impinge this section, it will not be held for error on appeal. *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 488, 177 S. E. 423 (1934).

Where it appears that the charge, when read contextually as a whole, was not prejudicial in its manner of stating the evidence and contentions of the parties, an exception, based upon detached portions thereof, will not be sustained. *Braddy v. Pfaff*, 210 N. C. 248, 186 S. E. 340 (1936).

Charges Held Not to Impinge on This Section.—See *State v. Hester*, 209 N. C. 99, 182 S. E. 738 (1935); *State v. Hodgins*, 210 N. C. 371, 186 S. E. 495 (1936); *State v. Atlantic Ice, etc., Co.*, 210 N. C. 742, 188 S. E. 412 (1936).

Matters Stricken from Complaint.—Requested instructions as to matters stricken from the complaint as to which the evidence had been withdrawn from the jury should be refused. *Tilghman v. Seaboard*,

etc., R. Co., 167 N. C. 163, 83 S. E. 315 (1914).

Application of Instructions to Case.—It is not error for the court to refuse to give instructions which, though correct in the abstract, are not applicable to the case. *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845 (1893).

The refusal to instruct as to a point not material to the verdict is not prejudicial error. *Mendenhall v. North Carolina R. Co.*, 123 N. C. 275, 31 S. E. 480 (1898).

However, the giving of an instruction not strictly applicable to the material questions to be determined is not ground for reversal, where no prejudice is shown and it appears the jury could not have been misled thereby. *Evans v. Howell*, 84 N. C. 461 (1881).

Arguments of Counsel.—It was not error in the court to recapitulate fairly such contentions of counsel as illustrated the bearing of the evidence on the issues. *Clark v. Wilmington, etc., R. Co.*, 109 N. C. 430, 14 S. E. 43, 14 L. R. A. 749 (1891).

Unauthorized Charge.—A judge cannot make a charge not authorized by the pleadings. Thus in an action for a debt barred by the statute of limitation, where the statute is not pleaded, the judge cannot charge that the debt is barred although requested to make such a charge. *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713 (1891).

Inconsistent or Contradictory Instructions.—An inconsistent charge by the court which leaves the jury in doubt as to the law applicable to their findings upon an issue is error. *Patterson v. Nichols*, 157 N. C. 406, 73 S. E. 202 (1911); *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 78 S. E. 276 (1913). See also, *Oakley v. National Cas. Co.*, 217 N. C. 150, 7 S. E. (2d) 495 (1940).

Erroneous Instruction Not Cured by Correct Instruction.—An error in giving an erroneous instruction is not cured by subsequently correctly stating the law. *State v. Morgan*, 136 N. C. 628, 48 S. E. 670 (1904).

When Charge Contains a "Powerful Summing up."—Where the trial judge in his general charge gives "every reasonable contention of the State," it is erroneous to give an entirely new charge, containing "a powerful summing up" for the State. *State v. McDowell*, 129 N. C. 523, 39 S. E. 840 (1901).

The use of the words "you want to find" in charging the jury as to the elements of the offense charged, construing the charge as a whole, merely placed the burden on

the State to prove the crime charged and not to constitute an expression of opinion or a direction or intimation that the jury should so find. *State v. Smith*, 221 N. C. 400, 20 S. E. (2d) 360 (1942).

The use of the words "the State has offered evidence which tends to show" in a charge to the jury does not constitute an expression of opinion in violation of this section. *State v. Howard*, 222 N. C. 291, 22 S. E. (2d) 917 (1942).

Contentions Not Necessarily a Part of Instructions.—The contentions of the parties to an action are not a necessary part of the instruction of the trial judge to the jury upon the law of the case. *State v. Whaley*, 191 N. C. 387, 132 S. E. 6 (1926).

Requiring Jury to Be Satisfied.—An instruction requiring the jury to be "satisfied" as to the facts of justification relied on to defeat an action for false arrest and imprisonment does not require too great a degree of proof to establish justification. *Sigmon v. Shell*, 165 N. C. 582, 81 S. E. 739 (1914).

Weight of Defendant's Testimony.—The testimony of defendant if accepted as true by the jury, is given the same credibility as that of a disinterested witness, and a charge to that effect, after a proper instruction as to interest, is not error. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258 (1924).

Instructions Should Be Restricted to Answers Expected.—Where the case is submitted for a special verdict, the jury should only be instructed on questions which they are to answer, and it is error to inform them as to the effect their answers will have on the ultimate rights of the parties, or to authorize them to answer in the form of a legal conclusion. *Bottoms v. Seaboard, etc., R. Co.*, 109 N. C. 72, 13 S. E. 738 (1891); *Earnhardt v. Clement*, 137 N. C. 91, 49 S. E. 49 (1904).

Defendants can not complain that the court embodied in the charge, as an abstract proposition, what is known as the "rule of the prudent man" in response to its requests, where, in specific instructions, the court correctly applies the law of negligence and contributory negligence to the facts of the case. *Blackwell v. Lynchburg, etc., Railroad*, 111 N. C. 151, 16 S. E. 12, 17 L. R. A. 729, 32 Am. St. Rep. 786 (1892).

Where Charge Favorable to Appellant.—The failure of the court to comply with this section will not be sufficient ground for a new trial, where the case on appeal shows that the charge of the court presented the case in the most favorable light for the defendant. *State v. Pritchett*, 106 N. C. 667, 11 S. E. 357 (1890).

Requests for Instructions Must Be Timely.—A party desiring more specific instructions than those given in the general charge must ask for them in apt time. A complaint of the charge, made after verdict, is too late. *Simmons v. Davenport*, 140 N. C. 407, 53 S. E. 225 (1906). See also, *State v. Brady*, 107 N. C. 822, 12 S. E. 325 (1890).

Exception Must Be Specific.—An exception to the charge on the ground that it failed to explain and apply the law to the evidence as required by this section may be disregarded as a broadside exception. *State v. Webster*, 218 N. C. 692, 12 S. E. (2d) 272 (1940).

An exception to the charge on the ground that it did not explain the evidence and did not declare and explain the law arising thereon as required by this section is ineffective as a "broadside" exception, it being necessary that an exception to the charge specifically refer to the particular point claimed to be erroneous. *Arnold v. State Bank, etc., Co.*, 218 N. C. 433, 11 S. E. (2d) 307 (1940).

An exception that the trial judge "failed to state in a plain and correct manner the evidence, and declare and explain the law arising thereon as required in this section," is too general and cannot be sustained. *Jackson v. Ayden Lumber Co.*, 158 N. C. 317, 74 S. E. 350 (1912). See *Baird v. Baird*, 223 N. C. 729, 28 S. E. (2d) 225 (1943).

Objection to a charge for not complying with this section must state specifically how the charge failed to measure up to the requirements of this section. *Steele v. Cox*, 225 N. C. 726, 36 S. E. (2d) 288 (1945).

And Based on Proper Assignment of Error.—An exception for the failure of the court to comply with the provisions of this section must be based upon a proper assignment of error on this ground. *State v. Muse*, 230 N. C. 495, 53 S. E. (2d) 529 (1949).

Exception and Assignment of Error.—An exception, for failure to charge the jury as required by this section, must be taken in the same manner as any other exception to the charge, and an assignment of error based thereon must particularize and point out specifically wherein the court failed to charge the law arising on the evidence—otherwise it becomes a mere broadside and will not be considered unless pointed out in some other exception. *State v. Britt*, 225 N. C. 364, 34 S. E. (2d) 408 (1945).

Errors Should Be Pointed Out before Verdict.—Any omission to state the evi-

dence or to charge in any particular way should be called to the attention of the court before verdict, so that the judge may have an opportunity to correct the oversight. *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884 (1944).

Any error or omission in the statement of the evidence by court must be called to the attention of the court at the trial to avail the defendant any relief on his appeal. *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823 (1946).

Error Cured by Verdict.—Where there are several counts of an indictment, and the charge was correct upon those on which a conviction has been had, the verdict cures the error committed in not giving the principles of law arising from the evidence upon the count which the appealing defendant was acquitted. *State v. Church*, 192 N. C. 658, 135 S. E. 769 (1926).

Same—Failure to Call Judge's Attention to Error.—The appellant must at the time call the attention of the trial judge to errors he is alleged to have committed in stating the contentions of the parties to the jury, when he has not done so, as an exception after verdict comes too late to be considered on appeal. *State v. Beavers*, 188 N. C. 595, 125 S. E. 258 (1924); *State v. Harvey*, 214 N. C. 9, 197 S. E. 620 (1938); *State v. Bowser*, 214 N. C. 249, 199 S. E. 31 (1938).

Evidence towards Which Instruction Directed Must Appear.—The law requires the judge to "state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The function of the appellate court on review is to determine whether this has been adequately done, and it cannot perform that office in the absence of the evidence toward which the instruction was directed. *Shepherd v. Dollar*, 229 N. C. 736, 51 S. E. (2d) 311 (1949).

Where Record Shows Charge Was Correct and No Objection Made.—Where it was stipulated in the record that the court correctly charged the jury on all phases of the case in compliance with this section, and the issues submitted were not objected to by defendants, it was held that the verdict of the jury must be upheld. *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463 (1943).

B. Explanation Required.

1. In General.

Rule Stated.—It is the duty of the court to state the evidence "to the extent necessary" and to declare and explain the law

as it relates to the pertinent aspects of the testimony offered. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212 (1951).

The chief object contemplated in this section is for the court to explain the law of the case, to point out the essentials to be proved on the one side and on the other, and to bring into view the relation of the particular evidence adduced to the particular issue involved. *Stern Fish Co. v. Snowden*, 233 N. C. 269, 63 S. E. (2d) 557 (1951).

It is the duty of the judge, under the provisions of this section, to state in a plain and correct manner the evidence given in the case and to declare and explain the law arising thereon, without expressing any opinion upon the facts. *State v. Owenby*, 226 N. C. 521, 39 S. E. (2d) 378 (1946).

It is the duty of the judge in charging the jury, to segregate the material facts of the case, array the facts on both sides, and apply the principles of law to each, so that the jury may decide the case according to the credibility of the witnesses and the weight of the evidence. *State v. Rogers*, 93 N. C. 523 (1885), citing *State v. Dunlop*, 65 N. C. 288 (1871); *State v. Jones*, 87 N. C. 547 (1882). See *Guyes v. Council*, 213 N. C. 654, 197 S. E. 121 (1938); *State v. Friddle*, 223 N. C. 258, 25 S. E. (2d) 751 (1943).

He is required to state clearly and distinctly the particular issues arising on the evidence, and on which the jury are to pass, and to instruct them as to the law applicable to every state of the facts which upon the evidence they may reasonably find to be a true one. *State v. Matthews*, 78 N. C. 523 (1878).

And in criminal cases this section requires the court to give to the jury such instructions as will enable them to understand the nature of the crime and properly determine each material fact upon which may depend the guilt or innocence of the accused. *State v. Fulford*, 124 N. C. 798, 32 S. E. 377 (1899).

An instruction meets the requirements of this section when it clearly applies the law to the evidence introduced upon the trial and gives the position taken by the respective parties as to the prominent and controlling features which make for the ascertainment of the facts. *State v. Graham*, 194 N. C. 459, 140 S. E. 26 (1927). See *State v. Biggs*, 224 N. C. 722, 32 S. E. (2d) 352 (1944).

Where the trial court in his charge to the jury explains the law applicable and gives the contention of the parties, but fails to

instruct the jury as to the application of the law to the substantial features of the case, the charge is insufficient to meet the requirements of this section and a new trial will be awarded. *Com'r of Banks v. Florence Mills*, 202 N. C. 509, 163 S. E. 598 (1932).

In both criminal and civil causes under this section, a judge in his charge to the jury should present every substantial and essential feature of the case embraced within the issue and arising on the evidence, and this without any special prayer for instructions to that effect. He should state in a plain and correct manner the evidence in the case and explain the law arising thereon, and a failure to do so, when properly presented, shall be held for error. *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937), citing *State v. Merrick*, 171 N. C. 788, 88 S. E. 501 (1916). See *McNeill v. McNeill*, 223 N. C. 178, 25 S. E. (2d) 615 (1943).

Where evidence is in the record defendant is entitled to have the law arising thereon explained and applied by the judge. *State v. Anderson*, 222 N. C. 148, 22 S. E. (2d) 271 (1942).

It is the duty of the court to explain the law and apply it to the testimony in the case. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797 (1949).

Discretion of the Court.—The manner in which the trial judge shall state the evidence and declare and explain the law arising thereon must necessarily be left in large measure to his sound discretion and good judgment, but he must charge on the different aspects presented by the evidence, and give the law applicable thereto. *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. (2d) 601 (1947).

Where the charge of the court fails to point out the distinction between the counts in the indictment, and leaves the jury with the impression that both counts are valid when there is only one question to be answered constitutes reversible error, under this section. *State v. Ray*, 207 N. C. 642, 178 S. E. 224 (1935).

Scope of Instruction.—The court should instruct the jury on all the issues presented by the pleadings and the evidence. *Patterson v. North Carolina Lumber Co.*, 145 N. C. 42, 58 S. E. 437 (1907).

Where the effect of a charge of the court to the jury is to eliminate from the case an instruction upon a principle of law arising from the evidence, so necessary that its omission would necessarily and substan-

tially prejudice one of the parties, in the consideration of the evidence by the jury, it is error, notwithstanding the party so prejudiced has not tendered a prayer for instruction covering the omission of which he complains. *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922).

Where Facts Are Simple.—The section does not require the judge to "charge the jury where the facts at issue are few and simple, and no principle of law is involved, unless he is requested to do so; but in cases where the witnesses are numerous, or the testimony conflicting or complicated, and different principles of law are applicable to different aspects of the case, it is his duty to conform to the requirement of the statute." *Duckworth v. Orr*, 126 N. C. 674, 36 S. E. 150 (1900), citing *State v. Grady*, 83 N. C. 643 (1880); *State v. Reynolds*, 87 N. C. 544 (1882); *Holly v. Holly*, 94 N. C. 96 (1886).

Instructions to the jury should be addressed to specific issues, but, where the issues are simple, and they do not appear to have misled the jury, the error in this respect will not be held as reversible. *Craig v. Stewart*, 163 N. C. 531, 79 S. E. 1100 (1913).

Contention of Parties.—It is not required by this section, or other statute, that the contentions of the litigants be stated at all although it is found to be a convenient method of integrating and presenting to the jury the subjects for consideration; and there is no rule making it mandatory. When, however, the judge states the contentions of one of the parties, he must fairly charge also as to the contentions of the adversary litigant. In *re Will of West*, 227 N. C. 204, 41 S. E. (2d) 838 (1947).

Although it is not required by this section that the trial judge should state the contentions of the parties to the jury, the practice has grown up in our courts as a helpful and accepted procedure, and a fair statement of the contentions of a party will not be held for error upon exception. *Rocky Mount Sav., etc., Co. v. Ætna Life Ins. Co.*, 204 N. C. 282, 167 S. E. 854 (1933).

It is error simply to state the contentions of the parties, both as to the facts and as to the law and not declare and explain the law applicable to the facts as the jury might find them from the evidence. *Nichols v. Champion Fibre Co.*, 190 N. C. 1, 128 S. E. 471 (1925); *Parker v. Thomas*, 192 N. C. 798, 136 S. E. 118 (1926). See *Fowler v. Champion Fibre Co.*, 191 N. C. 42, 131 S. E. 380 (1926).

Objection to the charge on the ground that the court unduly emphasized the contentions of the State, amounting to an expression of opinion on the facts, held untenable, since the charge construed as a whole stated only contentions legitimately arising on the evidence and inferences properly deducible therefrom. *State v. Wilcox*, 213 N. C. 665, 197 S. E. 156 (1938).

Explanation of Subordinate Features of Case.—The charge of the court did not fail to comply with the provisions of this section if it sufficiently pointed out and explained the substantive features of the case, and as to subordinate features the prisoner should have aptly tendered prayers for special instructions. *State v. Ellis*, 203 N. C. 836, 167 S. E. 67 (1933).

In the absence of a special request for instructions, the failure of the charge to define certain terms constituting a subordinate feature of the charge will not be held for error. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

Duty Cannot Be Omitted.—The duty of the court to explain technical words used in instructions cannot be omitted because some of the jury may be able to explain them. *State v. Clark*, 134 N. C. 698, 47 S. E. 36 (1904).

Failure to Instruct as to Corporate Liability.—The liability of a corporate defendant arising through the agency of a servant is a substantive feature of law arising on the evidence, and is not a simple or self-explanatory principle of law, and the failure of the court to instruct the jury, as required by this section, constitutes reversible error. *Robinson v. Standard Transp. Co.*, 214 N. C. 489, 199 S. E. 725 (1938).

Where in an action against a corporate and an individual defendant the trial court charged the jury as though the corporate defendant was the sole party sued, it was held that the individual defendant is entitled to a new trial for failure of the charge to declare and explain the law arising upon the evidence as it related individually to him and involving his contentions. *Robinson v. Standard Transp. Co.*, 214 N. C. 489, 199 S. E. 725 (1938).

Salutation of Instruction.—The trial judge should instruct "that if the jury find from the evidence" and not "if they believe the evidence." *State v. Green*, 134 N. C. 658, 46 S. E. 761 (1904); *State v. Seaboard Airline R.*, 145 N. C. 570, 59 S. E. 1048 (1907).

But where instructions consisting of several clauses contain at the beginning the words, "If the jury find from the evidence," it is not necessary to repeat such

words in each clause. *Wilkie v. Raleigh*, etc., R. Co., 127 N. C. 203, 37 S. E. 204 (1900), rehearing in 128 N. C. 113, 38 S. E. 289 (1901).

2. Statement of Evidence.

In General. — Under this section the judge is not required to state the evidence given in the case "except to the extent necessary to explain the application of the law thereto." *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

The court is required to state the evidence to the extent necessary to explain the law applicable thereto and to give equal stress to the respective contentions of the parties. *Martin Flying Service v. Martin*, 233 N. C. 17, 62 S. E. (2d) 528 (1950).

All that is required of a charge by this section is that the essential evidence offered at the trial be stated in a plain and correct manner, together with an explanation of the law arising thereon. *State v. Fleming*, 202 N. C. 512, 163 S. E. 453 (1932); *In re Beale*, 202 N. C. 618, 163 S. E. 684 (1932).

By virtue of this section where the charge of a trial court fails to state the evidence of a party relative to a material point and which directly bears on the amount recoverable, a new trial will be awarded. *Myers v. Foreman*, 202 N. C. 246, 162 S. E. 549 (1932).

When Facts Are Simple. — This section sensibly requires, on the part of the judge, a statement of the evidence to which he is attempting to apply the law, though the decisions have rationalized the statute so that the statement of the evidence it requires may be dispensed with when the facts are simple. *Morris v. Tate*, 230 N. C. 29, 51 S. E. (2d) 892 (1949).

Slight inaccuracies in the statement of the evidence in the instructions of the court to the jury will not be held for reversible error when not called to the attention of the judge at the time and the charge substantially complies with this section. *State v. Sterling*, 200 N. C. 18, 156 S. E. 96 (1930).

Failure to charge the jury as to the degree of circumstantial proof required to convict is not error, charge that jury should be satisfied from the evidence beyond a reasonable doubt of defendant's guilt in order to justify conviction being sufficient on the degree of proof required. *State v. Shoup*, 226 N. C. 69, 36 S. E. (2d) 697 (1946).

Repetition of Testimony Insufficient. — This duty is not performed by simply re-

peating the testimony in the order in which it was delivered, or in a general statement of the principles of law applicable to the case; but it requires the judge to state clearly and distinctly the particular issues arising in the controversy; to eliminate the controverted facts; to arrange the testimony in its bearing on their different aspects, and to instruct the jury as to the law applicable thereto in such manner as will enable them to see and comprehend the matters which are essential to an intelligent and impartial verdict. *State v. Boyle*, 104 N. C. 800, 10 S. E. 696 (1889).

This section is not complied with where the court reads to the jury full notes of all the testimony in the cause, and tells them that he does this to refresh, and not to control, their recollection of the testimony, that it is their duty to remember the testimony, and that they ought to rely in the last resort on their own recollection. *State v. Boyle*, 104 N. C. 800, 10 S. E. 696 (1889).

Possibilities of Fact. — Where there are several possibilities of fact, different from the inference tended to be drawn from the evidence offered, a judge is not required to note one such possibility, and specifically bring it to the attention of the jury. *State v. Clara*, 53 N. C. 25 (1860).

Restricting Evidence to Purpose for Which Admissible. — It is error to admit evidence, competent for one purpose only, to be considered and acted on generally by the jury, without instructions restricting it to the special purpose for which it is admissible. *Burton v. Wilmington, etc., R. Co.*, 84 N. C. 193 (1881). See also, *State v. Ballard*, 79 N. C. 627 (1878).

Recapitulation Unnecessary. — The judge is not bound to recapitulate all the evidence in his charge to the jury; it is sufficient for him to direct the attention of the jury to the principal questions they have to try, and explain the law applicable thereto. *State v. Gould*, 90 N. C. 658 (1884); *Boon v. Murphy*, 108 N. C. 187, 12 S. E. 1032 (1891); *State v. Thompson*, 226 N. C. 651, 39 S. E. (2d) 823 (1946).

Nor is the judge required to recite the testimony of each witness in the order in which he was examined, but need only give a clear and intelligent statement of the evidence, with its legal bearing upon the issue. *State v. Jones*, 97 N. C. 469, 1 S. E. 680 (1887).

Second Recapitulation Not Required. — The trial judge is not required to recapitulate the testimony a second time, although one of the parties may request it to be done. *Aston v. Craigmiles*, 70 N. C. 316 (1874).

Judge May Omit Testimony. — Unless there be some reason why the judge should remark particularly on the testimony of a witness, he may with propriety, decline to comply with a request to do so. *Findly v. Ray*, 50 N. C. 125 (1857).

Agreement of Counsel.—The failure of a judge to recite the testimony in his charge to the jury is not error, where it was agreed by the counsel on both sides that the testimony need not be recapitulated. *Wiseman v. Penland*, 79 N. C. 197 (1878).

Effect of a "Slip of the Tongue". — A mere inadvertent "slip of the tongue" in stating the evidence, will not be held as prejudicial error when counsel for defendant might easily have called attention thereto and had it corrected then and there. *State v. Sinodis*, 189 N. C. 565, 127 S. E. 601 (1925).

Contentions of Parties.—Where the trial judge gives the contentions of the State and of the defendant, clearly stating that they are but contentions in a trial for unintentional manslaughter, and correctly charges the law arising upon the evidence, objection that he has therein impinged upon the provisions of this section, in expressing his opinion upon the weight and credibility of the evidence, is untenable. *State v. Durham*, 201 N. C. 724, 161 S. E. 298 (1931).

Reviewing State's Evidence.—The portion of the charge devoted to reviewing the evidence for the State cannot be held for error as an expression of opinion that certain facts were fully proven when it appears that the court categorically indicated to the jury that it was then engaged in reviewing the State's evidence. *State v. Jessup*, 219 N. C. 620, 14 S. E. (2d) 668 (1941). See *State v. Johnson*, 219 N. C. 757, 14 S. E. (2d) 792 (1941).

Where Judge under Impression Certain Material Facts Were in Evidence.—Where the court in its charge called material facts to the attention of the jury, supported by the statement of the court, as well as of counsel, that it was under the impression that they were introduced in evidence, and they were not withdrawn but were to be rejected and not considered only in the event the jury did not so recall, it was held that this was not a statement "in a plain and correct manner," of "the evidence given in the case." *Curlee v. Scales*, 223 N. C. 788, 28 S. E. (2d) 576 (1944).

Special Request to Present Subordinate Feature of Evidence. — Where, in stating the evidence and explaining the law arising thereon, the court deals with all substantial

and essential features of the evidence, an objection thereto on ground that the charge failed to comply with this section cannot be sustained, it being the duty of the objecting party if he desired some subordinate feature to have been presented to the jury to have aptly tendered request for special instructions thereon. *Metcalf v. Foister*, 232 N. C. 355, 61 S. E. (2d) 77 (1950).

3. Explanation of Law.

In General.—This section confers upon litigants a substantial legal right and calls for instructions as to the law upon all substantial features of the case. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 147 S. E. 435 (1929), citing *Blake v. Smith*, 163 N. C. 274, 79 S. E. 596 (1913); *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922); *State v. O'Neal*, 187 N. C. 22, 120 S. E. 817 (1924); *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834 (1925); *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. (2d) 601 (1947); *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

As was said in *State v. Matthews*, 78 N. C. 523 (1878), the requirements of this section are not met by a general statement of legal principles which bear more or less directly, but not with absolute directness upon the issues made by the evidence. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 147 S. E. 435 (1929); *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. (2d) 601 (1947); *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

It is insufficient for the court to merely state the contentions of a party without declaring and explaining the law applicable to his version of the occurrence as supported by his evidence. *State v. Herbin*, 232 N. C. 318, 59 S. E. (2d) 635 (1950).

The duty of the court to declare and explain the law arising on the evidence remains unchanged by the present provisions of this section as rewritten by the General Assembly in 1949. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212 (1951).

Absence of Request for Special Instructions.—The failure of the court to instruct the jury on substantive features of the case arising on the evidence is prejudicial, even in the absence of a request for special instructions. *Spencer v. Brown*, 214 N. C. 114, 198 S. E. 630 (1938); *Van Gelder Yarn Co. v. Mauney*, 228 N. C. 99, 44 S. E. (2d) 601 (1947); *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

It is the duty of the trial court without request for special instructions to declare

and explain the law arising upon the evidence in the case, which duty is not discharged by general definitions or abstract discussions of the law, but requires that the court apply the law to the evidence in the case and instruct the jury as to the circumstances presented by the evidence under which the issue should be answered in the affirmative and under which it should be answered in the negative, and the failure of the court to comply substantially with the mandate of this section impinges a substantial legal right of the party aggrieved entitling him to a new trial. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375 (1941).

The mandate of this section is not met by a statement of the general principles of law, without application to the specific facts involved in the issue. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948); *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

Judge Must Explain Law as It Relates to Testimony.—The judge must declare and explain the law as it relates to the various aspects of the testimony offered. By this it is meant that this section requires the judge to explain the law of the case, to point out the essentials to be proved on the one side or the other, and to bring into view the relations of the particular evidence adduced to the particular issues involved. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

When the evidence is susceptible of several interpretations a failure to give instructions which declare and explain the law in its application to the several phases of the evidence is held for reversible error. *State v. Ardrey*, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

Charge Containing Only Declarations of Abstract Principles.—The court is required to charge the law arising on the evidence given in the case, and a charge containing declarations of abstract principles of law without relating them to the evidence, is insufficient. *Collingwood v. Winston-Salem Southbound Ry. Co.*, 232 N. C. 724, 62 S. E. (2d) 87 (1950).

When a person is on trial for a statutory crime, it is not sufficient for the court merely to read the statute under which he stands indicted. The statute should be explained, the essential elements of the crime thereby created outlined and the law as thus defined should be applied to the evidence in the case. This "calls for instructions as to the law upon all substantial features of the case." *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949), citing

Lewis v. Watson, 229 N. C. 20, 47 S. E. (2d) 484 (1948); *State v. Fain*, 229 N. C. 644, 50 S. E. (2d) 904 (1948).

The court need not read a statute to the jury in order to comply with the requirements of this section, a simple explanation of the law without the involvement of the technical language of a statute being preferable. *Batchelor v. Black*, 232 N. C. 314, 59 S. E. (2d) 817 (1950).

And it is not sufficient merely for the court to read a statute bearing on the issues in controversy and leave the jury unaided to apply the law to the facts. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212 (1951).

The action of the trial court in reading pertinent statutes regulating the operation of motor vehicles upon the public highways, without applying the law to the evidence in the case fails to comply with this section. *Chambers v. Allen*, 233 N. C. 195, 63 S. E. (2d) 212 (1951).

Removal of Doubt Engendered by Conflicting Statements of Counsel.—That counsel are permitted to argue the legal aspects of the case serves to emphasize the necessity of compliance with the provisions of this section. When counsel avail themselves of this right the court should explain and apply the law so as to remove any doubt in respect thereto which may have been engendered by conflicting statements of counsel. The duty to set at rest any question as to the law of the case rests upon the judge and not the jury. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797 (1949).

Trial by jury vouchsafed in the Constitution contemplates a verdict of the jury rendered upon the evidence guided by correct instructions as to the law applicable thereto in conformity with this section. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375 (1941).

When Party Must Request Further Matters of Instruction.—Where the judge has sufficiently charged the jury as to the law arising under the evidence in the case in compliance with this section, such further matters of instruction as the appellant may desire should be offered by special requests for instructions. *Gore v. Wilmington*, 194 N. C. 450, 140 S. E. 71 (1927); *Murphy v. Power Co.*, 196 N. C. 484, 146 S. E. 204 (1929). See *Graham v. State*, 194 N. C. 459, 140 S. E. 26 (1927); *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884 (1944).

Where the court in its charge substantially complies with this section, if defendant desires further elaboration and ex-

planation, he should tender prayers for instructions; otherwise, he cannot complain. *State v. Gordon*, 224 N. C. 304, 30 S. E. (2d) 43 (1944).

Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of this section when he has not submitted in apt time correct special prayers for instruction to such effect. *Planters Bank, etc., Co. v. Yelverton*, 185 N. C. 314, 117 S. E. 299 (1923).

The rule stated in *Bank v. Rochamora*, 193 N. C. 1, 136 S. E. 259 (1927), that "where the instruction is proper so far as it goes, a party desiring a more specific instruction must request it," applies to subordinate elaboration, but not substantive, material and essential features of the charge. *McCall v. Lumber Co.*, 196 N. C. 597, 146 S. E. 579 (1929).

It is the duty of the court in charging the jury to do so without request for special instructions, and the failure of the judge to explain the law arising upon the evidence constitutes reversible error. *Ryals v. Carolina Contracting Co.*, 219 N. C. 479, 14 S. E. (2d) 531 (1941).

When a judge has charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony shall be more fully explained, he should call the attention of the court to it. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 102 S. E. 611 (1920); *River-view Milling Co. v. State Highway Comm.*, 190 N. C. 692, 130 S. E. 724 (1925); *State v. Johnson*, 193 N. C. 701, 138 S. E. 19 (1927); *State v. Jordan*, 216 N. C. 356, 5 S. E. (2d) 156 (1939).

Where the charge of the court is sufficiently full to meet the requirements of this section, it will not be held for reversible error on defendant's exceptions, it being incumbent on defendant, if he desires more specific instructions on any point, or a more detailed and complete statement of his contentions to aptly make request therefor. *State v. Caudle*, 208 N. C. 249, 180 S. E. 91 (1935).

If the indictment fully describes the offense, and this was read to the jury by the court, then the charge is in compliance with this section, it being the duty of the defendant, if he desires more elaborate instruction, to aptly tender a request therefor. *State v. Gore*, 207 N. C. 618, 178 S. E. 209 (1935).

Defendant desiring more full or detailed instructions as to any particular phase of evidence or law should request special instructions. *State v. Hendricks*, 207 N. C. 873, 178 S. E. 557 (1935).

The failure of the court to charge the jury as to the credibility to be given the testimony of an accomplice, corroborated in every respect by other evidence, will not be held for error in the absence of a special request, whether such charge should be given being in the sound discretion of the trial court. *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533 (1940).

The failure of the court to instruct the jury that the fact that a defendant did not testify in his own behalf raises no presumption against him, will not be held for error in the absence of a request for instructions, the matter being in the sound discretion of the trial court. *State v. Kelly*, 216 N. C. 627, 6 S. E. (2d) 533 (1940).

An exception for failure of the court to charge upon the question of manslaughter, without exception to any portion of the charge or exception under this section, on the ground that the court failed to explain the law arising on the evidence and pointing out wherein the court failed to comply with this section does not properly present the question for review. *State v. Brooks*, 228 N. C. 68, 44 S. E. (2d) 482 (1947).

Effect of Failure to Request Special Instructions.—A litigant does not waive his statutory right to have the judge charge the jury as to the law upon all of the substantial features of the case by failing to present requests for special instructions. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

Where the trial court substantially complies with plaintiff's oral request for instructions in respect to evidence of previous statements made by plaintiff tending to contradict plaintiff's evidence on the stand, the failure to give more particular instructions on this aspect will not be held for error. *Grant v. Bartlett*, 230 N. C. 658, 55 S. E. (2d) 196 (1949).

Explanation Must Cover Any Authorized Finding.—It is the duty of the judge to explain and adapt the law to any authorized findings which the jury may make upon the evidence. *State v. Jones*, 87 N. C. 547 (1882); *Lawton v. Giles*, 90 N. C. 374 (1884).

Law on Facts and Inferences.—It is necessary to state the law arising on the various phases of the evidence, and on all facts which the jury should find from the evidence, when such facts constitute a

part of the basis for the answers to the issues. *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834 (1925), and cases therein cited.

Instructions Based on Assumption.—When instructions are asked for upon an assumed state of facts, which there is evidence tending to prove, and thus questions of law are raised which are pertinent to the case, it is the duty of the judge to answer the question so presented, and to instruct the jury distinctly what the law is, if they shall find the assumed state of facts to be true, and so in respect to every state of facts which may be reasonably assumed upon the evidence. *State v. Dunlop*, 65 N. C. 288 (1871).

But where a prayer for instructions assumes certain facts to be in proof, and in the opinion of the judge there is no evidence tending to prove them, he ought to say so, and thus not embarrass the jury by the consideration both of the assumed facts and of the questions of law predicated on their assumption. *State v. Dnnlop*, 65 N. C. 288 (1871).

Instruction Necessary to Reach Verdict.—Where an instruction upon the law is necessary for the jury to arrive at a verdict upon a material issue, it is the duty of the trial judge to charge the law thus arising without a request for special instruction. *Jacob Stove Works v. Boyd*, 191 N. C. 523, 132 S. E. 273 (1926).

Substantial Compliance with Request Sufficient.—The trial judge is not required to give special instructions in the precise words asked, even when unobjectionable. A substantial compliance is sufficient. *State v. Booker*, 123 N. C. 713, 31 S. E. 376 (1898).

The trial court is not required to give instructions in the language of the prayers, provided the instructions given are correct and cover the various phases of the testimony. *State v. Wilcox*, 132 N. C. 1120, 44 S. E. 625 (1903).

Instruction as to Statutory Provisions.—In automobile accident cases it is the duty of the court to charge the jury upon the provisions of the motor vehicle law arising upon the evidence and a charge embracing only general provisions of the common law is not sufficient. *Barnes v. Teer*, 219 N. C. 823, 15 S. E. (2d) 379 (1941).

Charge Covering Subordinate Features.—When a judge has followed this section and charged generally on the essential features of the case, if a litigant desires that some subordinate feature of the cause or some particular phase of the testimony

shall be more fully explained, he should call the attention of the court to it by prayers for instructions or other proper procedure; but on the substantive features of the case arising on the evidence, the judge is required to give a correct charge concerning it. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 102 S. E. 611 (1920); *Mebane Graded School Dist. v. Alamance County*, 211 N. C. 213, 189 S. E. 873 (1937); *Headen v. Bluebird Transp. Corp.*, 211 N. C. 639, 191 S. E. 331 (1937).

Refusal to Correct Special Request for Instructions.—Where the general charge of the court to the jury covers every correct principle applying under the evidence in the case and all of the special prayers, it is not objectionable that the court refused to correct special requests for instructions in the language offered by the appellant. *Williams v. Hedgepeth*, 184 N. C. 114, 113 S. E. 602 (1922).

Waiver of Error.—A failure to comply with this section is error which is not waived by failure to request special instructions, where there is no charge applicable to the facts given in evidence. *Nichols v. Champion Fibre Co.*, 190 N. C. 1, 128 S. E. 471 (1925).

Objection as to Fullness of Statement.—An instruction which gives to the jury a clear and comprehensive charge on the law applicable to the evidence in the case, stating the position of the respective parties as to every feature thereof, is not erroneous as failing to explain and declare the law arising from the evidence, as required by this section and an objection that a fuller statement of the evidence was required cannot be considered on appeal when exception thereto has not been brought to the attention of the trial court at the time of the alleged omission. *Tatham v. Andrews Mfg. Co.*, 180 N. C. 627, 105 S. E. 423 (1920).

Failure to Charge on Defense Not Presented.—Defendants denied the contract declared on, offered evidence that they did not enter into the contract, but did not object to plaintiff's parol evidence in support of the contract alleged. In making up the case on appeal, defendants excepted to the charge for that the court failed to charge the law relative to the statute of frauds and contended on appeal that plaintiff's evidence disclosed a contract to answer for the debt or default of another. It was held that defendants' exception to the charge could not be sustained, the court having had no notice that defendants would rely upon the statute, and that defendants had waived the defense of the

statute by failing to properly present such defense. *Allison v. Steele*, 220 N. C. 318, 17 S. E. (2d) 339 (1941).

Charge on Degrees of Crime.—Where a person indicted for a crime may be convicted of a lesser degree of the same crime and there is evidence tending to support the milder verdict, he is entitled to have the law with respect to the lesser offense submitted to the jury under a correct charge. A statement of the contentions or of certain phases of the evidence accompanied with a mere enunciation of a legal principle is not a compliance with this section. *State v. Hardee*, 192 N. C. 533, 135 S. E. 345 (1926), citing *State v. Williams*, 185 N. C. 685, 116 S. E. 736 (1923); *Wilson v. Wilson*, 190 N. C. 819, 130 S. E. 834 (1925); *Watson v. Sylva Tanning Co.*, 190 N. C. 840, 130 S. E. 833 (1925); *State v. Lee*, 192 N. C. 225, 134 S. E. 458 (1926).

Where the defendant admits his guilt of murder in the second degree, it is not error for the trial court to act upon the admission, and after fully charging the elements of murder in the first degree, and defining murder in the second degree, to instruct the jury to return a verdict of murder in the second degree if they should fail to find any one of the elements of first degree murder, as defined, beyond a reasonable doubt. *State v. Grier*, 209 N. C. 298, 183 S. E. 272 (1936).

Instruction Should Apply Law to Facts Adduced.—An instruction which correctly defines and explains negligence and proximate cause in abstract terms but fails to apply the law to the facts adduced by the evidence fails to meet the requirements of this section, and a new trial will be awarded on appellant's exception. *Smith v. Safe Bus Co.*, 216 N. C. 22, 3 S. E. (2d) 362 (1939).

A charge defining negligence and proximate cause and stating the contentions of the parties and properly placing the burden of proof, but which fails to apply the law to the evidence, will be held for error as failing to comply with this section since the application of the law to the facts as the jury may find them to be from the evidence, is a substantive feature of the charge which must be given even in the absence of a prayer for instruction. *Mack v. Marshall Field & Co.*, 218 N. C. 697, 12 S. E. (2d) 235 (1940).

Waiver of Error.—The failure of the court to explain the law arising on the evidence favorable to defendant is error, and mere silence of counsel upon the statement of the court after charging the law arising upon plaintiff's evidence that it

would not recapitulate the evidence is not a waiver of the substantial rights conferred by this section. *Carruthers v. Atlantic, etc., R. Co.*, 215 N. C. 675, 2 S. E. (2d) 878 (1939).

Any Substantial Error Is Material.—Any substantial error in the portion of the charge applying the law to the facts of the case is perforce material. *Templeton v. Kelley*, 216 N. C. 487, 5 S. E. (2d) 555 (1939).

Failure to Instruct as to Law of Self-Defense.—See *State v. Thornton*, 211 N. C. 413, 190 S. E. 758 (1937); *State v. Godwin*, 211 N. C. 419, 190 S. E. 761 (1937); *State v. Greer*, 218 N. C. 660, 12 S. E. (2d) 238 (1940).

Failure to Charge on Second Degree Murder.—See note under § 15-172.

Cited in *State v. Weston*, 197 N. C. 25, 147 S. E. 618 (1929).

C. Illustrative Cases.

Age and Chastity of Prosecutrix in Prosecution for Carnal Knowledge. —

Where defendant, in a prosecution for carnal knowledge of a girl over twelve and under sixteen years of age, offers evidence of the immoral character of the prosecutrix and denies his identity as the perpetrator of the offense, an instruction which omits the age and chastity of prosecutrix as elements of the offense fails to meet the mandatory requirements of this section, and an exception thereto will be sustained. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Alibi.—Evidence of an alibi is substantive, and defendant is entitled to an instruction as to the legal effect of his evidence of alibi if believed by the jury. *State v. Sutton*, 230 N. C. 244, 52 S. E. (2d) 921 (1949).

Where the defendant, charged with murder, introduced evidence of an alibi which was material to his defense, but the judge in his charge to the jury did not refer to this evidence, it was held to be error. *State v. Melton*, 187 N. C. 481, 122 S. E. 17 (1924).

Circumstantial Evidence.—The duty imposed upon the trial court by this section to "declare and explain the law" arising in the case on trial does not require the court to instruct the jury upon the law of circumstantial evidence in a criminal action involving both direct and circumstantial testimony, where the state relies principally upon the direct evidence, and the direct evidence is sufficient, if believed, to warrant the conviction of the accused. *State*

v. Hicks, 229 N. C. 345, 49 S. E. (2d) 639 (1948).

Concurrent Negligence.—Where the theory of trial in the lower court was that the negligence of defendant was the sole proximate cause of the accident, plaintiff's exception to the charge for its failure to submit the question of concurrent negligence cannot be sustained. *Smith v. Bonney*, 215 N. C. 183, 1 S. E. (2d) 371 (1939).

Contributory Negligence.—Where the trial judge has charged correctly and fully upon the issue of contributory negligence in regard to the defendant, it is not error for him to fail to charge the alternate propositions of law in regard to the plaintiff under the provisions of this section. *Lipscomb v. Cox*, 197 N. C. 64, 147 S. E. 683 (1929).

Instruction as to contributory negligence of 8½ year old child, held to fully comply with this section, where the judge explained that the degree of care required of a child is that he exercise care and prudence equal to his capacity. *Leach v. Varley*, 211 N. C. 207, 189 S. E. 636 (1937).

Where no requests for instruction are made by counsel as to the application of the law to the testimony bearing on an issue involving contributory negligence, it is the duty of the trial judge to give the general definition of ordinary care. *McCracken v. Smathers*, 119 N. C. 617, 26 S. E. 157 (1896).

Damages.—Where the principal denies that he made any contract with plaintiff broker for the sale of lumber and denies he had received any orders through plaintiff, the burden is on plaintiff not only to prove the brokerage contract but to prove each order upon which he asserts his right to commission and it is error for the court to charge on the issue of damages that there was no controversy as to the amount and that if the jury should find the plaintiff's evidence to be true to answer that issue in the sum demanded by plaintiff. *Haines v. Clark*, 230 N. C. 751, 55 S. E. (2d) 693 (1949).

Degrees of Crime.—Where in a prosecution for assault with a deadly weapon with intent to kill inflicting serious injury not resulting in death, verdicts of guilt of less degrees of the crime are permissible under the evidence dependent upon the variant facts as the jury may find them to be, the failure of the court to submit the question of defendant's guilt of such less degrees is erroneous and constitutes a failure to explain the law arising upon the facts in evidence as required by this section. *State*

v. Ardrey, 232 N. C. 721, 62 S. E. (2d) 53 (1950).

Disregard of Previous Inconsistent Instructions.—The action of the trial court in prefacing a special instruction with a charge that the jury should disregard previous instructions if and to the extent of inconsistency with the instructions about to be given, is not approved, but in the instant case it was held not prejudicial. *State v. Jackson*, 228 N. C. 656, 46 S. E. (2d) 858 (1948).

Duty Required of Automobile Driver.—Plaintiff was not walking along the highway but ran out from behind another automobile near an intersection and was struck and injured by the defendant's car. It was held that it was not reversible error for the trial judge to fail to charge the jury specifically upon the various particulars as to the speed, etc., required of the driver of an automobile upon the highway at a cross-road, if he charged correctly upon the general law arising from the evidence. *Fisher v. Deaton*, 196 N. C. 461, 146 S. E. 66 (1929), distinguishing *Bowen v. Schnibben*, 184 N. C. 248, 114 S. E. 170 (1922).

Failure to Define "Conspiracy."—Where the court charged the jury that defendant would be guilty of first degree murder even if one of the others fired the fatal shot, if it was fired in the execution of their unlawful conspiracy and agreement and the defendant excepted on the ground that the court did not define "conspiracy," it was held that the exception could not be sustained, in the absence of a special request for instructions, the term "conspiracy" being used synonymously with "agreement," and the charge being clear and easily understood, and defendant being guilty of murder in the first degree under the evidence regardless of the existence of a technical conspiracy. *State v. Puckett*, 211 N. C. 66, 189 S. E. 183 (1937).

Failure to Give Elaborate Definition of Slander.—In an action for damages for slander, where in his charge to the jury the trial judge properly and fairly stated the evidence pertinent to the issues, and the contentions of the parties, in compliance with this section, and it appeared that the jury sufficiently understood the elements of actionable defamation necessary to be found before any liability could attach to defendants, there was no error in the court's failure to give a more elaborate definition of slander. *Gillis v. Great Atlantic, etc., Tea Co.*, 223 N. C. 470, 27 S. E. (2d) 283 (1943).

Fornication and Adultery.—Upon trial in

the superior court, after appeal by the male defendant only from a conviction of fornication and adultery in the recorder's court, a charge that, if the jury find from the evidence, beyond a reasonable doubt, that the defendant, not being married to the woman, did lewdly and lasciviously bed and cohabit with her and violated the statute, they should bring in a verdict of guilty, and if they should fail to so find, they should bring in a verdict of not guilty, substantially complies with this section in the absence of request for further instructions. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945).

Force Used in Defense of Home—Eviction of Trespassers.—When, in the trial of a criminal action charging an assault or kindred crime, there is evidence from which it may be inferred that the force used by defendant was in defense of his home, he is entitled to have the evidence considered in the light of applicable principles of law. In such event, it becomes the duty of the court to declare and explain the law arising thereon, and failure to so instruct the jury on such substantive feature is prejudicial error. And the same rule applies to the right to evict trespassers from one's home. *State v. Spruill*, 225 N. C. 356, 34 S. E. (2d) 142 (1945).

Forcible Trespass. — In a prosecution for forcible trespass, a charge to the jury that the defendant's guilt depended on the fact of his presence, without further instructions, is not a compliance with this section. *State v. Lawson*, 98 N. C. 759, 4 S. E. 134 (1887).

Fraud in Instrument.—Where there is evidence in a suit to set aside an instrument for fraud, tending to show the existence of the fraud both in the factum and in the treaty, a failure of the trial judge to charge the principles arising therefrom upon fraud in the factum is error. *Parker v. Thomas*, 192 N. C. 798, 136 S. E. 118 (1926).

Fraud Necessary to Violate Deed.—It is not required to charge the jury of the full definitions of fraud upon which equity will set aside a deed, the subject of the action, if he instructs them correctly and clearly upon such of the principles as are applicable to the issue under the relevant evidence in the case, and the general charge, as so given, is within the intent and meaning of this section. *Williams v. Hedgpeeth*, 184 N. C. 114, 113 S. E. 602 (1922).

Though the charge is correct as a general essay on homicide, and its propositions taken generally are supported by the authorities, still it is not a full compliance

with this section. *State v. Dunlop*, 65 N. C. 288 (1871).

Illegality of Contract.—Where in an action upon a contract there is evidence that the contract was a wagering one, the judge should explain the statute, the consideration of the contract which would make it illegal, and the law applicable; and his merely instructing the jury to answer the issue "Yes" if the defendant had shown it was illegal, but if it had failed in this respect to answer it "No", is insufficient. *Orvis Bros. & Co. v. Holt-Morgan Mills*, 173 N. C. 231, 91 S. E. 948 (1917).

Instruction that jury should be guided by the law as argued by counsel if not inconsistent with rules of law laid down by the court, but to follow the instructions given by the court if argument of counsel was inconsistent therewith, must be held for reversible error. *Brown v. Vestal*, 231 N. C. 56, 55 S. E. (2d) 797 (1949).

Instruction to "Settle Case as Between Man and Man"—Where there is much conflicting evidence, it is error for the judge to instruct the jury to "take the case and settle it as between man and man," without charging on the different aspects of the case. *Blake v. Smith*, 163 N. C. 274, 79 S. E. 596 (1913).

Legal Status of Party.—The evidence disclosed that intestate was pushing a handcart on the right side of the highway, and that he was struck from the rear by defendant's vehicle traveling in the same direction. Plaintiff contended that the handcart was a vehicle and that §§ 20-146 and 20-149 applied. Defendant contended that intestate was a pedestrian and was required by § 20-174(d) to push the handcart along the extreme left-hand side of the highway. It was held that an instruction failing to define intestate's status and explain the law arising upon the evidence fails to meet the requirements of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

Negligence.—An instruction that if the jury should find certain specific facts from the greater weight of the evidence such conduct "would be negligence," instead of "would constitute negligence," was held not an expression of opinion in violation of this section, even when considered with a subsequent instruction applying the rule of the prudent man to the conduct of defendant when confronted by an emergency. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 412, 42 S. E. (2d) 593 (1947).

Same—Injury to Passenger.—In an action to recover damages of a bus line where there is sufficient evidence tending to show

that a passenger was injured by the negligence of the defendant in not providing an adequate catch or other device to prevent a folding seat from falling when raised, and that it fell upon the plaintiff's hand and caused the injury in suit; and also evidence that the injury thus inflicted was caused by the independent act of a fellow passenger or by the act of the plaintiff herself, a charge of the court correctly placing the burden of proof and generally defining the law of actionable negligence, etc., but omitting to explain the law arising upon the particular phases of the evidence, is not a compliance with the mandate of this section and constitutes reversible error. *Williams v. Eastern Carolina Coach Co.*, 197 N. C. 12, 147 S. E. 435 (1929).

Note.—Where from the pleadings and evidence an issue is raised for the jury to determine whether the holder of a note had elected to sue the original payee instead of the maker, under the provisions of this section it is the duty of the trial judge to charge the jury upon the phase of the case, material to the determination of the controversy upon the principles of law applying thereto, without a prayer for special instructions. *Darden v. Baker*, 193 N. C. 386, 137 S. E. 146 (1927).

Obligations of Counsel, Court and Jury.—An instruction that "it is the business of counsel to make their side appear the best side, their reasons the best of reasons; but you and I are under different obligations" is erroneous. *State v. Hardy*, 189 N. C. 799, 128 S. E. 152 (1925).

Presumption of Good Character.—Where the character of a witness had not been impeached either by contradictory evidence or the manner of his cross-examination, it is presumed to be good, and the testimony of other witnesses thereto will be excluded; and where in a criminal action the case has been given to the jury, who return to court with a request for a further instruction as to whether a witness's character is considered good until proven bad in court, the judge's reply that it is presumed to be good until the contrary is shown, is free from error. *State v. Pugh*, 183 N. C. 800, 111 S. E. 849 (1922).

Processioning Proceedings.—Instruction in processioning proceedings held insufficient. *Bradshaw v. Warren*, 215 N. C. 442, 2 S. E. (2d) 375 (1939).

Reckless Driving.—An instruction that if the jury is satisfied beyond a reasonable doubt that defendant is guilty of reckless driving to convict him, otherwise to acquit him, is insufficient, in a prosecution under

§ 20-140, to meet the requirements of this section since it fails to explain the law or apply the law to the facts as the jury should find them to be. *State v. Flinchem*, 228 N. C. 149, 44 S. E. (2d) 724 (1947).

The charge, in a prosecution for reckless driving and driving at an excessive speed, both as to the statement of the evidence and the law arising on the essential features of the evidence, was held to be in substantial compliance with the requirements of this section. *State v. Vanhoy*, 230 N. C. 162, 52 S. E. (2d) 278 (1949).

Recommendation of Life Imprisonment.

—In a prosecution for burglary in the first degree it is error for the court to fail to charge the jury that it may return a verdict of guilty of burglary in the first degree with recommendation of imprisonment for life. *State v. Mathis*, 230 N. C. 508, 53 S. E. (2d) 666 (1949).

Respondent Superior.—In *Webb v. Statesville Theater Corp.*, 226 N. C. 342, 38 S. E. (2d) 84 (1946), it was held that the failure of court to charge jury upon the principle of respondent superior was not error as failing to declare and explain the law arising on the evidence where defendant admitted the relationship of master and servant and the case was tried throughout on that theory.

Section Complied with.—See *State v. Thompson*, 227 N. C. 19, 40 S. E. (2d) 620 (1946); *Glosson v. Trollinger*, 227 N. C. 84, 40 S. E. (2d) 606 (1946).

Self-Defense.—Where State's evidence tended to show a deliberate, premeditated killing with a deadly weapon, and there was no evidence that the killing was in self-defense, and defendant offered no evidence, the failure of court to instruct the jury upon the right of self-defense was not error. *State v. Deaton*, 226 N. C. 348, 38 S. E. (2d) 81 (1946).

Where defendant introduced evidence that deceased was a man of violent character, an instruction during the trial to the effect that such evidence was competent upon the plea of self-defense, without any instruction in the charge or elsewhere applying the evidence to the question of defendants' reasonable apprehension of death or great bodily harm from the attack which their evidence tended to show that deceased had made on them, is insufficient to meet the requirements of this section, notwithstanding the absence of a request for special instructions. *State v. Riddle*, 228 N. C. 251, 45 S. E. (2d) 366 (1947).

Specific Intent in Robbery.—In a prosecution for robbery the court should charge that the taking of the property must be

with a specific intent on the part of the taker to deprive the owner of his property permanently and to convert it to his own use, and an instruction merely that the taking must be with felonious intent is insufficient. *State v. Lunsford*, 229 N. C. 229, 49 S. E. (2d) 410 (1948).

Speed Regulations.—The mere reading of the statutory speed regulations, laid down in § 20-141, without separating the irrelevant provisions from those pertinent to the evidence and without application of the relevant provisions to the evidence adduced, is insufficient to meet the requirements of this section. *Lewis v. Watson*, 229 N. C. 20, 47 S. E. (2d) 484 (1948).

Subordinate Features.—In the absence of a special request for instruction it is not reversible error under this section for the trial judge to have failed to instruct the jury that they should scrutinize the testimony of detectives who were paid to secure evidence to convict the defendant, the same being as to subordinate and not substantive features of the evidence in the case. *State v. O'Neal*, 187 N. C. 22, 120 S. E. 817 (1924).

Title in Replevin Action.—In action in replevin to recover possession of an automobile judge charged jury that if they were satisfied by the greater weight of the evidence of the truth of it, they should find in favor of the plaintiff or answer the first issue as to ownership "yes." It was held that charge inadvertently ignored the fact that title to the ownership of car was still at issue, and may be taken as assuming the fact that it was sufficiently proved or as expressing an opinion on the weight and sufficiency of the evidence. *James v. James*, 226 N. C. 399, 38 S. E. (2d) 168 (1946).

Violation of Traffic Signal.—In civil action for damages resulting from collision between vehicles of plaintiff and defendant at street intersection, where the city maintained traffic signals, the evidence being sharply contradictory as to whether plaintiff or defendant violated the traffic signal by entering intersection on a red light, it was held that court erred, in its charge to jury, by failing to state in a plain and con-

cise manner the evidence offered as to right of way between the parties and to declare and explain the law applicable thereto. *Stewart v. Yellow Cab Co.*, 225 N. C. 654, 36 S. E. (2d) 256 (1945).

Where a charge excluded from consideration important evidence in the case bearing upon the essential inquiry whether defendant had waived, or surrendered, all rights under an agreement, if he had any, and agreed to go back to an original contract, it was erroneous. *Acme Mfg. Co. v. McPhail*, 179 N. C. 383, 102 S. E. 611 (1920).

Where defendant was seeking a monetary recovery of plaintiff the burden of proving the right to such recovery was upon defendant, and failure to instruct jury as to this issue was error. *Crain v. Hutchins*, 226 N. C. 642, 39 S. E. (2d) 831 (1946).

Applied in *State v. Fain*, 229 N. C. 644, 50 S. E. (2d) 904 (1948).

Cited in *Mulholland v. Brownrigg*, 9 N. C. 349 (1823); *Currie v. Clark*, 90 N. C. 355 (1884); *Fry v. Currie*, 91 N. C. 436 (1884); *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418 (1885); *State v. Chastain*, 104 N. C. 900, 10 S. E. 519 (1889); *McMillan v. Baxley*, 112 N. C. 578, 16 S. E. 845 (1893); *State v. Kale*, 124 N. C. 816, 32 S. E. 892 (1899); *Gates v. Max*, 125 N. C. 139, 34 S. E. 266 (1899); *Davis v. Blevins*, 125 N. C. 433, 34 S. E. 541 (1899); *Neal v. Carolina Cent. R. Co.*, 126 N. C. 634, 36 S. E. 117 (1900); *State v. Edwards*, 126 N. C. 1051, 35 S. E. 540 (1900); *Kearns v. Southern R. Co.*, 139 N. C. 470, 52 S. E. 131 (1905); *State v. Rogers*, 168 N. C. 112, 83 S. E. 161 (1914); *Ball Thrash Co. v. McCormack*, 172 N. C. 677, 90 S. E. 916 (1916); *Futch v. Atlantic, etc., R. Co.*, 178 N. C. 282, 100 S. E. 436 (1919); *State v. Cline*, 179 N. C. 703, 103 S. E. 211 (1920); *State v. Alston*, 215 N. C. 713, 3 S. E. (2d) 11 (1939); *State v. Buchanan*, 216 N. C. 709, 6 S. E. (2d) 521 (1940); *State v. McManus*, 217 N. C. 445, 8 S. E. (2d) 251 (1940); *Greene v. Greene*, 217 N. C. 649, 9 S. E. (2d) 413 (1940); *Barnes v. Teer*, 218 N. C. 122, 10 S. E. (2d) 614 (1940); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940).

§ 1-181. Requests for special instructions.—(a) Requests for special instructions to the jury must be—

- (1) In writing,
- (2) Entitled in the cause, and
- (3) Signed by counsel submitting them.

(b) Such requests for special instructions must be submitted to the trial judge before the judge's charge to the jury is begun. However, the judge may, in his discretion, consider such requests regardless of the time they are made.

(c) Written requests for special instructions shall, after their submission to

the judge, be filed as a part of the record of the same. (C. C. P., s. 239; Code, s. 415; Rev., s. 538; C. S., s. 565; 1951, c. 837, s. 6.)

Editor's Note.—The 1951 amendment rewrote this section and inserted the provisions of subsection (b) relating to the time for submitting special instructions. Prior to the amendment the section did not fix a time limit for the filing of requests for instructions.

The cases cited below were decided prior to the amendment requiring the requests to be submitted before the judge's charge to the jury is begun.

Section 1-182 requires requests for written instructions from the judge to be made at or before the close of the evidence. There seems to be a divergence of opinion in the Supreme Court as to whether these two sections should be read together. In *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003 (1906), it was held that these two sections should not be read together and the time limit expressed in § 1-182 had no bearing on this section. In *Barringer v. Deal*, 164 N. C. 246, 80 S. E. 161 (1913), § 1-182 was read into this section and the headnote to the case stated that requests for special instructions had to be made before the close of the evidence. However, the requests in this case were handed up after the conclusion of the charge.

Time Limit for Requests for Instructions.—Requests for special instructions must be in before the beginning of the argument. *State v. Morgan*, 225 N. C. 549, 35 S. E. (2d) 621 (1945).

Defendant's request for special instruction to jury while the solicitor was arguing the case and after counsel for defendant had completed his argument was too late to form a basis for a successful exceptive assignment of error. *State v. Morgan*, 225 N. C. 549, 35 S. E. (2d) 621 (1945).

Requests for special instructions should be presented in time to give the court opportunity to consider them before submitting them to the jury. *State v. Rowe*, 98 N. C. 629, 4 S. E. 506 (1887).

Special instructions requested after the judge has concluded his charge will not be considered on appeal. *Posey v. Patton*, 109 N. C. 455, 14 S. E. 64 (1891). But this does not mean that the court is prevented from granting the request if he desires, and it has been held that it is discretionary with the presiding judge whether he will recall the jury and submit instructions, which were not presented until the charge was finished and the jury had retired to consider their verdict. *Scott v. Green*, 89 N. C. 278 (1883).

Section Mandatory.—Failure to grant an instruction not asked for in writing is not ground for exception. *Marshall v. Stine*, 112 N. C. 697, 17 S. E. 495 (1893). And the trial judge may disregard oral requests. *State v. Horton*, 100 N. C. 443, 6 S. E. 238 (1888); *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850 (1902); *Hicks v. Nivens*, 210 N. C. 44, 185 S. E. 469 (1936).

It is within the sound discretion of the trial judge to give or to refuse prayer for instruction that is not in writing and signed as required by this section. *State v. Spencer*, 225 N. C. 608, 35 S. E. (2d) 887 (1945).

The court is at liberty to disregard oral requests for instructions which do not relate to a substantial and essential feature of the case. *State v. Hicks*, 229 N. C. 345, 49 S. E. (2d) 639 (1948).

A party must aptly tender written request for special instructions desired by him in order for an exception to the charge for its failure to contain such instructions to be considered on appeal. *State v. Spillman*, 210 N. C. 271, 186 S. E. 322 (1936).

If a litigant desires a fuller or more detailed charge by the court to the jury, it is incumbent upon him to ask therefor by presenting prayers for special instructions. *Woods v. Roadway Express*, 223 N. C. 269, 25 S. E. (2d) 856 (1943).

A party desiring more particular instructions on a subordinate feature of the case must aptly tender request therefor. *McKay v. Bullard*, 219 N. C. 589, 14 S. E. (2d) 657 (1941).

For other cases relating to "apt time" for tendering written requests, see *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3 (1892); *Ward v. Albemarle, etc., R. Co.*, 112 N. C. 168, 16 S. E. 921 (1893).

Failure to Give Proper Instruction Is Reversible Error.—When a party tenders a request for a specific instruction, correct in itself and supported by the evidence, the failure of the trial court to give such instruction, in substance at least, either in response to the prayer or in some portion of the charge, is reversible error. *Calhoun v. State Highway, etc., Comm.*, 208 N. C. 424, 181 S. E. 271 (1935).

Failure to Sign—Discretion of Court.—It is within the sound discretion of the trial judge to give or refuse a prayer for special instruction not signed by the attorneys tendering it as required by this section. *Avery County Bank v. Smith*, 186 N. C. 635, 120 S. E. 215 (1923).

Court Need Not Use Exact Words of

Instruction.—Where a party prays for an instruction to which he is entitled, it is error to refuse it. The court, however, is not required to adopt the words of the instruction prayed for, but it is error to change its sense or to so qualify it as to weaken its force. *Brink v. Black*, 77 N. C. 59 (1877); *Lloyd v. Bowen*, 170 N. C. 216, 86 S. E. 797 (1915); *Coral Gables v. Ayres*, 208 N. C. 426, 181 S. E. 263 (1935).

Party Cannot Complain of Favorable Instructions.—The defendants cannot, on appeal from a conviction, complain of an erroneous instruction which was not prejudicial to them but in their favor. *State v. Freeman*, 122 N. C. 1012, 29 S. E. 94 (1898).

Instruction on Matters Arising Only on Verdict.—It is not error in the judge to omit to charge the jury upon matters of law which can only arise upon the verdict, and have no bearing on the questions to be considered by the jury. *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418 (1885).

Oral Exception.—Where the judge in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was prayed for. *Lee v. Williams*, 112 N. C. 510, 17 S. E. 165 (1893).

Assignment of Error.—Though the failure to give an instruction asked for in writing is deemed excepted to, yet, if it is not set out in the case on appeal, it will be deemed to have been waived, and will not be passed on by the Supreme Court. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266 (1890); *Marshall v. Stine*, 112 N. C. 697, 17 S. E. 495 (1893).

Exceptions to the refusal of the court to grant a prayer for instructions, or in granting a prayer, or to instructions generally, cannot be taken for the first time in the Supreme Court; they should be made on a motion for a new trial, but it is sufficient

if they are assigned in the statement of the case on appeal. *Lee v. Williams*, 111 N. C. 200, 16 S. E. 175 (1892).

The appellant is entitled to have his assignments of error for refusing or granting special instructions, if set out by him in his statement of the case on appeal, incorporated by the judge in the case settled. If they are omitted, certiorari will lie. *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383 (1890).

Judge's Statement of Oral Instructions Binding.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850 (1902).

Conflicting Evidence.—The trial judge commits reversible error in failing to give substantially a material instruction duly requested under this section embodying a correct principle of law supported by the evidence in the case, though the evidence may be conflicting. *Parks v. Security Life, etc., Co.*, 195 N. C. 453, 142 S. E. 473 (1928).

The Supreme Court cannot indulge in speculation as to the form of an instruction, where no prayer for the instruction as required by this section appears in the record. *Kearney v. Thomas*, 225 N. C. 156, 33 S. E. (2d) 871 (1945).

Applied in *Taylor v. Rierson*, 210 N. C. 185, 185 S. E. 627 (1936).

Cited in *Pleasants v. Raleigh and Augusta R. R.*, 95 N. C. 195 (1886); *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383 (1890); *State v. Macon*, 198 N. C. 483, 152 S. E. 407 (1930); *Penland v. French Broad Hospital*, 199 N. C. 314, 154 S. E. 406 (1930); *Lane v. Paschall*, 199 N. C. 364, 154 S. E. 626 (1930); *Pyatt v. Southern R. Co.*, 199 N. C. 397, 154 S. E. 847 (1930); *State v. Sims*, 213 N. C. 590, 197 S. E. 176 (1938); *Clarke v. Martin*, 217 N. C. 440, 8 S. E. (2d) 230 (1940).

§ 1-182. Instructions in writing; when to be taken to jury room.—The judge, at the request of any party to an action on trial, made at or before the close of the evidence, before instructing the jury on the law, must put his instructions in writing and read them to the jury. He shall then sign and file them with the clerk as a part of the record of the action.

When a judge puts his instructions in writing either of his own will or at the request of a party to the action, he must, at the request of either party to the action, allow the jury to take his instructions with them on their retirement, and the jury must return the instructions with their verdict to the court. (C. P., s. 238; Code, s. 414; 1885, c. 137; Rev., ss. 536, 537; C. S., s. 566.)

Editor's Note.—It is not the policy or purpose of the statute, nor does the language used bear such rigorous construction

as to forbid any and all oral expressions from the presiding judge. As what he may tell the jury in matters of law for their in-

formation and guidance must be written and read, so he is not permitted to add to, take from, modify or explain what he delivers as his charge, for this would be to change perhaps the meaning which would otherwise be ascribed to the writing and produce the very mischief intended to be remedied. But the act, upon any reasonable interpretation of its terms, does not go further and put an interdict upon every oral utterance which is in precise accord with what is written and affects it in none of the suggested particulars, at the peril of a venire de novo if he does thus speak. *Currie v. Clark*, 90 N. C. 355 (1884). See *State v. Crowell*, 116 N. C. 1052, 21 S. E. 502 (1895).

Section Mandatory.—The requirements of this section are mandatory in criminal as well as civil cases and if the judge fails to comply with a request duly made that he reduce his charge to writing, a new trial will be ordered. *Currie v. Clark*, 90 N. C. 355 (1884); *State v. Connelly*, 107 N. C. 463, 12 S. E. 251 (1890). The question is not whether the record contains the instructions as actually delivered, there being no admission in regard to it, but whether the request was duly made and refused and the refusal followed by an exception. *State v. Black*, 162 N. C. 637, 78 S. E. 210 (1913).

The court must put its charge, as to the law, in writing, however inconvenient, if the request is made in apt time. *Jenkins v. Wilmington, etc., R. Co.*, 110 N. C. 438, 15 S. E. 193 (1892).

Applies to Later Instructions.—It is error to charge the jury orally upon any point when they return into court for instructions, when counsel has requested written instructions. *State v. Young*, 111 N. C. 715, 16 S. E. 543 (1892).

"Instructions" Defined.—The word "instructions" as used in this section, relates to the principles of law applicable to the case, and which would influence the action of the jury, after finding the facts, in shaping their responses to the issue. *State v. Dewey*, 139 N. C. 556, 51 S. E. 937 (1905).

Recapitulation of Evidence.—A request to give instructions in writing, under this section, does not require that the recapitulation of evidence be in writing. *Dupree v. Virginia Home Ins. Co.*, 92 N. C. 418 (1885); *Phillips v. Wilmington, etc., R. Co.*, 130 N. C. 582, 41 S. E. 805 (1902).

Request Must Be Specific.—A request that the trial judge "charge the jury in writing, and as follows" is a request solely to deliver those instructions to the jury, and is not a request to put the entire charge in

writing. *Phillips v. Wilmington, etc., R. Co.*, 130 N. C. 582, 41 S. E. 805 (1902).

But where the defendant at the close of the evidence requested the court "to put the charge to the jury in writing and in part to charge the jury as follows," and the whole charge on the law was not put in writing, this was held to be error. *Sawyer v. Lumber Co.*, 142 N. C. 161, 55 S. E. 84 (1906).

Oral Instructions Same as Written.—Where the court gave oral instructions not differing from those set out in the written charge, and the appellant makes no suggestion to the contrary, his exception to the oral part of the charge does not constitute ground for a new trial. *Currie v. Clark*, 90 N. C. 355 (1884).

Exception.—An exception to the failure of the judge to put his charge in writing, when asked "at or before the close of the evidence," is taken in time if first set out in appellant's "case on appeal." *Sawyer v. Lumber Co.*, 142 N. C. 161, 55 S. E. 84 (1906). The headnote to *Phillips v. Wilmington, etc., Ry. Co.*, 130 N. C. 582, 41 S. E. 805 (1902), is not the holding of that case but is merely dicta.

An exception "for refusal of prayers for instructions" does not embrace a refusal or failure to grant a prayer to put the charge in writing. *State v. Adams*, 115 N. C. 775, 20 S. E. 722 (1894).

Effect of Violation.—When it appears from inspection of the record, that the court below refused to put its charge in writing, at the request of one of the parties made in apt time, a new trial will be granted by the Supreme Court. *State v. Connelly*, 107 N. C. 463, 12 S. E. 251 (1890).

Judge's Statement of Oral Instructions Controlling.—A statement of the trial judge as to what the instructions to the jury were, where orally given, and in the absence of a request that they be put in writing, is binding on appeal. *Justice v. Gallert*, 131 N. C. 393, 42 S. E. 850 (1902); *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76 (1904).

Request of Juror.—It is proper for the court to permit the jury to carry the charge with them on retiring to the jury room, at the request of one of the jurors. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625 (1906).

Request Made after Charge in Hands of Jury.—Where the trial judge, having at the request of plaintiff put his charge in writing, read and handed it to the jury and allowed them to carry it to the jury room, the plaintiff objected upon the ground that the court had not been requested to hand

the written charge to the jury. Thereupon, and after his Honor had offered to withdraw the written charge from the jury in whose possession it had been about five minutes, the defendant requested that the jury be permitted to keep the written charge, it was held that it was not error upon such request of the defendant to permit the jury to retain the written charge. *Little v. Carolina Central R. Co.*, 119 N. C. 771, 26 S. E. 106 (1896).

Special Prayers Given but Not Handed to Jury.—Where the charge of the court was taken to the jury room on retirement, but by oversight the special prayers asked by appellant and given were not also handed to the jury, this does not constitute error, where his counsel were present in the courtroom and did not then, or at any time before verdict, call the matter to the attention of the court. *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625 (1906).

Data Other than Charge.—It is error for

the trial judge, over objection, to permit the jury to take plats of or certificates relating to the location of disputed lands to their room and inspect them in their deliberations. *Nicholson v. Eureka Lumber Co.*, 156 N. C. 59, 72 S. E. 86 (1911). This also applies to plaintiff's estimate of damages, *Burton v. Wilkes*, 66 N. C. 604 (1872); an account rendered, *Watson v. Davis*, 52 N. C. 178 (1859); depositions read on trial, *Lafoon v. Shearin*, 95 N. C. 391 (1886); and papers read as evidence, *Williams v. Thomas*, 78 N. C. 47 (1878).

Cited in *Powell v. Wilmington, etc., R. Co.*, 68 N. C. 395 (1873); *Lowe v. Elliott*, 107 N. C. 718, 12 S. E. 383 (1890); *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3 (1892); *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905); *Craddock v. Barnes*, 142 N. C. 89, 54 S. E. 1003 (1906); *Barringer v. Deal*, 164 N. C. 246, 80 S. E. 161 (1913).

§ 1-183. Motion for nonsuit.—When on trial of an issue of fact in a civil action or special proceeding, the plaintiff has introduced his evidence and rested his case, the defendant may move to dismiss the action, or for judgment as in case of nonsuit. If the motion is allowed the plaintiff may appeal to the Supreme Court and it shall not be necessary for him to take exception to the ruling of the court allowing the motion. If the motion is refused and the defendant does not choose to introduce evidence the jury shall pass upon the issues in the action and the defendant may on appeal to the Supreme Court urge as ground for reversal the trial court's denial of his motion without the necessity of the defendant having taken exception to such denial. If the defendant introduces evidence he thereby waives any motion for dismissal or judgment as of nonsuit which he may have made prior to the introduction of his evidence and cannot urge such prior motion as ground for appeal. Defendant, however, may make such motion at the conclusion of the evidence of both parties irrespective of whether or not he made a motion for dismissal or judgment as of nonsuit therefore. If the motion is allowed the plaintiff may appeal to the Supreme Court and it shall not be necessary for him to take exception to the ruling of the court allowing the motion. If the motion is refused and after the jury has rendered its verdict the defendant may on appeal urge as ground for reversal the trial court's denial of his motion made at the close of all the evidence without the necessity of the defendant having taken exception to such denial. (1897, c. 109; 1899, c. 131; 1901, c. 594; Rev., s. 539; C. S., s. 567; 1951, c. 1081, s. 1.)

Editor's Note.—The 1951 amendment, which became effective April 14, 1951, and rewrote this section, did away with the necessity of taking exceptions and made other changes. It should be borne in mind that the cases cited below construe the section as it read prior to the amendment.

As to note on evidence to be considered on motion to nonsuit, see 23 N. C. Law Rev. 243.

The power of the superior court to grant an involuntary nonsuit is altogether statutory, and did not exist prior to the passage of Laws 1897, c. 109. See *Riley v.*

Stone, 169 N. C. 421, 86 S. E. 348 (1915).

For discussion of the 1897 act and the 1899 amendment, see *Means v. Carolina Central R. R. Co.*, 126 N. C. 424, 35 S. E. 813 (1900), citing *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959 (1898); *Purnell v. Raleigh, etc., R. Co.*, 122 N. C. 832, 29 S. E. 953 (1898).

Criminal Cases.—It was held in *State v. Houston*, 155 N. C. 432, 71 S. E. 65 (1911), that this statute did not apply to criminal cases. Thereupon the legislature enacted Laws 1913, c. 73 (§ 15-173), which was intended to serve the same purpose in crimi-

nal cases as is done by § 1-183 in civil actions.

Section Strictly Followed.—Since the allowance of a motion for judgment as of nonsuit is based upon purely statutory grounds, the requirements of this section must be strictly followed. *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123 (1945).

Section Explained.—Under this section the defendant is not put to his election to move for a judgment of nonsuit or proceed with the evidence unless the plaintiff has produced his evidence and rested his case. If the motion for judgment is therein refused he can note his exception and proceed as if he had made no motion. *Worth v. Ferguson*, 122 N. C. 381, 29 S. E. 574 (1898).

It was not intended to deprive parties of the right to trial by jury where there is any evidence to sustain the allegations of the complaint. *Fox v. Asheville Army Store*, 215 N. C. 187, 1 S. E. (2d) 550 (1939).

Nonsuit under this section is permissible only on demurrer to the evidence, and not on demurrer to the complaint or motion for judgment on the pleadings. *Dix-Downing v. White*, 206 N. C. 567, 174 S. E. 451 (1934); *Sykes v. Blakey*, 215 N. C. 61, 200 S. E. 910 (1939).

Effect of Motion to Nonsuit.—By its motion for a compulsory nonsuit under this section, and its prayers for a directed verdict, the defendant challenges the sufficiency of the evidence to support the cause of action alleged. *Potter v. National Supply Co.*, 230 N. C. 1, 51 S. E. (2d) 908 (1949).

Time to Make Motion to Nonsuit.—The allowance of a motion as of nonsuit is based upon purely statutory grounds, and the requirements of this section must be strictly followed, and where the defendant fails to move for judgment as of nonsuit at the close of the plaintiff's evidence, his exception to the refusal of his motion therefor at the close of all the evidence is not sufficient to present on appeal the question of whether upon all the evidence the plaintiff is entitled to recover. *Penland v. French Broad Hospital*, 199 N. C. 314, 154 S. E. 406 (1930).

Where a party fails to move for judgment as of nonsuit at the close of plaintiff's evidence, its motion therefor at the close of all the evidence cannot be granted, since the right to demur to the evidence is waived. *Jones v. Dixie Fire Ins. Co.*, 210 N. C. 559, 187 S. E. 769 (1936). See *State v. Ormond*, 211 N. C. 437, 191 S. E. 22

(1937); *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123 (1945).

Motion to Nonsuit Is a Question of Law.—A motion to nonsuit tests the sufficiency of the evidence to carry the case to the jury and support a recovery. The question thus presented is a question of law and is always to be decided by the court. *Ward v. Smith*, 223 N. C. 141, 25 S. E. (2d) 463 (1943); *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316 (1949); *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757 (1950).

Court Does Not Pass on Credibility or Weight of Evidence.—In ruling on a motion for nonsuit, the court does not pass on the credibility of the witnesses or the weight of the testimony. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

Contradictions in plaintiff's evidence do not justify nonsuit. *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791 (1950).

Plaintiff's Evidence Is Taken as True.—In passing upon a motion for a compulsory nonsuit under this section, the court must assume the evidence in behalf of the plaintiff to be true and must extend to the plaintiff the benefit of every fair inference which can be reasonably drawn therefrom by the jury in favor of the plaintiff. *Hughes v. Thayer*, 229 N. C. 773, 51 S. E. (2d) 488 (1949); *Higdon v. Jaffa*, 231 N. C. 242, 56 S. E. (2d) 661 (1949).

The evidence favorable to plaintiffs is taken as true. *Stokes v. Edwards*, 230 N. C. 306, 52 S. E. (2d) 797 (1949).

And All Conflicts Resolved in His Favor.—In determining whether or not the trial court erred in denying the defendant's motion for an involuntary nonsuit or in refusing to direct a verdict for the defendant in conformity to its requests for instructions, the Supreme Court must take it for granted that the evidence tending to support the plaintiff's claim is true and must resolve all conflicts of testimony in his favor. *Potter v. National Supply Co.*, 230 N. C. 1, 51 S. E. (2d) 908 (1949). See *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

Admissions and Inferences.—A motion to dismiss under this section is substantially a demurrer to the evidence, which waives all objections to its competency, and admits as true that which the evidence tends to prove. *Roscoe v. Lumber Co.*, 124 N. C. 42, 32 S. E. 389 (1899).

The demurrer to the evidence admits all facts of which there is any evidence and all conclusions which can be fairly and logically drawn from such facts. This rule is substantiated by a long array of cases. See *Hopkins v. Bowers*, 111 N. C. 175, 16

S. E. 1 (1892); *Snider v. Newell*, 132 N. C. 614, 44 S. E. 354 (1903).

When the defendant moves for a compulsory nonsuit, he admits, for the purpose of the motion, the truth of all facts in evidence tending to sustain the plaintiff's claim; and the plaintiff is entitled to have the court, in ruling on the motion, give him the benefit of every favorable inference which the testimony fairly supports. *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757 (1950).

Evidence Adjudged against Defendant.

—In cases of demurrer and motions to dismiss under this section the evidence must be taken most strongly against the defendant. *Purnell v. Raleigh, etc., R. Co.*, 122 N. C. 832, 29 S. E. 953 (1898); *Gates v. Max*, 125 N. C. 139, 34 S. E. 266 (1899); *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499 (1899).

Plaintiff Entitled to Benefit of Inferences.

—On a motion to nonsuit under this section, the evidence is to be taken in the light most favorable to the plaintiff, and he is entitled to the benefit of every reasonable intendment upon the evidence and every reasonable inference to be drawn therefrom. *Standard Oil Co. v. Hunt*, 187 N. C. 157, 121 S. E. 184 (1924); *Lindsey v. Suncrest Lumber Co.*, 189 N. C. 118, 126 S. E. 174 (1925); *Southwill v. Atlantic Coast Line R. Co.*, 189 N. C. 417, 127 S. E. 361 (1925); *Ghorley v. Atlantic, etc., Ry. Co.*, 189 N. C. 634, 127 S. E. 634 (1925); *Inge v. Seaboard Air Line R. Co.*, 192 N. C. 522, 135 S. E. 522 (1926); *State v. Carter*, 194 N. C. 293, 139 S. E. 604 (1927); *Brown v. Southern Ry. Co.*, 195 N. C. 699, 143 S. E. 536 (1928); *Cromwell v. Logan*, 196 N. C. 588, 146 S. E. 233 (1929); *Bright v. Hood*, 214 N. C. 410, 199 S. E. 630 (1938); *Reid v. City Coach Co.*, 215 N. C. 469, 2 S. E. (2d) 578, 123 A. L. R. 140 (1939); *White v. North Carolina R. Co.*, 216 N. C. 79, 3 S. E. (2d) 310 (1939); *Barnes v. Wilson*, 217 N. C. 190, 7 S. E. (2d) 359 (1940); *Queen City Coach Co. v. Lee*, 218 N. C. 320, 11 S. E. (2d) 341 (1940); *Wingler v. Miller*, 223 N. C. 15, 25 S. E. (2d) 160 (1943); *Lindsey v. Speight*, 224 N. C. 453, 31 S. E. (2d) 371 (1944); *Buckner v. Wheeldon*, 225 N. C. 62, 33 S. E. (2d) 480 (1945); *Garrett v. Garrett*, 229 N. C. 290, 49 S. E. (2d) 643 (1948); *Grier v. Phillips*, 230 N. C. 672, 55 S. E. (2d) 485 (1949); *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791 (1950).

For other cases following the above rule, see *Nance v. Merchants' Fertilizer*,

etc., Co., 200 N. C. 702, 158 S. E. 486 (1931); *Holton v. Northwestern Oil Co.*, 201 N. C. 744, 161 S. E. 391 (1931); *Smith v. Raleigh Granite Co.*, 202 N. C. 305, 162 S. E. 731 (1932); *Sampson v. Jackson Bros. Co.*, 203 N. C. 413, 166 S. E. 181 (1932); *Thigpen v. Jefferson Standard Life Ins. Co.*, 204 N. C. 551, 168 S. E. 845 (1933); *Hobbs v. Kirby*, 205 N. C. 238, 171 S. E. 94 (1933); *Brunswick County v. North Carolina Bank, etc., Co.*, 206 N. C. 127, 173 S. E. 327 (1934); *Broadway v. Cope*, 208 N. C. 85, 179 S. E. 452 (1935); *Teseneer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535 (1936); *Owens v. Blackwood Lbr. Co.*, 210 N. C. 504, 187 S. E. 804 (1936); *Hancock v. Wilson*, 211 N. C. 129, 189 S. E. 631 (1937); *Cole v. Atlantic Coast Line R. Co.*, 211 N. C. 591, 191 S. E. 353 (1937); *Pearson v. Luther*, 212 N. C. 412, 193 S. E. 739 (1937); *Briley v. Roberson*, 214 N. C. 295, 199 S. E. 73 (1938); *Warren v. Breedlove*, 219 N. C. 383, 14 S. E. (2d) 43 (1941); *Edwards v. National Council, etc.*, 220 N. C. 41, 16 S. E. (2d) 466 (1941).

On a motion by the defendant for a nonsuit under the statute, or on a demurrer to the evidence, the latter must be construed most favorably to the plaintiff, and every fact essential to the cause of action, which it tends to prove, must be taken as established, and plaintiff also is entitled to the most favorable inferences deducible therefrom, considering only so much of the evidence as is favorable to the plaintiff and rejecting that which is unfavorable. *Rush v. McPherson*, 176 N. C. 562, 97 S. E. 613 (1918); *Newby v. Atlantic, etc., Realty Co.*, 182 N. C. 34, 108 S. E. 323 (1921).

Evidence Erroneously Admitted. — A motion for a compulsory nonsuit under this section does not present for review errors committed by the court in admitting testimony. Upon such motion all relevant evidence admitted by the court must be accorded its full probative force, irrespective of whether it has been erroneously received. *Ballard v. Ballard*, 230 N. C. 629, 55 S. E. (2d) 316 (1949).

Consideration of Defendant's Evidence.

—Upon a motion as of nonsuit the defendant's evidence will not be considered unless favorable to the plaintiff or not in conflict therewith, when it may be used to explain or make clear the evidence introduced by the plaintiff. *Harrison v. North Carolina R. R. Co.*, 194 N. C. 656, 140 S. E. 598 (1927); *Tarrant v. Pepsi-Cola Bottling Co.*, 221 N. C. 390, 20 S. E. (2d) 565 (1942); *Jeffries v. Powell*, 221 N. C. 415, 20 S. E. (2d) 561 (1942); *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E.

(2d) 398, 147 A. L. R. 283 (1943); *Pappas v. Crist*, 223 N. C. 265, 25 S. E. (2d) 850 (1943); *Buckner v. Wheeldon*, 225 N. C. 62, 33 S. E. (2d) 480 (1945).

While this section requires a consideration of the whole evidence, only that part of the defendant's evidence which is favorable to plaintiff can be taken into consideration, since, otherwise, the court would pass upon the weight of the evidence, the credibility of which rests solely with the jury. *Wall v. Bain*, 222 N. C. 375, 23 S. E. (2d) 330 (1942).

Upon a motion as of nonsuit so much of defendant's evidence as is favorable to the plaintiff or tends to explain or make clear that which has been offered by plaintiff may be considered, but that which tends to establish another and a different state of facts or which tends to contradict or impeach the evidence offered by plaintiff is to be disregarded. *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209 (1944); *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

The court will consider only the evidence which tends to support plaintiff's claim upon a motion for judgment as of nonsuit at the close of all evidence. *Stell v. First Citizens Bank, etc., Co.*, 223 N. C. 550, 27 S. E. (2d) 524 (1943).

Defendant's evidence, which conflicts with that tending to support plaintiff's claim, is not to be considered on motion to nonsuit under this section. *Davidson v. Western Union Tel. Co.*, 207 N. C. 790, 178 S. E. 603 (1935).

Nonsuit in Favor of Party Having Burden of Proof.—A judgment of nonsuit is never permissible in favor of the party having the burden of proof upon evidence offered by him. *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742 (1948).

There is but one exception to this rule: When the plaintiff offers sufficient evidence to constitute a prima facie case in an action in which the defendant has set up an affirmative defense, and the evidence of the plaintiff establishes the truth of the affirmative defense as a matter of law, a judgment of nonsuit may be entered. *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742 (1948).

In the absence of such evidence or admissions on the part of the plaintiff it does not matter how clearly the matter appears in the evidence of the defendant, decision is not thereby shifted to the court as a matter of law, since the question of credibility still remains. *MacClure v. Accident, etc., Ins. Co.*, 229 N. C. 305, 49 S. E. (2d) 742 (1948).

When Motion Should Be Disallowed.—If upon the whole evidence there are inferences tending to support plaintiff's case, nonsuit is properly refused. *Maddox v. Brown*, 232 N. C. 244, 59 S. E. (2d) 791 (1950).

The court cannot properly enter a compulsory nonsuit and thereby withdraw the case from the jury if the facts are in dispute, or if the testimony in relation to the facts is such that different conclusions may reasonably be reached thereon. *Graham v. North Carolina Butane Gas Co.*, 231 N. C. 680, 58 S. E. (2d) 757 (1950).

Defendant's motion as of nonsuit, will be denied when the evidence, taken in the light most favorable to the plaintiff, and every reasonable intendment therefrom, is sufficient to take the case to the jury and support a verdict as a matter of law in the plaintiff's favor. *Robinson v. Ivey & Co.*, 193 N. C. 805, 138 S. E. 173 (1927).

The defendant, after the court has refused his motion as of nonsuit upon the evidence, may except, introduce evidence, and renew his motion after all the evidence has been introduced; but his last motion only can be considered, and upon all the evidence in the case, and if therein the plaintiff has made out a case, the motion should be disallowed. *Blackman v. Woodmen*, 184 N. C. 75, 113 S. E. 565 (1922).

Upon a motion for judgment as of nonsuit, the whole evidence must be taken in the light most favorable for plaintiff and the motion disallowed if there is any reasonable inference of defendant's proximately causative negligence, unless, in plaintiff's own evidence, there is such a clear inference of contributory negligence that reasonable minds could not come to a contrary conclusion. *Jackson v. Browning*, 224 N. C. 75, 29 S. E. (2d) 21 (1944).

Where defendants failed to lodge their motion for dismissal of the action and for a judgment as in case of nonsuit when plaintiff had introduced his evidence and rested his case, the granting of such a motion after all the evidence on both sides was in was unauthorized and error. *Avent v. Millard*, 225 N. C. 40, 33 S. E. (2d) 123 (1945).

Not Allowed after Verdict.—An exception that there is no evidence on an issue in a case can only be taken before verdict. *Sugg v. Fatson*, 101 N. C. 188, 7 S. E. 709 (1888); *Wilson Cotton Mills v. Randleman Cotton Mills*, 115 N. C. 475, 20 S. E. 770 (1894); *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351 (1903).

Where the court reserves its rulings on motions of nonsuit until after rendition of a verdict the court may not set aside the

verdict for insufficiency of the evidence as a matter of law, and grant the motion for judgment as of nonsuit made at the close of all the evidence. *Batson v. City Laundry Co.*, 202 N. C. 560, 163 S. E. 600 (1932); *Jones v. Dixie Fire Ins. Co.*, 210 N. C. 559, 187 S. E. 769 (1936).

Plaintiff's Evidence Must Be Nil. — If there is more than a scintilla of evidence tending to prove the plaintiff's contention it must be submitted to the jury. *Gates v. Max*, 125 N. C. 139, 34 S. E. 266 (1899). See *Cable v. Southern Ry. Co.*, 122 N. C. 892, 29 S. E. 377 (1898); *Cox v. Norfolk, etc., R. Co.*, 123 N. C. 604, 31 S. E. 848 (1898).

It was not the intention or effect of the passage of this section, to deprive parties of the right of trial by jury in cases where there is any evidence or to make the weight and effect of the evidence always a question of law for the courts. *Willis v. Atlantic, etc., R. Co.*, 122 N. C. 905, 29 S. E. 941 (1898).

Where Only Some of Defendants Move for Nonsuit.—When the only defendants who have any interest adverse to plaintiff move for judgment of nonsuit, which is granted, objection and exception thereto, upon the theory that only some of defendants lodged the motion, are untenable. *Daughtry v. Daughtry*, 223 N. C. 528, 27 S. E. (2d) 446 (1943).

How Questions of Law and Fact Presented.—Whether there is evidence from which the jury could answer an issue in the affirmative is a question of law, and is presented to the court for decision by motion for judgment of nonsuit. *McCall v. Textile Industrial*, 189 N. C. 775, 128 S. E. 349 (1925).

A motion to nonsuit questions the sufficiency of the evidence to carry the case to the jury and to support a recovery, which is always a question of law to be determined by the court. *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137 (1941).

Additional Evidence Allowable.—Where a motion to nonsuit under this section is made, it is discretionary with the judge, before passing on it, to allow the plaintiff to introduce additional evidence. *Featherston v. Wilson*, 123 N. C. 623, 31 S. E. 843 (1898).

The trial court, after the plaintiff had rested his case, and after the motion of the defendants for judgment as of nonsuit under this section was denied, and before either of the defendants had offered evidence, allowed the plaintiff to offer additional evidence. This action of the court was within its discretion, and for that

reason is not reviewable by this court, and the rights of the defendants under this section were not affected by the action of the court. *Pearson v. Simon*, 207 N. C. 351, 177 S. E. 124 (1934).

When Motion Must Be Renewed. — Where defendant moved to dismiss the case and direct a verdict, when plaintiff rested his case, but after denial of the motion introduced evidence, and did not renew at the close of the whole case, it was held that the defendant could not, on appeal, complain of the denial of his motion to dismiss. *Choate Rental Co. v. Justice*, 211 N. C. 54, 188 S. E. 609 (1936); *Hawkins v. Dallas*, 229 N. C. 561, 50 S. E. (2d) 561 (1948).

Waiver.—The introduction of evidence by the defendant upon the overruling of his motion at the conclusion of the plaintiff's evidence, and his failure to renew his motion on all the evidence, is a waiver of his right under the statute. *Wooley v. Bruton*, 184 N. C. 438, 114 S. E. 628 (1922); *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356 (1925); *Gillard v. Carolina, etc., Co.*, 189 N. C. 783, 128 S. E. 158 (1925); *Ferrell v. Metropolitan Life Ins. Co.*, 208 N. C. 420, 181 S. E. 327 (1935); *Stephenson v. Honeycutt*, 209 N. C. 701, 184 S. E. 482 (1936).

The defendant waives his right to maintain the insufficiency of the evidence to take the case to the jury by not making a motion as of nonsuit thereon at the close of the evidence. *Murphy v. Power Co.*, 196 N. C. 484, 146 S. E. 204 (1929); *Gibbs v. Telegraph Co.*, 196 N. C. 516, 146 S. E. 509 (1929).

Where the defendant in a civil action does not comply with the provisions of this section, in making a motion for judgment as of nonsuit he waives the question of the sufficiency of the evidence. *Harris v. Buie*, 202 N. C. 634, 163 S. E. 693 (1932).

A motion for dismissal or for judgment of nonsuit made, under this section at the close of the plaintiff's evidence and not renewed at the close of all the evidence is waived. *Debnam v. Rouse*, 201 N. C. 459, 160 S. E. 471 (1931).

Where a defendant makes a motion as of nonsuit at the close of the plaintiff's evidence, and upon the motion being overruled, introduces evidence in his own behalf, he waives his right to present the question of the sufficiency of the evidence to go to the jury by failing to renew his motion at the close of all the evidence, and his appeal will be regarded as if no motion had been made by him. *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31 (1931).

Where the defendant does not move for

nonsuit as provided by this section, in the lower court he waives his right to have the insufficiency of the evidence to be submitted to the jury considered on appeal. *Harrison v. Metropolitan Life Ins. Co.*, 207 N. C. 487, 177 S. E. 423 (1934).

Same—Introduction of Evidence.—A defendant waives his right to object to the sufficiency of the evidence on his motion of nonsuit made at the close of the plaintiff's evidence by introducing evidence in his own behalf and not renewing his motion after the close of all the evidence in the case. *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 140 S. E. 598 (1927); *Grant v. Power Co.*, 196 N. C. 617, 146 S. E. 531 (1929).

Exception Considered on Appeal.—Where exception is taken to the refusal of the court to dismiss the action, both after the close of plaintiff's evidence and after the defendant's evidence has been introduced, only the exception taken after the close of all the evidence will be considered on appeal, under the express provision of this section, and, so considered, the evidence must be accepted as true and construed in the light most favorable to the plaintiff. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559 (1921).

Where exception is taken to refusal to grant defendant's motion to nonsuit made at close of plaintiff's evidence, but he then elected to offer evidence, only the exception noted at the close of all the evidence could be urged or considered on appeal. *Harrison v. North Carolina R. Co.*, 194 N. C. 656, 140 S. E. 598 (1927), citing *Harper v. Supply Co.*, 184 N. C. 204, 114 S. E. 173 (1922); *Nash v. Royster*, 189 N. C. 408, 127 S. E. 356 (1925). See *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209 (1944).

Under this section an exception to a motion to dismiss in a civil action, taken after the close of the plaintiff's evidence and renewed by defendant after the introduction of his own evidence, does not confine the appeal to the plaintiff's evidence alone, and a judgment will be sustained under the second exception if there is any evidence on the whole record of the defendant's liability. *Lynn v. Pinehurst Silk Mills*, 208 N. C. 7, 179 S. E. 11 (1935).

Motion to Set Aside Verdict.—An order of the court setting aside a verdict upon motion that it was against the weight of evidence is in conflict with his further sustaining a motion to nonsuit the plaintiff upon the evidence under this section. *Riley v. Stone*, 169 N. C. 421, 86 S. E. 348 (1915).

Motion for Judgment on Exceptions.—

In a proceeding attacking the validity of an improvement assessment, the burden is on the defendant municipality to sustain the assessment, and a motion by the plaintiff for judgment on her exceptions after defendant's evidence is in, is in effect a motion for judgment as of nonsuit under this section. *Holton v. Mocksville*, 189 N. C. 144, 126 S. E. 326 (1925).

Effect of Remanding Case.—When in the Supreme Court the lower court is reversed for refusing a motion to dismiss upon the evidence as of nonsuit, it is equivalent to the direction to dismiss the action. *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212 (1906); *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180 (1908). The superior court is without authority to allow an amendment or to proceed contrary to the opinion, but the plaintiff may bring another suit within twelve months after the judgment of nonsuit. *Tussey v. Owen*, 147 N. C. 335, 61 S. E. 180 (1908).

Evidence Sufficient for Jury.—Defendant's motion as of nonsuit upon the evidence will be denied if there is any sufficient evidence, testified to by either the plaintiff's or defendant's witnesses, circumstantial or otherwise, viewed in the light most favorable to the plaintiff, to take the issue to the jury for determination. *Goss v. Williams*, 196 N. C. 213, 145 S. E. 169 (1928). See *Cromartie v. Stone*, 194 N. C. 663, 140 S. E. 612 (1927); *Dalton v. Stoneville Cabinet Co.*, 195 N. C. 870, 142 S. E. 480 (1928); *Burnett v. Williams*, 196 N. C. 620, 146 S. E. 533 (1929); *Cameron v. Cameron*, 212 N. C. 674, 194 S. E. 102 (1937).

Same—Illustrative Cases.—Where the defense of an independent contractor is relied upon in an action to recover damages for alleged negligent injury, evidence in plaintiff's behalf tending to show that the relationship of independent contractor had before the happening of the accident been severed and that the defendant's employees were in charge of and loading logs upon the defendant's tramroad when the plaintiff's injury occurred in the course of his employment, is sufficient to take the case to the jury as to his employment by the defendant at the time, upon defendant's motion as of nonsuit. *Lilley v. Interstate Cooperation Co.*, 194 N. C. 250, 139 S. E. 369 (1927).

Where in a personal injury negligence case there is evidence for defendant that the injury in suit was caused either by the act of God, etc., or by an accident, and, per contra, that it was proximately caused by the defend-

ant's negligence in the exercise of ordinary care to furnish the plaintiff, his employee, a reasonably safe place to work or reasonably safe appliances under the circumstances, defendant's motion for nonsuit will be denied. *Jones v. Atlantic Coast Line R. Co.*, 194 N. C. 227, 139 S. E. 242 (1927).

When the father has entered into a contract with his son for support of himself and wife for life, and gives as a consideration certain of his property, without retaining sufficient property to pay his then existing creditors, and the pleadings and evidence raise the question of the son's good faith and part performance without notice, these questions should be submitted to the jury upon appropriate issues; and motion for nonsuit is properly refused. *Peoples Bank, etc., Co. v. Mackorell*, 195 N. C. 741, 143 S. E. 518 (1928).

In an action for negligence of defendant's delivery truck driver, evidence as to the driver's identity and that he was acting within scope of his employment at time of injury, is sufficient to take the case to the jury and deny defendant's motion for a nonsuit. *Misenheimer v. Hayman*, 195 N. C. 613, 143 S. E. 1 (1928).

In an action for injuries against a municipality for failure to keep highway in safe condition, defendant's motion for judgment as in case of nonsuit, provided for by this section, was properly granted, where the evidence disclosed that accident occurred outside the town limits. *Spell v. Roseboro*, 214 N. C. 364, 199 S. E. 265 (1938).

Evidence tending to show that plaintiff's intestate was struck and killed by defendant's train, that the engineer failed to blow for the crossing, and that the track was straight and unobstructed for a distance of about two hundred yards and that the engineer could have seen the intestate and the cow for that distance is held sufficient to take the case to the jury on the doctrine of last clear chance, the evidence tending to show that the intestate was on the track oblivious or otherwise insensible of danger, and defendant's motion for judgment as of nonsuit is properly denied. *Triplett v. Southern R. Co.*, 205 N. C. 113, 110 S. E. 146 (1933).

In an action on a disability clause in a policy of life insurance where plaintiff testified that at the time of the issuance of the policy his eyesight was not impaired and that he was thoroughly examined by insurer's physician upon his application for the policy, and that no impairment or disease of his sight was disclosed by the physician's examination and test of his

eyes, and that subsequent blindness had rendered him disabled, and defendant introduced testimony of an eye specialist that from his examination of plaintiff's eyes plaintiff was suffering from a chronic eye disease several years prior to the application for the policy, and moved for a nonsuit on the ground that the evidence showed that the disease resulting in plaintiff's disability originated prior to the issuance of the policy: Held, the evidence, viewed in the light most favorable to plaintiff, was sufficient to be submitted to the jury and a motion for a nonsuit was properly overruled. *Misskelley v. Home Life Ins. Co.*, 205 N. C. 496, 171 S. E. 862 (1933).

The parking of a truck on a public highway at night without lights in violation of statute, is negligence per se, and where the evidence is conflicting as to whether such improper parking proximately caused plaintiff's injuries, resulting from a collision between the truck and the car in which he was riding as a guest, the question of proximate cause is for the determination of the jury upon an appropriate issue, and a motion as of nonsuit is properly denied. *Barrier v. Thomas, etc., Co.*, 205 N. C. 425, 171 S. E. 626 (1933).

In an action by the daughter of the deceased against his administrators to recover the value of services rendered deceased, it was held that under the evidence the relationship between plaintiff and her father raised no presumption that the services were gratuitous, and a motion as of nonsuit was properly denied. *Keiger v. Sprinkle*, 207 N. C. 733, 178 S. E. 666 (1935).

The conviction of the defendant in a criminal action in a lower court procured by the prosecuting witness upon evidence known to him to be perjured is not conclusive evidence of probable cause, and in an action by the defendant against the plaintiff for malicious prosecution, a motion for judgment as in case of a nonsuit is properly denied. *Moore v. Winfield*, 207 N. C. 767, 178 S. E. 605 (1935).

Where the evidence tended to show an agent had apparent authority, the evidence that the act of agent was within his apparent authority and binding on his principal is a question for the jury, and a motion as of nonsuit on the ground of not being bound by an agent's unauthorized act is properly denied. *Charleston, etc., Ry. Co. v. Lassiter & Co.*, 207 N. C. 408, 177 S. E. 9 (1934).

It is improper for the court to sustain a motion for judgment under this section

where the evidence is anticipated, the plaintiff not having "introduced his evidence and rested his case" as provided by this section. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 207 N. C. 122, 176 S. E. 265 (1934).

Where there is evidence in support of plaintiff's contention as to the amount of indebtedness sued on, defendant's motion as of nonsuit under this section is properly denied, although there is evidence in contradiction. *Pearson v. Simon*, 207 N. C. 351, 177 S. E. 124 (1934).

Where every element of the crime of having carnal knowledge of a female child under sixteen years of age in violation of § 14-26, is supported by the State's evidence in the case, defendant's motion as of nonsuit under this section is properly denied. *State v. Houpe*, 207 N. C. 377, 177 S. E. 20 (1934).

Where the evidence is sufficient to support a verdict in plaintiff's favor, defendant's motion as of nonsuit under this section is properly overruled. *Davidson v. Western Union Tel. Co.*, 207 N. C. 790, 178 S. E. 603 (1935).

In an action for damages for personal injuries to plaintiff by negligence of defendant, where plaintiff's evidence tended to show that she was driving her car, at 20 to 25 miles per hour, south on a city street towards its intersection with another street running east and west, and that defendant's truck was approaching the intersection from the west and was 125 feet distant from the intersection when plaintiff entered same, and said truck, running at 45 miles per hour, struck plaintiff's car, which was within 4 feet of the curb on the south side of the intersection, knocking it 70 feet into a stone wall across the street, motion of nonsuit was properly denied. *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642 (1943).

In an action to recover damages for fraud where plaintiff, a woman 65 years of age and of no business experience and of limited education, sued defendant, a banker of large financial interests, and plaintiff's evidence tended to show that she consulted defendant, an old and intimate friend, about investing money and he invested her money in 1929 in a note secured by real estate mortgage, over four years past maturity, defendant assuring plaintiff that the note was "as good as gold," that he would look out for its collection and payment of taxes on the property and that the principal could be collected at any time, whereas the property was not worth the debt and

defendant did not collect the interest regularly and allowed the realty securing the note to be sold for taxes in 1942, without notice to plaintiff, and plaintiff suffered a heavy loss from the investment, the allowance of motion for nonsuit was error. *Small v. Dorsett*, 223 N. C. 754, 28 S. E. (2d) 514 (1944).

In an action to recover damages for malpractice against a physician, where all the evidence tended to show that plaintiff, a patient in defendant's hospital and admittedly in an insane condition, got under her bed and could not be removed by the nurses, whereupon defendant took hold of her arm and pulled so hard that he heard the bone break, and failed to reduce or immobilize the fracture in a reasonable time, but sent for her father and delivered her to him, declining to treat her further, there was error in sustaining a motion for judgment as of nonsuit. *Groce v. Myers*, 224 N. C. 165, 29 S. E. (2d) 553 (1944).

Where plaintiff, a passenger in defendant's motor vehicle, brought an action to recover damages for personal injuries received from the alleged negligence of defendant's driver, when the car in which they were driving at about 35 to 40 miles per hour, on a paved highway, in fair weather, about seven-thirty A. M., suddenly left the road, ran down an embankment and turned over, causing the plaintiff's injuries, motion for judgment as of nonsuit, for lack of evidence of negligence, was held properly refused. *Boone v. Matheny*, 224 N. C. 250, 29 S. E. (2d) 687 (1944).

In an action for damages, based on abuse of process, where plaintiff's evidence tended to show that defendant procured the issuance of a warrant against plaintiff for disposing of mortgaged property and offered not to have it served if plaintiff would pay the amount claimed by defendant, and that, after plaintiff's arrest under the warrant and imprisonment, defendant offered to procure his release if plaintiff would pay or work out the amount claimed, there is sufficient evidence of motive and intent to carry the case to the jury and motion for judgment as of nonsuit was properly denied. *Ellis v. Wellons*, 224 N. C. 269, 29 S. E. (2d) 884 (1944).

In an action to recover damages for the wrongful death of plaintiff's intestate caused by a collision between the automobile of plaintiff's intestate and a truck of defendant, where plaintiff's evidence tended to show, though no eyewitness testified, that defendant's truck was being operated

on its left-hand side of the highway and the coupe of plaintiff's intestate was being operated on its right-hand side of the highway, at the time of the collision between the two vehicles going in opposite directions, there was error in the allowance of a motion for judgment as of nonsuit at the close of plaintiff's evidence. *Wyrick v. Ballard, etc., Co.*, 224 N. C. 301, 29 S. E. (2d) 900 (1944).

In divorce action, where evidence for plaintiff tends to show a living separate and apart for the statutory period and that plaintiff has resided in the State for six months, and defendant offered evidence of wrongful abandonment and recrimination, there is error in allowing a motion for judgment as of nonsuit. *Taylor v. Taylor*, 225 N. C. 80, 33 S. E. (2d) 492 (1945).

Upon a charge of fornication and adultery, it was held that there was sufficient evidence to support a conviction and motion for nonsuit was properly denied. *State v. Davenport*, 225 N. C. 13, 33 S. E. (2d) 136 (1945).

Upon a warrant charging defendant with violating § 60-136, which regulates the occupancy of seats by white and colored passengers in streetcars or other passenger vehicles or motor buses, it was held that there was sufficient evidence for jury and motion for nonsuit was properly denied. *State v. Brown*, 225 N. C. 22, 33 S. E. (2d) 121 (1945).

In an action to recover damages for alleged injuries to plaintiff resulting from an admitted automobile collision, motion by defendants for judgment as of nonsuit held properly denied. *Hobbs v. Queen City Coach Co.*, 225 N. C. 323, 34 S. E. (2d) 211 (1945).

Evidence which raises only a mere suspicion or conjecture of the issue to be proved is insufficient to be submitted to the jury. *Shuford v. Brown*, 201 N. C. 17, 158 S. E. 698 (1931); *Shuford v. Scruggs*, 201 N. C. 685, 161 S. E. 315 (1931); *Sutton v. Herrin*, 202 N. C. 599, 163 S. E. 578 (1932).

It is well settled that evidence which does no more than raise a suspicion, that a fact material to the cause of action alleged in the complaint may be as alleged therein, is not sufficient for submission to the jury as tending to sustain the allegation of the complaint. *Broughton v. Standard Oil Co.*, 201 N. C. 282, 159 S. E. 321 (1931).

Evidence tending to show a definite contract by deceased to devise his property to plaintiff, and upon the death of the de-

ceased intestate, is sufficient to be submitted to the jury in plaintiff's action against deceased's administrator for breach of the contract and motion as of nonsuit was properly refused. *Hager v. Whitner*, 204 N. C. 747, 169 S. E. 645 (1933).

Where the plaintiff brought suit on a policy of accident insurance in which she was named beneficiary, and which provided for the payment of a certain sum if the assured was killed by being struck by a gasoline propelled vehicle, the evidence that the assured met his death by being struck by a vehicle propelled by gasoline was sufficient to be submitted to the jury and motion for nonsuit was properly refused. *Colboch v. Independent Life Ins. Co.*, 204 N. C. 716, 169 S. E. 709 (1933).

Where the answer pleads a counterclaim the plaintiff may not take a voluntary nonsuit over the defendant's objection. *Ætna Life Ins. Co. v. Griffin*, 200 N. C. 251, 156 S. E. 515 (1931).

Defendant Cannot Withdraw Counterclaim in Order to Enter Motion as of Nonsuit.—Where the defendant in an action on a contract sets up a counterclaim arising out of the same contract declared upon by the plaintiff, the defendant may not withdraw his counterclaim over the plaintiff's objection in order to enter a motion as of nonsuit as provided by this section, on the plaintiff's cause of action. *McGee v. Frohman*, 207 N. C. 475, 177 S. E. 327 (1934).

Judgment as of Nonsuit May Be Entered by Trial Court of Its Own Motion.—A judgment as of nonsuit entered by the trial court of its own motion will not be held for error when the evidence would justify a directed verdict, a nonsuit and a directed verdict having the same legal effect. *Ferrell v. Metropolitan Life Ins. Co.*, 208 N. C. 420, 181 S. E. 327 (1935).

When Nonsuit Proper.—Where the evidence of plaintiff is not sufficient to be submitted to the jury it is proper for the court to sustain defendant's motion for judgment as in case of nonsuit at the close of plaintiff's evidence. *Lloyd v. Speight*, 195 N. C. 179, 141 S. E. 574 (1928); *Blackwell v. Coca-Cola Bottling Co.*, 208 N. C. 751, 182 S. E. 469 (1935). See also *Lamb v. Smith*, 215 N. C. 463, 2 S. E. (2d) 361 (1939).

In the absence of any evidence tending to sustain an affirmative answer to the issue submitted to the jury there was error in the refusal of the court to allow defendant's motion, at the close of all the evidence, for judgment as of nonsuit. *Ford v. Willys-Overland*, 197 N. C. 147, 147 S. E. 822 (1929).

Where there is no evidence tending to sustain the plaintiff's cause of action the defendant's exceptions to the refusal of the trial court to grant his motion of nonsuit or his request for a directed verdict will be sustained on appeal. *Ferguson v. Glenn*, 201 N. C. 128, 159 S. E. 5 (1931).

Same — Illustrative Cases. — Where a contract creating a local representative for the sale of automobiles by interpretation as to its effect, creates the relationship of vendor and purchaser, the local representative may not bind the vendor upon a warranty of the machines, and the vendor is not liable for representations or warranties made by the local dealer, and an action against it on such warranty is properly nonsuited. *Ford v. Willys-Overland*, 197 N. C. 147, 147 S. E. 822 (1929).

Evidence tending to show that the plaintiff was injured by an explosion of a cartridge which the defendant's young son threw in defendant's store on Saturday when the son was helping his father therein, is insufficient to hold his father liable in damages, and defendant's motion as of nonsuit is properly granted. *Norman v. Porter*, 197 N. C. 222, 148 S. E. 41 (1929).

A contract of hire at a stipulated hourly wage, without reference to the number of hours the employment was to continue, gives the employee no right of action for damages because he was employed a fewer number of hours than other employees engaged at the same time, and it was not error to nonsuit the plaintiff under this section. *Sherrill v. Graham County*, 205 N. C. 178, 170 S. E. 636 (1933).

Where plaintiff's evidence tended to show plaintiff was not acting within the scope of his employment at the time of the injury, defendant's motion as of nonsuit should have been allowed, plaintiff being *sui juris*. *Colvin v. Atlantic Coast Line R. Co.*, 205 N. C. 168, 170 S. E. 639 (1933).

In an action by an employee against her employer to recover for personal injury alleged to have resulted from the employer's negligence, it was held that where there was no evidence of any negligence on the part of defendant employer, the evidence tending to show that the injury resulted solely from the act of plaintiff's fellow-servant, a judgment as of nonsuit should be sustained under this section. *Armstrong v. Acme Spinning Co.*, 205 N. C. 553, 172 S. E. 313 (1934).

Where the evidence tended to show the negligence of a municipality in the care of its streets, it was held that to be liable the danger must be of an unusual character

and one that exposes travelers to unusual hazards, and that a demurrer to the evidence should be properly sustained unless such danger was shown. *Haney v. Lincoln*, 207 N. C. 282, 176 S. E. 573 (1934).

Where defendant was confronted with an emergency, and the evidence did not disclose a failure on his part to exercise ordinary care in the operation of his automobile under the circumstances, defendant's motion for judgment as of nonsuit was held properly granted. *O'Kelly v. Barbee*, 223 N. C. 282, 25 S. E. (2d) 750 (1943).

In an action to recover damages against defendant by plaintiff, who was an employee of a transportation company engaged in delivering caustic soda, a dangerous substance, by truck to defendant's mills, where plaintiff alleged negligence by defendant, it was held that defendant owed no duty to plaintiff to furnish a safe place, suitable appliances, and sufficient help, and since plaintiff on his own evidence, was guilty of contributory negligence, judgment of nonsuit was proper. *Morrison v. Cannon Mills Co.*, 223 N. C. 387, 26 S. E. (2d) 857 (1943).

Where there was not sufficient evidence to be submitted to the jury of plaintiff being down or in an apparently helpless condition on the track, so that the engineer or fireman saw, or, by the exercise of ordinary care in keeping a proper lookout, could have seen such helpless condition of plaintiff in time to have stopped the train before striking him, there was no error in the ruling of the court, and the judgment as in case of nonsuit was properly entered. *Battle v. Southern Ry. Co.*, 223 N. C. 395, 26 S. E. (2d) 859 (1943).

In an action for the negligent injury by defendant of plaintiff who drove a tractor, to which were attached plows, on the railroad track of defendant, where it stalled and plaintiff remained on the track in an attempt to get the tractor and plows across, after he had seen defendant's train approaching, until injured, judgment of nonsuit was proper. *Wilson v. Southern Ry. Co.*, 223 N. C. 407, 26 S. E. (2d) 900 (1943).

Where plaintiff was injured in an aeroplane crash, the pilot being negligent in not having a license, it was held that there was no evidence that this negligence was the proximate cause of the injury, the doctrine of *res ipsa loquitur* did not apply, and judgment as of nonsuit was proper. *Smith v. Whitley*, 223 N. C. 534, 27 S. E. (2d) 442 (1943).

Where in consideration of an agreement

by his son and daughter to support him, plaintiff executed a fee simple deed, conveying all of his real estate to such son and daughter and about a year thereafter changed his mind and wanted his land back, and there was no evidence of fraud or undue influence, motion for judgment as of nonsuit was properly allowed. *Gerringer v. Gerringer*, 223 N. C. 818, 28 S. E. (2d) 501 (1944).

Where the evidence tended to show that defendant's servant, contrary to orders and without his master's knowledge, took deceased and other boys, also employees of defendant, at their request, on a pleasure ride in the master's truck, and, while so engaged on the public highway, the truck struck a hole and plaintiff's intestate was thrown out and killed, defendant's demurrer to the evidence should have been sustained. *Rogers v. Black Mountain*, 224 N. C. 119, 29 S. E. (2d) 203 (1944).

In action by owner of automobile against operator of a parking lot to recover for theft of the car upon the theory of bailment, where evidence tended to show that contract signed by plaintiff obligated defendant to permit the vehicle to occupy parking space in the lot, that ordinarily driver parked and removed car herself, taking the keys with her, but that on the occasion in question the driver left vehicle at the gas pumps on the lot with the keys in the car, and that car was taken by a person unknown, it was held the evidence was insufficient to show a bailment and motion for judgment as of nonsuit was proper. *Freeman v. Myers Automobile Service Co.*, 226 N. C. 736, 40 S. E. (2d) 365 (1946).

Motion for judgment as of nonsuit held proper in action for injuries to plaintiff caused by defendant's "magic eye" doors, *Watkins v. Taylor Furnishing Co.*, 224 N. C. 674, 31 S. E. (2d) 917 (1944); in action to recover double indemnity on insurance policy, *McLain v. Shenandoah Life Ins. Co.*, 224 N. C. 837, 32 S. E. (2d) 592 (1945); in action to set up and foreclose alleged lost mortgage, *Downing v. Dickson*, 224 N. C. 455, 31 S. E. (2d) 378 (1944); in action for wrongful death, *Eldridge v. Church Oil Co.*, 224 N. C. 457, 31 S. E. (2d) 381 (1944); in action for damages from negligent operation of defendant's automobile, *Ray v. Post*, 224 N. C. 665, 32 S. E. (2d) 168 (1944); in divorce action, *Dudley v. Dudley*, 225 N. C. 83, 33 S. E. (2d) 489 (1945); *Moody v. Moody*, 225 N. C. 89, 33 S. E. (2d) 491 (1945); in broker's action for commission, *Bolich-Hall*

Realty, etc., Co. v. Disher, 225 N. C. 345, 34 S. E. (2d) 200 (1945).

Contributory Negligence. — "It is the prevailing and permissible rule of practice to enter judgment of nonsuit in a negligence case, when it appears from the evidence offered on behalf of the plaintiff that his own negligence was the proximate cause of the injury, or one of them." *Bailey v. North Carolina R. Co.*, 223 N. C. 244, 25 S. E. (2d) 833 (1943), quoting *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137 (1941).

Defendant may take advantage of his plea of contributory negligence by a motion for a compulsory judgment of nonsuit under this section when the facts necessary to show the contributory negligence are established by the plaintiff's own evidence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949). See *Elder v. Plaza Ry.*, 194 N. C. 617, 140 S. E. 298 (1927); *Hayes v. Western Union Tel. Co.*, 211 N. C. 192, 189 S. E. 499 (1937).

Contributory negligence may be taken advantage of on a motion as of nonsuit when the plaintiff's own evidence tends to establish it. *Elder v. Plaza Ry.*, 194 N. C. 617, 140 S. E. 298 (1927). See also *Hendrix v. So. R. Co.*, 198 N. C. 142, 150 S. E. 873 (1929); *Owens v. Atlantic Coast Line R. Co.*, 207 N. C. 856, 175 S. E. 717 (1934); *Ramsey v. Nash Furniture Co.*, 209 N. C. 165, 183 S. E. 536 (1936); *Hinshaw v. Pepper*, 210 N. C. 573, 187 S. E. 786; *Godwin v. Atlantic Coast Line R. Co.*, 220 N. C. 281, 17 S. E. (2d) 137 (1941); *Daughtry v. Cline*, 224 N. C. 381, 30 S. E. (2d) 322, 154 A. L. R. 789 (1944); *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

The burden of proof on an issue as to contributory negligence rests upon the defendant, and while the court can hold that a party upon whom rests the burden of proof has failed to offer any evidence to sustain it, it cannot adjudge that he has proved his case, for where there is any evidence the jury alone can pass upon its truth. *Sims v. Lindsay*, 122 N. C. 678, 30 S. E. 19 (1898).

One defendant's motion to nonsuit on the ground that the negligence of his co-defendant insulated his alleged negligence, is properly refused when the evidence tends to show that the injury was the result of the joint and concurrent negligence of the defendants. *Lewis v. Hunter*, 212 N. C. 504, 193 S. E. 814 (1937).

A judgment of involuntary nonsuit on the ground of contributory negligence of the plaintiff cannot be rendered unless the

evidence is so clear on that issue that reasonable minds could draw no other inference. *Manheim v. Blue Bird Taxi Corp.*, 214 N. C. 689, 200 S. E. 682 (1939). See *Crone v. Fisher*, 223 N. C. 635, 27 S. E. (2d) 642 (1943); *Daughtry v. Cline*, 224 N. C. 381, 30 S. E. (2d) 322 (1944); *Atkins v. White Transp. Co.*, 224 N. C. 688, 32 S. E. (2d) 209 (1944); *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

A judgment of nonsuit upon the evidence may not be granted under this section when there is legal evidence of the employer's negligence under the Federal Employers' Liability Act, upon the sole ground of the plaintiff's contributory negligence. *Inge v. Seaboard Air Line R. Co.*, 192 N. C. 522, 135 S. E. 522 (1926).

Where the plaintiff's evidence made out a case of negligence, and contributory negligence was relied upon as a defense, under this section it was not error to refuse to dismiss the action. *Wood v. Bartholomew*, 122 N. C. 177, 29 S. E. 959 (1898).

But where the evidence on the part of the plaintiff (the defendant having introduced none) is demurred to, and if true, establishes negligence on the part of the plaintiff, and of the defendant, concurrent to the last moment, a judgment as of nonsuit, sustaining the demurrer, is proper. *Neal v. Carolina Central R. Co.*, 126 N. C. 634, 36 S. E. 117 (1900). See *Hollingsworth v. Skelding*, 142 N. C. 246, 55 S. E. 212 (1906).

The court cannot allow a motion for judgment of nonsuit on the ground of contributory negligence on the part of the plaintiff in actions for personal injury or of the decedent in actions for wrongful death if it is necessary to rely either in whole or in part on testimony offered by the defense to sustain the plea of contributory negligence. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949); *Grimm v. Watson*, 233 N. C. 65, 62 S. E. (2d) 538 (1950); *Rollison v. Hicks*, 233 N. C. 99, 63 S. E. (2d) 190 (1951).

Same — Evidence Sufficient to Sustain Nonsuit. — Where the driver of plaintiff's loaded truck, trailing defendants' bus at 25 to 30 miles per hour and within 20 feet, on a street 25 to 30 feet wide with an open space on the left of from 12 to 17 feet, saw the bus begin to stop and "slammed on his brakes," as he was too near to turn aside or stop, hitting the bus with such force that the front of the truck was practically demolished and the bus was badly damaged, defendants' motion for judgment as of nonsuit on the ground of contributory negligence should have been sustained.

Atkins v. White Transp. Co., 224 N. C. 688, 32 S. E. (2d) 209 (1944).

In an action for wrongful death at a railroad crossing it was held that the defendant's motion as of nonsuit should have been sustained on the issue of contributory negligence. *Harrison v. North Carolina R. R. Co.*, 194 N. C. 656, 140 S. E. 598 (1927).

Same — Logging Railroad Employee. —

As the contributory negligence of a logging railroad employee under §§ 28-173, 60-67, and 60-70 does not bar the recovery of damages for his death when engaged in performance of his duties, defendant's motion for judgment as of nonsuit is properly refused. *Brooks v. Suncrest Lumber Co.*, 192 N. C. 141, 138 S. E. 532 (1927).

Same—Evidence Sufficient to Deny Nonsuit.—

Where the failure of defendant employer to furnish the plaintiff, its employee, a safe place to work, concurs with the negligence of a fellow servant in proximately causing the injury in suit, the defendant is liable in damages for the consequent injury, and his motion as of nonsuit upon the evidence, under this section is properly denied. *Beck v. Thomasville Chair Co.*, 188 N. C. 743, 125 S. E. 615 (1924).

Where there is evidence that the defendant railroad company negligently coupled a car under which the deceased was at work to its train, causing his death, the fact that the deceased was guilty of contributory negligence in failing to place the customary signals where he was at work, does not entitle the defendant to a judgment as of nonsuit. *Ritchie v. Denton R. Co.*, 192 N. C. 666, 26 S. E. 136 (1926).

Where a railroad company has for some time kept a watchman to warn travelers crossing its tracks at a public street and this is known to the plaintiff, who was injured by a train while attempting to cross, the absence of the watchman and the failure to give warning is an implied invitation to the traveler to cross, which may be considered by the jury and the defendant's motion as of nonsuit upon the evidence is properly denied. *Barber v. Southern R. Co.*, 193 N. C. 691, 138 S. E. 17 (1927).

Plaintiff's evidence was to the effect that intestate had an unobstructed view along the track upon which the train approached for only 600 feet, that intestate looked and listened immediately before traveling onto the crossing, that the crossing was in bad repair and the car stalled on the track, and was hit by the speeding train seven seconds after its approach could have been reasonably apprehended. It was held that defendant railroad company's motion to

nonsuit on the ground of contributory negligence should have been denied notwithstanding defendants' testimony that plaintiff drove upon the track in the path of the oncoming train and defendants' photographic evidence showing an entirely different situation at the crossing. *Bundy v. Powell*, 229 N. C. 707, 51 S. E. (2d) 307 (1949).

Evidence to the effect that as plaintiff, an invited guest, was in the act of seating himself and closing the door, defendant suddenly put the car in motion, causing the door to swing violently back and hit plaintiff on the forehead, was held sufficient to be submitted to the jury on the question of the actionable negligence of defendant in failing to ascertain whether the plaintiff was in a position of safety before she put the car in motion and therefore nonsuit on the ground of contributory negligence was properly denied. *Spivey v. Newman*, 232 N. C. 281, 59 S. E. (2d) 844 (1950).

Same—Demurrer Sustained.—Where the plaintiff was employed by defendant, and defendant's superintendent, as a matter of accommodation, invited the plaintiff to ride to his home in an automobile furnished him by defendant, during which ride plaintiff was injured as a result of the superintendent's negligent driving, it was held that defendant's demurrer to the evidence should have been sustained. *Peters v. Great Atlantic & Pacific Tea Co.*, 194 N. C. 172, 138 S. E. 595 (1927).

Where the evidence tended to show that plaintiff's intestate was negligent up to the time of the injury and the doctrine of the "last clear chance" is inapplicable, it was held that defendant's demurrer to the evidence should have been sustained. *Lemings v. Southern Ry. Co.*, 211 N. C. 499, 191 S. E. 39 (1937).

Evidence Sufficient to Deny Nonsuit.—See *Hampton v. Thomasville Coca-Cola Bottling Co.*, 208 N. C. 331, 180 S. E. 584 (1935); *Niblock v. Blue Bird Taxi Co.*, 203 N. C. 737, 182 S. E. 330 (1935); *Dilling v. Federal Life Ins. Co.*, 209 N. C. 546, 183 S. E. 752 (1936); *Daniels v. Swift & Co.*, 209 N. C. 567, 183 S. E. 748 (1936); *Tese-neer v. Henrietta Mills Co.*, 209 N. C. 615, 184 S. E. 535 (1936); *Roberts v. Grogan*, 222 N. C. 30, 21 S. E. (2d) 829 (1942).

In an action for alleged damages to plaintiff's stock of goods by the willful, wanton, and malicious negligence of defendants, employees of the state highway commission, where the plaintiff's evidence tended to show that defendants, in charge of a sweeper and blower in working the

highway near plaintiff's store, without warning, so used the sweeper and blower as to throw such a cloud of dirt and filth through the open windows and doors of the store that the merchandise therein was badly damaged, there is ample evidence for the jury and allowance of motion for judgment as of nonsuit was erroneous. *Miller v. Jones*, 224 N. C. 783, 32 S. E. (2d) 594 (1945).

In an action by the owner of a lot in a residential subdivision to enjoin another owner from using his lot for business purposes, nonsuit was improperly entered on plaintiff's evidence tending to show that all of the lots in the subdivision had been sold with restrictions according to a general scheme of developing the property exclusively for residential purposes and that there had not been a single violation of the restrictive covenants anywhere within the subdivision. *Higdon v. Jaffa*, 231 N. C. 242, 56 S. E. (2d) 661 (1949).

Sufficiency of Evidence May Be Res Judicata on Second Appeal.—Where the Supreme Court has ruled on a former appeal that the evidence was sufficient to overrule defendant's motion as of nonsuit under this section, and the evidence upon the second trial is substantially the same, the question of the sufficiency of the evidence is res judicata and will not be considered on the second appeal. *Jernigan v. Jernigan*, 207 N. C. 831, 178 S. E. 587 (1935).

Setting Aside after Refusal of Motion.—Where the trial court has refused to grant the defendant's motion as of nonsuit, he may not set aside the verdict on the ground of the insufficiency of the evidence as a matter of law, but may do so only as a matter within his discretion. *Lee v. Penland*, 200 N. C. 340, 157 S. E. 31 (1931). See *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219 (1944).

Ejectment.—On a trial in an action of ejectment, where the question involved is whether a tenant holding over the possession from a former owner had agreed to pay rent to the purchaser, and the evidence is conflicting, a motion as of nonsuit is properly denied. *Carnegie v. Perkins*, 191 N. C. 412, 131 S. E. 750 (1926).

However it is error for the judgment to incorporate an adjudication in defendant's favor as to his title, as such is only permissible on affirmative findings sufficient to justify it. *Moore v. Miller*, 179 N. C. 396, 102 S. E. 627 (1920).

Where the defendant denied being in possession, but there was evidence that he

was present at a survey made for the plaintiff, and claimed to be the owner, pointed to wood he had cut upon it, and forbade the surveyor to enter on it, a judgment of nonsuit was improper. *Cowles v. McNeill*, 125 N. C. 385, 34 S. E. 499 (1899).

Where, in an action to recover damages for procuring the sheriff to wrongfully seize and sell plaintiff's property, the complaint alleged that the sheriff sold his property under an execution, it was incumbent on the plaintiff to show on the trial that the seizure and sale were unlawful, and upon his failure to offer any evidence as to the invalidity of the judgment, it was not error to nonsuit the plaintiff under this section. *O'Briant v. Wilkerson*, 122 N. C. 304, 30 S. E. 126 (1898).

Agency. — Where there is evidence to show that defendant's night watchman was employed to perform his duties only within a certain enclosure; that he had been deputized to act for defendant as special policeman; that he had arrested the plaintiff at a remote place on the mill settlement property, where he was not authorized to guard, and caused his incarceration in the city jail; that the case was dismissed by the justice of the peace for the lack of evidence and the plaintiff finally discharged: It was held, a question for the jury in plaintiff's action for damages, of whether the defendant's night watchman was acting within the scope of his employment and a motion of nonsuit upon the evidence was properly denied. *Butler v. Holt-Williamson Mfg. Co.*, 182 N. C. 547, 109 S. E. 559 (1921).

Refusal of defendant's motion for nonsuit and his failure to offer evidence should not be considered as conclusively establishing the credibility of plaintiff's evidence. *Grady v. Faison*, 224 N. C. 567, 31 S. E. (2d) 760 (1944).

New Trial Granted.—In an action to set aside a sale of lands under a former judgment defendants moved to nonsuit at the close of the plaintiff's evidence, but did not renew the motion at the close of the plaintiff's evidence. As fraud was alleged, which plaintiff might show, a new trial was granted by the Supreme Court instead of dismissing the action. *Rackley v. Roberts*, 147 N. C. 201, 60 S. E. 975 (1908).

Applied, in action for sale of land to pay debts of intestate, in *Chambers v. Byers*, 214 N. C. 373, 199 S. E. 398 (1938); in action for damages to plaintiff's land caused by defendant's dam, in *Sink v. Lexington*, 214 N. C. 548, 200 S. E. 4 (1938); in action for damages due to defective food, in *Scott*

v. Swift & Co., 214 N. C. 580, 200 S. E. 21 (1938); in action for slander, in *Bryant v. Reedy*, 214 N. C. 748, 200 S. E. 896 (1939); in action on a contract of settlement with defendant bank, in *Jones v. Bank of Chapel Hill*, 214 N. C. 794, 1 S. E. (2d) 135 (1939); in action for reformation of a mortgage, in *Lowery v. Wilson*, 214 N. C. 800, 200 S. E. 861 (1939); in action by tenant to recover for breach of a half-share farming contract, in *Doyle v. Whitley*, 214 N. C. 814, 200 S. E. 888 (1939); in action to recover for damages to private lands resulting from the operation by a city of its sewage disposal plant, in *Ivester v. Winston-Salem*, 215 N. C. 1, 1 S. E. (2d) 88 (1939); in action by a student to compel defendant university to award certain degrees, in *Pate v. Duke University*, 215 N. C. 57, 1 S. E. (2d) 127 (1939); in action by plaintiff to recover for an injury received at a night baseball game, in *Cates v. Cincinnati Exhibition Co.*, 215 N. C. 64, 1 S. E. (2d) 131 (1939); in action by a minor employee to recover for injuries received from an unguarded saw, in *McLaughlin v. Black*, 215 N. C. 85, 1 S. E. (2d) 130 (1939); in action by guest passenger on motorcycle to recover for injuries when the motorcycle collided with a car, in *Mason v. Johnston*, 215 N. C. 95, 1 S. E. (2d) 379 (1939); in action by plaintiff to recover for injuries sustained from falling over roots of trees in defendant municipality, in *Finch v. Spring Hope*, 215 N. C. 246, 1 S. E. (2d) 634 (1939); in action for loss of services and consortium of wife as result of taxi accident, in *Watkins v. Grier*, 224 N. C. 339, 30 S. E. (2d) 223 (1944); in action for wrongful death of child by drowning in pond created by a stopped drain, in *Hedgepath v. Durham*, 223 N. C. 822, 28 S. E. (2d) 503 (1944); in action for damages sustained from falling on step down from lobby into defendant's store, in *Benton v. United Bank Bldg. Co.*, 223 N. C. 809, 28 S. E. (2d) 491 (1944); in action to set aside deed on ground of incompetency, duress and undue influence, in *Goodson v. Lehmon*, 225 N. C. 514, 35 S. E. (2d) 623, 164 A. L. R. 510 (1945).

For other cases applying section, see *Sakellaris v. Wyche*, 205 N. C. 173, 170 S. E. 638 (1933); *Love v. Queen City Lines*, 206 N. C. 575, 174 S. E. 514 (1934); *Keith v. Liggett, etc., Tobacco Co.*, 207 N. C. 645, 178 S. E. 90 (1935); *Davenport v. Pennsylvania Fire Ins. Co.*, 207 N. C. 861, 177 S. E. 187 (1934); *Betts v. Jones*, 208 N. C. 410, 181 S. E. 334 (1935); *Planters'*

Nat. Bank, etc., Co. v. Atlantic Coast Line R. Co., 208 N. C. 574, 181 S. E. 635 (1935); Cordell v. Brotherhood of Locomotive Firemen, etc., 208 N. C. 632, 182 S. E. 141 (1935); Morris v. Seashore Transp. Co., 208 N. C. 807, 182 S. E. 487 (1935); Dixon v. Johnson Realty Co., 209 N. C. 354, 183 S. E. 382 (1936); Queen v. DeHart, 209 N. C. 414, 184 S. E. 7 (1936); McGraw v. Southern Ry. Co., 209 N. C. 432, 184 S. E. 31 (1936); Jackson v. Scheiber, 209 N. C. 441, 184 S. E. 17 (1936); Williams v. Greensboro Fire Ins. Co., 209 N. C. 765, 185 S. E. 21 (1936); Federal Life Ins. Co. v. Nichols, 209 N. C. 817, 185 S. E. 10 (1936); Burns v. Charlotte, 210 N. C. 48, 185 S. E. 443 (1936); Woodley v. Combs, 210 N. C. 482, 187 S. E. 762 (1936); Ollis v. Board of Education, 210 N. C. 489, 187 S. E. 772 (1936); Exum v. Baumrind, 210 N. C. 650, 188 S. E. 200 (1936); Joyner v. Dail, 210 N. C. 663, 188 S. E. 209 (1936); Anderson v. American Mut. Liability Ins. Co., 211 N. C. 23, 188 S. E. 642 (1936); Wilson v. Perkins, 211 N. C. 110, 189 S. E. 179 (1937); Kelly v. Hunsucker, 211 N. C. 153, 189 S. E. 664 (1937); Yates v. Thomasville Chair Co., 211 N. C. 200, 189 S. E. 500 (1937); Breece v. Standard Oil Co., 211 N. C. 211, 189 S. E. 498 (1937); Mebane Graded School Dist. v. Alamance County, 211 N. C. 213, 189 S. E. 873 (1937); Cashatt v. Brown, 211 N. C. 367,

190 S. E. 480 (1937); Stovall v. Ragland, 211 N. C. 536, 190 S. E. 899 (1937); Jackson v. Thomas, 211 N. C. 634, 191 S. E. 327 (1937); Creech v. Sovereign Camp, W. O. W., 211 N. C. 658, 191 S. E. 840 (1937); Smith v. Sink, 211 N. C. 725, 192 S. E. 108 (1937); Chason v. Marley, 224 N. C. 844, 32 S. E. (2d) 652 (1945); Bourne v. Southern Ry. Co., 225 N. C. 43, 33 S. E. (2d) 239 (1945); Stafford v. Yale, 228 N. C. 220, 44 S. E. (2d) 872 (1947); Sisson v. Royster, 228 N. C. 298, 45 S. E. (2d) 351 (1947); Penland v. Southern R. Co., 228 N. C. 528, 46 S. E. (2d) 303 (1948); Bethune v. Bridges, 228 N. C. 623, 46 S. E. (2d) 711 (1948); Hahn v. Perkins, 228 N. C. 727, 46 S. E. (2d) 854 (1948); Fanelty v. Rogers Jewelers, 230 N. C. 694, 55 S. E. (2d) 493 (1949); Venus Lodge v. Acme Benevolent Ass'n, 231 N. C. 522, 58 S. E. (2d) 109, 15 A. L. R. (2d) 1446 (1950).

Cited in Montgomery v. Blades, 223 N. C. 331, 26 S. E. (2d) 567 (1943); Nebel v. Nebel, 223 N. C. 676, 28 S. E. (2d) 207 (1943); Perry v. Herrin, 225 N. C. 601, 35 S. E. (2d) 883 (1945); McCullen v. Durham, 229 N. C. 418, 50 S. E. (2d) 511 (1948); Jenkins v. City Coach Co., 231 N. C. 208, 56 S. E. (2d) 571 (1949); Foster v. Burton, 231 N. C. 714, 58 S. E. (2d) 742 (1950); Hooper v. Maryland Cas. Co., 233 N. C. 154, 63 S. E. (2d) 128 (1951).

§ 1-184. **Waiver of jury trial.**—Trial by jury may be waived by the several parties to an issue of fact, in actions on contract, and with the assent of the court in other actions, in the manner following:

1. By failing to appear at the trial.
2. By written consent, in person or by attorney, filed with the clerk.
3. By oral consent, entered in the minutes. (C. C. P., s. 240; Code, s. 416; Rev., s. 540; C. S., s. 568.)

Cross References.—As to waiver of jury trial, see Constitution, Art. IV, § 13. As to provision for trial of issue of fact by jury, see § 1-172. As to reference of issues, fact or law, by consent, see § 1-188.

Consent Necessary.—A party cannot be deprived of the right to a trial by jury except by his own consent. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895).

Methods of Waiver.—The waiver of a jury trial by consent, must be in writing, filed with the papers in the case, or by oral consent entered on the minute-docket of the court. *Hahn v. Brinson*, 133 N. C. 7, 45 S. E. 359 (1903).

Waiver by Failure to Make Motion in Apt Time.—The parties to an action may waive their right to trial by jury guaranteed by our State Constitution, Art. IV, §

13, but the manner of such waiver is governed by this section, and where the plaintiff in mandamus proceedings to compel a power company to furnish it electricity for redistribution to its customers at retail fails to move in apt time for the preservation of its right to trial by jury under § 1-513, but makes such motion after the judge has heard the evidence and argument, and is ready to decide the facts at issue and enter judgment thereon, the motion is not made in apt time, and the right to trial by jury is waived. *Holmes Electric Co. v. Carolina Power & Light Co.*, 197 N. C. 766, 150 S. E. 621 (1929).

Reference.—If a reference is made by consent it is a mode of trial selected by the parties and is a waiver of the right of trial by a jury. *Green v. Castlebury*, 70 N. C. 20 (1874); *Green v. Castleberry*, 77 N. C.

164 (1877). See § 1-188 and notes thereto.

It was error for a trial court to determine issues of fact raised by the pleadings in the absence of waiver of the constitutional and statutory right to a trial by jury, there being no question of reference. *Sparks v. Sparks*, 232 N. C. 492, 61 S. E. (2d) 356 (1950).

Consent Necessary to Vacate Waiver.—

Consent to waiver under this section binds both parties until it is vacated by common consent. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754 (1889).

Failure to Object.—Failure to object to an order of reference at the time it is made is equivalent to consent. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895).

Judge May Disregard Waiver.—The trial judge, in the exercise of a sound discretion, may disregard the agreement of the parties that a jury trial shall be waived. *Lumber Co. v. Lumber Co.*, 137 N. C. 431, 49 S. E. 946 (1905).

Review of Decision Refusing to Submit Issues.—Where after the jury has been empanelled the parties to an action on a note admit facts sufficient to support a judgment determining the rights of the parties under the law applicable to such facts, the refusal of the court to submit issues to the jury will be upheld in view of this section. *Federal Reserve Bank v. Jones*, 205 N. C. 648, 172 S. E. 185 (1934).

Judge's Findings of Fact Are Conclusive.—Where the parties consent to trial by the court without a jury, the findings of the court are as conclusive as a verdict

of the jury if supported by competent evidence. *Poole v. Gentry*, 229 N. C. 266, 49 S. E. (2d) 464 (1948); *Burnsville v. Boone*, 231 N. C. 577, 58 S. E. (2d) 351 (1950).

When an action is tried by the court without a jury pursuant to the provisions of this section, the findings of fact of the trial judge are conclusive, and are not subject to review on appeal, in the absence of exceptions that they are not supported by evidence. *Cannon v. Blair*, 229 N. C. 606, 50 S. E. (2d) 732 (1948), citing *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424 (1913); *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221 (1937). See *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763 (1909); *Eley v. Atlantic Coast Line R. Co.*, 165 N. C. 78, 80 S. E. 1064 (1914).

Findings of fact by the court, when a jury trial has been waived by consent, will not be disturbed on appeal, if based upon competent evidence. *Fish v. Hanson*, 223 N. C. 143, 25 S. E. (2d) 461 (1943).

Applied in *Blades v. Wilmington Trust Co.*, 207 N. C. 771, 178 S. E. 565 (1935); *Shore v. Norfolk Nat. Bank of Commerce*, 207 N. C. 798, 178 S. E. 572 (1935); *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221 (1937); *Griggs v. Stoker Service Co.*, 229 N. C. 572, 50 S. E. (2d) 914 (1948); *Mitchell v. Barfield*, 232 N. C. 325, 59 S. E. (2d) 810 (1950).

Cited in *Governor v. Lassiter*, 83 N. C. 38 (1880); *Caldwell v. Wilson*, 121 N. C. 425, 480, 28 S. E. 554 (1897); *Green Sea Lumber Co. v. Pemberton*, 188 N. C. 532, 125 S. E. 119 (1924); *Brown v. Sheets*, 197 N. C. 268, 148 S. E. 233 (1929).

§ 1-185. Findings of fact and conclusions of law by judge.—Upon trial of an issue of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately. Upon trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision must be filed with the clerk during the court at which the trial takes place, and judgment upon it shall be entered accordingly. (C. C. P., s. 241; Code, s. 417; Rev., s. 541; C. S., s. 569.)

Cross Reference.—As to how the issue shall be tried, see § 1-172.

Consent Necessary.—On the trial of a civil action a jury was sworn and impaneled and issues framed, but no evidence adduced on either side, and the jury was discharged without rendering a verdict, it was held that the judge had no right to pass upon the issues, except upon a waiver of jury trial in accordance with this section. *Chasteen v. Martin*, 81 N. C. 51 (1879).

Sufficient Compliance.—Where the court does nothing more than indicate from what source the facts may be gleaned, it is not a sufficient compliance with the re-

quirements of this section that the court's decision shall contain a statement of the facts found. *Shore v. Norfolk National Bank of Commerce*, 207 N. C. 798, 178 S. E. 572 (1935).

Separate Conclusions of Facts and Law.—A judge of the superior court, in passing upon a mixed question of law and fact, should, as required by this section, state the facts found and the conclusions of law separately. *Foushee v. Pattershall*, 67 N. C. 453 (1872); *Walker v. Walker*, 204 N. C. 210, 167 S. E. 818 (1933). See also, *Harrison v. Brown*, 222 N. C. 610, 24 S. E. (2d) 470 (1943).

The decision of the judge in writing,

with a separate statement of his findings of fact and conclusions of law is sufficient under this section. *Eley v. Atlantic, etc., R. Co.*, 165 N. C. 78, 80 S. E. 1064 (1914).

Where the court fully and completely sets out the facts found by him and renders judgment thereon, an exception that the court did not state his findings of fact and conclusions of law separately as required by this section, cannot be sustained, since the judgment constitutes the court's conclusion of law on the facts found. *Dailey v. Washington Nat. Ins. Co.*, 208 N. C. 817, 182 S. E. 332 (1935).

Findings of Judge Conclusive.—When a trial by jury has been waived by the parties for the judge to find the facts his findings thereof are conclusive on appeal if there is evidence to support them. *Yarborough v. Moore*, 151 N. C. 116, 65 S. E. 763 (1909); *Eley v. Atlantic, etc., R. Co.*, 165 N. C. 78, 80 S. E. 1064 (1914). See *Fish v. Hanson*, 223 N. C. 143, 25 S. E. (2d) 461 (1943).

Same—Exceptions. — Where the judge has acted according to this section the relevant and pertinent facts found by him are conclusive on appeal when there is sufficient legal evidence to support them. An exception to a finding of fact on the ground that there was no evidence thereof, must be made in apt time before the judge. *Buchanan v. Clark*, 164 N. C. 56, 80 S. E. 424 (1913); *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221 (1937).

Where the court simply responded

formally to the issues and directed judgment, to which no exception was taken, and no assignment of error was made, the judgment will be affirmed. *Parks v. Davis*, 98 N. C. 481, 4 S. E. 202 (1887).

Exception to Judgment Presents Only Question Whether Facts Found Support It.—An exception to a judgment rendered in a trial by the court, without exception to the evidence or the court's findings of fact, presents the sole question of whether the facts found support the judgment. *Best v. Garriss*, 211 N. C. 305, 190 S. E. 221 (1937).

Motion to Vacate Attachment. — This section is not applicable to a motion to vacate a warrant of attachment. *Millhisser v. Baisley*, 106 N. C. 433, 11 S. E. 314 (1890).

Judgment Granting Defendant's Motion as of Nonsuit.—Where cause is heard by the court by consent, its written judgment granting defendant's motion as of nonsuit is equivalent to a finding that all the evidence, considered in the light most favorable to plaintiffs, is insufficient to show facts entitling plaintiffs to recover on any issue raised by the pleadings, and is sufficient finding of facts by the court as required by this section. *Home Real Estate Loan, etc., Co. v. Carolina Beach*, 216 N. C. 778, 7 S. E. (2d) 13 (1940).

Cited in *Surratt v. Dennis*, 199 N. C. 757, 155 S. E. 865 (1930).

Quoted in *Berry v. Payne*, 219 N. C. 171, 13 S. E. (2d) 217 (1941).

§ 1-186. Exceptions to decision of court.—1. For the purposes of an appeal, either party may except to a decision on a matter of law arising upon a trial by the court within ten days after the judgment, in the same manner and with the same effect as upon a trial by jury. Where the decision does not authorize a final judgment, but directs further proceedings before a referee or otherwise, either party may except thereto, and make a case or exception as above provided in case of an appeal.

2. Either party desiring a review, upon the evidence appearing on the trial of the questions of law, may at any time within ten days after the judgment, or within such time as is prescribed by the rules of the court, make a case or exceptions in like manner as upon a trial by jury, except that the judge in settling the case must briefly specify the facts found by him, and his conclusions of law. (C. C. P., s. 242; Code, s. 418; Rev., s. 542; C. S., s. 570.)

Cross Reference.—See the next foregoing section and the note thereto.

Editor's Note.—In *Green v. Castlebury*, 70 N. C. 20 (1874), which since its decision has been cited as the case par excellence on this section, it was held that the right of appeal, and not the mere matter of making up the case, was the subject of this section.

In that case it was also decided that "case or exceptions" was a correct print

and an attempt to point out that this section should read "case on exceptions" was erroneous.

Purpose of Section.—The main object of this section is to declare that the trial by the court shall not be conclusive; but that just as an appeal lies when the trial is by jury, so an appeal lies when the trial is by the court. *Green v. Castlebury*, 70 N. C. 20 (1874).

Exceptions Necessary.—Where the deci-

sion of all questions both of law and fact is left to the judge, his findings and conclusions will not be reviewed by the Supreme Court, unless exceptions appear to

have been aptly taken, or error is distinctly pointed out. *Chastain v. Coward*, 79 N. C. 543 (1878).

§ 1-187. Proceedings upon judgment on issue of law.—On a judgment for the plaintiff upon an issue of law, he may proceed in the manner prescribed by the first two subdivisions of § 1-211 herein upon failure of the defendant to answer, where the summons was personally served. If judgment is for the defendant, upon an issue of law, and if taking of an account or the proof of any fact is necessary to enable the court to complete the judgment, a reference or assessment by jury may be ordered, as provided in § 1-212 herein. (C. C. P., s. 243; Code, s. 419; Rev., s. 543; C. S., s. 571.)

Cited in *Ranson v. McClees*, 64 N. C. 17 (1870); *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754 (1889).

ARTICLE. 20.

Reference.

§ 1-188. By consent.—Any or all of the issues in an action, whether of fact or law, may be referred, upon the written consent of the parties, except in actions to annul a marriage, or for divorce and separation. (C. C. P., s. 244; Code, s. 420; Rev., s. 518; C. S., s. 572.)

Cross References.—As to how issues shall be tried, see § 1-172. As to compulsory reference, see § 1-189.

Editor's Note.—A trial by reference cannot have the effect of withdrawing the actions or the causes of action from the jurisdiction of the court. The referee, by consent of the parties, becomes a mere adjunct, and acts in the place of the court, and, in appropriate cases, in the place of the court and jury, in respect to the trial.

He must make a report of his proceedings and actions, and his report, unless objected to in the way prescribed, stands as the decision of the court, and on application to the judge, he may enter judgment upon the same.

If the judge does not formally find the facts, it is presumed that he accepts the facts as found by the referees.

A reference, by consent of the parties, of an entire cause, for the determination of its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law. *Oteri v. Scalzo*, 145 U. S. 578, 12 S. Ct. 895, 36 L. Ed. 824 (1892).

It was not intended by this and the following sections to deprive parties of the right to refer all or any matters in controversy to arbitrators with power to make an award, which should be a rule of the

court. It was said by the court in *Lusk v. Clayton*, 70 N. C. 185 (1874), that "The parties can undoubtedly make such a reference, and the only question possible would be whether the judge would recognize the award and make it a rule of court, enforceable by its process, or leave the parties to their action on the arbitration bond or other like remedy. We can not suppose it was intended to abolish so useful a mode of adjusting rights by indirect, and we think that the power to make an award a rule of court still exists as included to every court under its power to enter judgment by confession." It has often been held by the court that these sections have not repealed the common-law practice of reference to arbitrators, and that the practice is still extant, notwithstanding them. See *Keener v. Goodson*, 89 N. C. 273 (1883).

The common-law practice was extant until the legislature of 1927 passed a statute regulating arbitration and award, which has been codified as §§ 1-544 et seq.

Definitions.—A reference has been defined as the act of sending any matter by a court of chancery, or (as in North Carolina) one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. *Bouv. Law Dict.*, title Reference.

Distinction between Consent and Compulsory Reference.—Where a reference is by consent, the parties waive the right to have any of the issues of fact passed on by a jury. Where the reference is compulsory,

either party has the right to have all issues of fact which arise on the pleadings submitted to a jury, but not the questions of fact which arise on exceptions to the findings of fact by the referee. *State v. Brown*, 70 N. C. 27 (1874); *State v. Askew*, 94 N. C. 194 (1886).

What May Be Referred. — All or any of the issues in an action may be referred by consent of the parties. *Lusk v. Clayton*, 70 N. C. 185 (1874).

Waiver of Jury Trial.—A reference made by consent is a waiver of the right of trial by a jury. *Green v. Castlebury*, 70 N. C. 20 (1874); *In re Parker*, 209 N. C. 693, 184 S. E. 532 (1936); *Anderson v. McRae*, 211 N. C. 197, 189 S. E. 639 (1937).

Judge May Disregard Agreement to Refer. — The trial judge, in the exercise of a sound discretion, may disregard the agreement of parties that a reference shall be made. *Lumber Co. v. Lumber Co.*, 137 N. C. 431, 49 S. E. 946 (1905).

Strict Words of Statute Not Required.—It is proper that the agreement to refer should specify in terms the "issues of law and fact;" but where the purpose is obvious, the strict words of the statute will not be required. *Vaughan v. Lewellyn*, 94 N. C. 472 (1886); *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754 (1889).

Order Entered of Record Sufficient.—An order of reference by consent entered of record is a sufficient compliance with this section requiring the same to be in writing. And when entered it must stand until a full report is made. *White v. Utley*, 86 N. C. 415 (1882).

Plea in Bar. — A reference of a cause cannot be ordered when anything is pleaded in bar of plaintiff's right of action, until such plea is tried. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248 (1895).

Reference Does Not Deprive Court of Jurisdiction.—Sending a case to be tried by a referee does not deprive the court of

its jurisdiction, and it can make any and all necessary orders therein pending the trial before the referee. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493 (1887).

Plaintiff May Take Nonsuit.—A plaintiff may take a nonsuit while the case is pending before a referee, if the case be one in which he is entitled to do so. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493 (1887).

No Appeal from Order of Reference.—Upon a consent reference to try a cause, the question as to whether all the issues raised by the pleadings are to be considered depends upon the extent of the agreement of the parties, and the finding of the trial court is conclusive. *Barrett v. Henry*, 85 N. C. 322 (1881).

Referee Must Discharge Duties.—The referee selected by the parties must remain in the discharge of his duties, unless with like consent another is substituted in his place, until the order has been fully executed and the final report made. *Perry v. Tupper*, 77 N. C. 413 (1877).

Referee's Report Set Aside.—When for cause the referee's report is set aside, the order of reference is not thereby revoked; it continues, and a second trial may be had before the same referee, although a party may not consent to such a second trial. *Flemming v. Roberts*, 77 N. C. 415 (1877).

Consent Necessary to Vacate Reference.—Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754 (1889); *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895). Unless a sufficient cause therefor is made to appear. *Patrick v. Richmond, etc., R. Co.*, 101 N. C. 602, 8 S. E. 172 (1888).

Cited in Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119 (1924); *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319 (1934).

§ 1-189. Compulsory.—Where the parties do not consent, the court may, upon the application of either, or of its own motion, direct a reference in the following cases:

1. Where the trial of an issue of fact requires the examination of a long account on either side; in which case the referee may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein.

2. Where the taking of an account is necessary for the information of the court, before judgment, or for carrying a judgment or order into effect.

3. Where the case involves a complicated question of boundary, or one which requires a personal view of the premises.

4. Where a question of fact other than upon the pleadings arises upon motion or otherwise, in any stage of the action.

5. Where the issues of fact and questions of fact arise in an action of which the courts of equity of the State had exclusive jurisdiction prior to the adoption of

the Constitution of one thousand eight hundred and sixty-eight, and in which the matter or amount in dispute is not less than the sum or value of five hundred dollars.

The compulsory reference under this section does not deprive either party of his constitutional right to a trial by jury of the issues of fact arising on the pleadings, but such trial shall be only upon the written evidence taken before the referee. (C. C. P., s. 245; Code, s. 421; 1897, c. 237, ss. 1, 2; Rev., s. 519; 1917, c. 280; 1919, c. 7; C. S., s. 573.)

- I. Editor's Note.
- II. General Consideration.
- III. Illustrative Cases.

I. EDITOR'S NOTE.

It is the order of reference that extends the jurisdiction and controls the relation of the court to the trial by referees of the issues of fact and law, and extends its authority to compel the parties to the action, by proper judgments and orders in the regular course of procedure, to do and submit to what ought to be done as the result of the reference.

The referee, once appointed, is like the judge when there is a waiver of a jury trial, invested with the powers of both judge and jury, but with the difference that the authority is conferred upon the referee not for a particular term or limited time, but until a final hearing of the cause.

The difficulty of examining or taking long and often complicated accounts in the progress of a trial, so as to enable a jury to reach a satisfactory conclusion in reference to the bearing of such evidence upon their verdicts, rendered it necessary to confer upon the trial judge the power to order compulsory reference for the purpose of making calculations and presenting results instead of data.

The right to refer by consent is without limit, but the court cannot order a compulsory reference except in the cases enumerated in this section. This distinction exists because in the compulsory reference the parties reserve their right to jury trial upon the coming in of the report of the referee, and as the parties will be subjected to expense and delay of two trials, it ought not to be resorted to for the trial of the issues raised by the pleadings, except when a long account, complicated boundary, or some other intricate questions arise which cannot be intelligently investigated before a jury (*Hall v. Craige*, 65 N. C. 51 (1871); *Peyton v. Hamilton-Brown Shoe Co.*, 167 N. C. 280, 83 S. E. 487 (1914)). Where there is a plea in bar it must be disposed of before a reference for an account can be made. *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746 (1896); *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091 (1907). The reason of this rule

is that it would be useless to take an account, if the plea in bar would defeat the plaintiff's action, if found for the defendant. But it is otherwise where the matter pleaded in bar would not defeat the plaintiff's action, if found for the defendant. *Humble v. Mebane*, 89 N. C. 410 (1883). This is so for the reason that what is pleaded in bar is not a bar. See *Lee v. Thornton*, 176 N. C. 208, 97 S. E. 23 (1918).

When a reference is ordered for any of the reasons set forth in this section, it should appear clearly and affirmatively that the courts act upon the authority herein found. See *Kerr v. Hicks*, 133 N. C. 175, 45 S. E. 529 (1903).

No order of reference should be permitted by the court until the pleadings are in and the parties are at issue. The failure to observe the law of procedure always results in confusion and too often in sacrifice of substantive rights.

In *State v. McKenzie*, 65 N. C. 102 (1871) it was held that a party had no right to demand a trial by jury of an issue involving a complicated account, but the court subsequently declared the ruling modified (*State v. Brown*, 70 N. C. 27 (1874); *Lippard v. Roseman*, 70 N. C. 34 (1874)) so as to concede the right, if not barred by failure to demand it in apt time (*Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895)).

II. GENERAL CONSIDERATION.

Liberal Construed.—This section, allowing a compulsory reference by order of the trial judge, should be liberally construed, to expedite the trial of causes and to promote substantial justice between the parties litigant. *Murchison Nat. Bank v. Evans*, 191 N. C. 535, 132 S. E. 563 (1926).

Where several causes of action arising out of the same transaction or series of transactions are properly joined in the complaint, the court may not ordinarily order that one of them be referred to a referee, but under the facts and circumstances of this case the court's order of compulsory reference of one of the causes of action was upheld, it appearing that the action involved a long account and that the controversy was so involved that it could not be readily presented to a jury, this section

being liberally construed to afford the salutary procedure therein provided. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156 (1934).

The court has discretionary power to grant or refuse a reference in those cases coming within the purview of this section and while movant has the right to insist that the judge exercise his discretionary power and act on the motion, he has no legal right to demand that the court direct a reference. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375 (1950).

This section stipulates that "the court may ... direct a reference" in certain classes or types of cases. It is manifest that the verb "may" is used in this connection in its ordinary sense as implying permissive, and not mandatory, action or conduct. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375 (1950).

What Constitutes a "Long Account."—There is no statutory or judicial definition of a "long account," but a correct conclusion as to whether an account was "long" would depend upon the facts and circumstances of a given case, and the account in controversy was correctly classified as a "long account." *Dayton Rubber Mfg. Co. v. Horn*, 203 N. C. 732, 167 S. E. 42 (1932).

What constitutes a "long account" must be determined upon the facts of each particular case, it not being necessary that the action be for an accounting, it being sufficient if a long account is directly and not merely collaterally involved in the action. *Fry v. Pomona Mills*, 206 N. C. 768, 175 S. E. 156 (1934).

Where action was instituted to recover for services rendered defendant county by plaintiff as an attorney, plaintiff alleging as a basis of recovery, services rendered in a certain civil action and services rendered relating to twenty-one different transactions extending over a period of more than a year subsequent to the termination of the civil action, it could not be said as a matter of law that the cause of action does not require the consideration of a long account, and defendants' exception to the order of compulsory reference on this ground could not be sustained. *Grimes v. Beaufort County*, 218 N. C. 164, 10 S. E. (2d) 640 (1940).

Parties Not Deprived of Jury Trial.—By a compulsory reference the parties waive nothing, and are still entitled to a trial by jury, on the issues as if no reference had been made. *Green v. Castlebury*, 70 N. C. 20 (1874); *State v. Askew*, 94 N. C. 194 (1886).

In reference cases the trial by jury is

restricted by this section to the written evidence taken before the referee, which sufficiently complies with the constitutional mandate, if the testimony is taken under oath in the manner prescribed by law, with opportunity to cross-examine. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943).

In a case of a compulsory reference either party may, at some stage of the proceedings to be determined by the court, demand a trial by jury of the issues arising in the report of the referee. *State v. Brown*, 70 N. C. 27 (1874).

Unless There Is a Failure to Follow Appropriate Procedure.—The right to trial by jury in civil cases may be waived, and in reference cases the failure to except to the findings of the referee or properly to preserve the right to jury trial has been uniformly held to constitute a waiver. *Chesson v. Kieckhefer Container Co.*, 223 N. C. 378, 26 S. E. (2d) 904 (1943).

In order to preserve the right to trial by jury in a compulsory reference, a party must object to the order of reference at the time it is made, file exceptions to particular findings of fact made by the referee, tender appropriate issues based on the facts pointed out by the exceptions and raised by the pleadings, and demand a jury trial on each of the issues thus tendered. *Booker v. Highlands*, 198 N. C. 282, 151 S. E. 635 (1930); *Marshville Cotton Mills v. Maslin*, 200 N. C. 328, 156 S. E. 484 (1931); *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

While a compulsory reference, under this section, does not deprive either party of his constitutional right to trial by jury on the issues of fact arising on the pleadings, such right is waived by failure to follow the appropriate procedure. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

A failure to object to an order of reference, at the time it is made, is a waiver of the right to a trial by jury. *Belvin v. Raleigh Paper Co.*, 123 N. C. 138, 31 S. E. 655 (1898).

Exception to Order of Court.—By excepting to an order of court referring to a long account between the parties as determinative, a party may preserve his right to a trial by jury upon the evidence thus taken, unless he waives his right during the progress of the reference; and while an issue determinative of the action should first be tried before a reference is ordered, a party excepting to the order may not successfully insist thereon when the issue is to be determined solely by the reference provided for by this section.

Green Sea Lumber Co. v. Pemberton, 188 N. C. 532, 125 S. E. 119 (1924).

A party duly and aptly excepting to an order of reference, and also to the admissions of evidence before the referee, and submitting issues, secures his right thereby to a trial by jury upon the issues presented by him. *Brown v. Buchanan*, 194 N. C. 675, 140 S. E. 749 (1927).

Where a case is one properly subject to a compulsory reference under this section, a party excepting to the order of reference is not entitled to have issues tendered upon the hearing of exceptions to the referee's report submitted to the jury when the issues do not arise upon the exceptions. *Atlantic Joint Stock Land Bank v. Fisher*, 206 N. C. 412, 173 S. E. 907 (1934).

Where defendant sets up no plea in bar, and the pleadings indicate the necessity of examining a long account between the parties, defendant's exception to an order for compulsory reference will not be sustained under this section. *Texas Co. v. Phillips*, 206 N. C. 355, 174 S. E. 115 (1934).

Party Should Tender Issues of Fact Arising on Pleadings.—A party should not tender issues as to questions of fact presented by his exceptions to the findings of the referee, but should tender issues of fact arising on the pleadings and relate his issues of fact to his exceptions and to the findings of fact by number, and demand a jury trial as to each of such issues. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949), wherein compulsory reference was ordered in special proceeding to establish boundary line.

Common-Law Arbitration.—The provisions of the Code of Civil Procedure have not repealed the common-law practice of reference to arbitrators. *Keener v. Goodson*, 89 N. C. 273 (1883).

Judge of Probate Court Cannot Refer.—A judge of the court of probate cannot refer the taking of the account to a referee, and, if he does, the account will be set aside as irregularly taken. This section does not extend the jurisdiction of the probate judge. *Rowland v. Thompson*, 65 N. C. 110 (1871).

Power of Court to Vacate Reference.—Where the trial judge has ordered a compulsory reference upon the ground that the complaint stated a long and involved account, and where no exception is taken to the order by either party, the court is without authority to set aside the order of reference and submit the case to the jury when upon his rulings the referee has committed error in excluding certain evidence materially bearing upon the controversy. *Ameri-*

can Trust Co. v. Jenkins, 196 N. C. 428, 146 S. E. 68 (1929).

Motion to Refer Must Be Timely.—A motion for a compulsory reference should be made in an action before the jury has been impaneled, or the rights of a party thereto will be considered as waived. *Peyton v. Hamilton-Brown Shoe Co.*, 167 N. C. 280, 83 S. E. 487 (1914).

It is not error to refuse a compulsory reference, when the motion to refer is not until after the close of the evidence. *Hughes v. Boone*, 102 N. C. 137, 9 S. E. 286 (1889).

Reference Should Follow Pleas.—A reference should not be ordered, after overruling a demurrer, until the pleadings are in and the parties are at issue. *Penn. Lumber Co. v. McPherson*, 133 N. C. 287, 45 S. E. 577 (1903).

Reference Precedes Court Adjudication of Liability.—A reference to hear and determine all matters in controversy, under this section, precedes any adjudication by the court of the liability of the parties. *Governor v. Lassiter*, 83 N. C. 38 (1880).

But it is irregular to proceed with a reference to state an account while there are matters of defense left open which, if sustained by evidence, would bar the claim to have such account. The issue raised by the replication should be submitted to the jury before ordering a reference to take the account demanded. *Sloan v. McMahon*, 85 N. C. 296 (1881).

When Findings of Referee Are Conclusive.—On a reference without objection, the findings of the referee, when approved by the trial court, are conclusive on appeal, unless there be no evidence to support them or some error of law has been committed in the hearing of the cause. *Williamson v. Spivey*, 224 N. C. 311, 30 S. E. (2d) 46 (1944).

Appeal before Judgment Premature.—In *Leroy v. Saliba*, 182 N. C. 575, 108 S. E. 303 (1921), it was said: "The jury having found that the partnership existed, an appeal from the order of reference before judgment upon the report thereon is premature and must be dismissed. The defendant should have noted his exception and upon the coming in of the report and exceptions thereto should have brought up his appeal from the final judgment."

When Nonsuit Allowed.—A plaintiff may take a nonsuit while the case is pending before a referee, if the case be one in which he is entitled to do so. *McNeill v. Lawton*, 97 N. C. 16, 1 S. E. 493 (1887).

However, in cases purely equitable in their nature, if a reference for an account

has been ordered and a report made, the plaintiff will not be allowed to take judgment of nonsuit. *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346 (1906).

Plea in Bar Defeats Order of Reference.

—When the answer raises a plea in bar, which if established would end the action, a compulsory order of reference cannot be properly ordered until such plea is decided. *Commissioners v. White*, 123 N. C. 534, 31 S. E. 670 (1898); *Bank v. Fidelity, etc., Co.*, 126 N. C. 320, 35 S. E. 588 (1900).

It is error for trial court to order a compulsory reference under this section before disposing of pleas in bar set up by defendants on the grounds of laches and the bar of the statute of limitations. *Graves v. Pritchett*, 207 N. C. 518, 177 S. E. 641 (1935).

A plea in bar such as will preclude a compulsory reference is one which extends to the whole cause of action so as to defeat it absolutely and entirely, and which if found in favor of the pleader will put an end to the case, leaving nothing further to be determined. *Grimes v. Beaufort County*, 218 N. C. 164, 10 S. E. (2d) 640 (1940).

Where in an action to redeem land sold under foreclosure under order of court and for an accounting, defendants plead estoppel, laches and title by adverse possession for seven years under color (§ 1-38), it is error for the court to resolve the pleas in bar against defendant and order a compulsory reference, since defendants are entitled to an adequate hearing on their pleas in bar before reference can properly be ordered. *Grady v. Parker*, 230 N. C. 166, 52 S. E. (2d) 273 (1949).

A plea in bar of a reference is not conclusive unless it extends to the whole cause of action so as to defeat it absolutely and entirely. *Reynolds v. Morton*, 205 N. C. 491, 171 S. E. 781 (1933).

Pleas in Bar.—The following pleas have held to be pleas in bar: (1) Statute of limitations. *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091 (1907). (2) Account stated. *Kerr v. Hicks*, 129 N. C. 141, 39 S. E. 797 (1901); *Kerr v. Hicks*, 131 N. C. 90, 42 S. E. 532 (1902); *Jones v. Wooten*, 137 N. C. 421, 49 S. E. 915 (1905). (3) Failure to comply with the provisions of a contract which are conditions precedent to liability. *Bank v. Fidelity, etc., Co.*, 126 N. C. 320, 35 S. E. 588 (1900). (4) Plea of sole seizin by reason of adverse possession of twenty years against a tenant in common. But plea of sole seizin which by its very terms involves an accounting, is not a good plea. *Duckworth v. Duckworth*, 144 N. C. 620,

57 S. E. 396 (1907). (5) Release. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701 (1917). (6) Accord and satisfaction. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701 (1917). (7) Estoppel by judgment. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248 (1917). (8) Answer denying trust. *Reynolds v. Morton*, 205 N. C. 491, 171 S. E. 781 (1933).

Party Cannot Object to Reference.—A party to an action may not successfully object to a compulsory reference when the same is allowed by this section and the complaint states a good cause of action, and no complete plea in bar to the entire cause is set up by him. *Murchison Nat. Bank v. McCormick*, 192 N. C. 42, 133 S. E. 183 (1926).

Consent Necessary to Vacate Reference.

—Where an action is once referred the order of reference cannot be annulled except by the consent of all parties. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895).

Failure to Refer Not Error.—Where the controversy involves the taking of a long account, it should be referred but where it has otherwise been tried, without error or prejudice to the appellant, the judgment of the trial court will not be disturbed. *Ragland v. Lassiter-Ragland*, 174 N. C. 579, 94 S. E. 100 (1917).

Report of Referee as Evidence.—Compulsory references are authorized in certain instances by this section, but when such a reference is ordered under the statute neither party is deprived of his constitutional right to a trial by jury of the issues of fact arising on the pleadings. It is provided, however, that "such trial shall be only upon the written evidence taken before the referee." This refers to the testimony of all the witnesses taken down by the referee, or under his direction, signed by them, and returned to the court as a part of the record in the cause as required by § 1-193. But the report of the referee, consisting of his findings of fact and conclusions of law, would not be competent as evidence before the jury. See *Bradshaw v. Hilton Lumber Co.*, 172 N. C. 219, 90 S. E. 146 (1916); *Booker v. Highlands*, 198 N. C. 282, 151 S. E. 635 (1930).

The referee's findings of fact and conclusions of law are not competent as evidence in the trial of the issue raised by exceptions to the report. *Cherry v. Andrews*, 231 N. C. 261, 56 S. E. (2d) 703 (1949).

It has been said, however, that where an amendment to the pleadings is allowed, after the report is in, containing an additional charge, the parties ought to be allowed to offer evidence before the jury as

to such charge, for it was not embraced in the reference. See *Moore v. Westbrook*, 156 N. C. 482, 72 S. E. 482 (1911); *Booker v. Highlands*, 198 N. C. 282, 151 S. E. 635 (1930).

Applied in Marshville Cotton Mills v. Maslin, 200 N. C. 328, 156 S. E. 484 (1931); *Perry v. Pulley*, 206 N. C. 701, 175 S. E. 89 (1934).

III. ILLUSTRATIVE CASES.

Location of Dividing Line.—A compulsory reference may be ordered by the trial judge in an action involving the true location of a dividing line between the owners of adjoining lands, in an action of trespass, and the wrongful cutting of timber, where the location of the line is complicated or requires a personal view of the premises. *Waller v. Dudley*, 194 N. C. 139, 138 S. E. 595 (1927).

Suit to Vacate Deed.—Where a suit to set aside a deed to lands, an action for possession, and a petition for dower, have been consolidated, an allegation of the wife's adultery is in bar of the wife's right, and whether the compulsory order of reference be treated as one of consolidation and reference of the consolidated action, or a reference of each action and proceeding under one form, it is improvidently entered. *Lee v. Thornton*, 176 N. C. 208, 97 S. E. 23 (1918).

Reservation of Timber.—When a conveyance of lands reserved all the trees of a certain size on the date of the deed, it is error for the court to dissolve an order restraining the cutting of the trees solely upon the ground that it was impossible to ascertain at a later date which trees were of the required size on the date of the deed, as such may be fairly approximated by experts, who, upon the failure of the parties to agree, may be appointed by the court. *Kelly v. Enterprise Lumber Co.*, 157 N. C. 175, 72 S. E. 957 (1911).

Suit to Sell Corporation Assets.—Where a stockholder sued to compel the corporation to sell certain lands and distribute the proceeds among the stockholders, and the corporation claimed that such lands should have been included in a conveyance previously made by it to another corporation, but that they were omitted by mistake it was a proper case for a reference. *Pinchback v. Bessemer Min., etc., Co.*, 137 N. C. 171, 49 S. E. 106 (1904).

Contract for Rent.—Where the question involved in the action is the amount of rent due under a contract placing the rental at not less than a certain monthly sum, with obligation of the lessee to pay more in accordance with what other tenants were

paying in the locality for other stores, etc., of the same rental value, the question to be determined by the jury does not require a view of the premises, entitling the party requesting it to a compulsory reference under the provisions of this section. *Kearns v. Huff*, 191 N. C. 593, 132 S. E. 566 (1926).

Suit on Confessed Judgment.—A compulsory reference cannot be ordered by the court in a suit on a judgment confessed by the defendants as executors before the Civil War, where the only matters of defense are payments made by them in Confederate currency during the war, and alleged counterclaims for notes due from the plaintiffs to them as executors. *Hall v. Craige*, 65 N. C. 51 (1871).

Action by Ward against Guardian.—Where in an action by a guardian to impeach a former decree, it appeared that alleged expenditures for the benefit of the ward should be ascertained before final judgment, it was held not to be error in the court to direct a mistrial and order a reference. *Sutton v. Schonwald*, 80 N. C. 20 (1879).

Action on Administration Bond.—A plea in an answer to a complaint on an administration bond of "performance of the condition of the bond by payment to the next of kin," is good in substance, and an issue taken upon it may be the subject of a compulsory reference under this section. *Flack v. Dawson*, 69 N. C. 42 (1873).

Suit by Creditor against Executor.—In an action by a creditor against an executor if the defendant denies the debt, and also that he has assets, the issue as to the debt is tried in the ordinary way; and if the debt be established a reference is to be had to ascertain the amount of the debts and their several classes, and upon the coming in of the report a judgment will be entered in favor of all the creditors who have proved their debts, for such part of the fund as they may be entitled to. *Heilig v. Foard*, 64 N. C. 710 (1870).

Where Examination of Long Account Required.—Where the verdict of the jury establishes that plaintiff is entitled to commissions on the gross receipts of defendant store and a bonus on the increase of the total gross receipts over those of the same period of the preceding year, as extra compensation under his contract of employment, the ascertainment of the amount requires an examination of a long account, and the court is empowered to order a compulsory reference to determine such amount. *Parker v. Helms*, 231 N. C. 334, 56 S. E. (2d) 659 (1949).

An action in ejectment in which defend-

ants plead the statutes of limitation of twenty and seven years (§§ 1-38 through 1-40) is not subject to compulsory reference under this section. *Williams v. Robertson*, 233 N. C. 309, 63 S. E. (2d) 632 (1951).

Cited in *Wall v. Covington*, 76 N. C. 150 (1877); *Patrick v. Richmond, etc., R. Co.*, 101 N. C. 602, 8 S. E. 172 (1888); *Lassiter v. Upchurch*, 107 N. C. 411, 12 S. E. 63

(1890); *Dunn v. Johnson*, 115 N. C. 249, 20 S. E. 390 (1894); *Kerr v. Hicks*, 133 N. C. 175, 45 S. E. 529 (1903); *Corporation Comm. v. Farmers, etc., Bank*, 192 N. C. 366, 135 S. E. 48 (1926); *Waller v. Dudley*, 194 N. C. 139, 138 S. E. 595 (1927); *Nissen v. Baker*, 198 N. C. 433, 152 S. E. 34 (1930); *Bank of Rose Hill v. Graham*, 198 N. C. 530, 152 S. E. 493 (1930); *Leach v. Quinn*, 223 N. C. 27, 25 S. E. (2d) 170 (1943).

§ 1-190. How referee chosen or appointed.—In all cases of reference the parties as to whom issues are joined in the action (except when the defendant is an infant or an absentee) may agree in writing upon a person or persons, not exceeding three, and a reference shall be ordered to him or them, and to no other person or persons. And if such parties do not agree, the court shall appoint one or more referees, not more than three, who are free from exception. No person may be appointed referee to whom all parties in the action object. No judge or justice of any court may sit as referee in action pending in the court of which he is judge or justice, and not already referred, unless the parties otherwise stipulate. (C. C. P., s. 247; Code, s. 423; Rev., s. 520; C. S., s. 574.)

§ 1-191. Referees may administer oaths.—Every referee has power to administer oaths in any proceeding before him, and has generally the power vested in a referee by law. (C. C. P., s. 356; Code, s. 599; Rev., s. 521; C. S., s. 575.)

§ 1-192. Powers of referee of trial.—The trial by referees shall be conducted in the same manner as a trial by the court. Referees have the same power to grant adjournments and to allow amendments to pleadings and to the summons as the court upon such trial, upon the same terms and with like effect. They shall have the same power to preserve order and punish all violations thereof upon such trial, and to compel the attendance of witnesses before them by attachment and to punish them as for contempt for nonattendance or refusal to be sworn or to testify, as is possessed by the court. (C. C. P., s. 246; Code, s. 422; Rev., s. 522; C. S., s. 576.)

Referee Has No Inherent Power. — A referee has no inherent or original powers and can only do those things expressly enumerated by statute, and such as he is authorized to do by the court which sends him the case. While he may "allow amendments to any pleadings," he is not authorized to allow a defendant who has not previously done so to file an answer, except by consent. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248 (1895).

May Make New Parties. — Under this section, a referee has power to admit new parties to an action. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621 (1889).

However a notice issued by a referee and served upon a surety on the administrator's bond to appear before him, no order having been made to make such surety a party, is not a legal process effective to bring him into court. *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391 (1894).

Power to Enforce Rulings.—The referee has power to enforce obedience to the rulings on the trial of the issues before him, just as the court would have upon the trial

before it. *LaFontaine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).

To review the action of the referee in permitting amendments to pleadings and the making of new parties, under this section, and contending successfully on appeal that there was a misjoinder of parties and causes of action, it is required that the appellant should have excepted in apt time and have preserved his exceptions or they will not be considered on appeal to the Supreme Court. *Sheffield v. Alexander*, 194 N. C. 744, 140 S. E. 726 (1927).

Power to Amend Pleadings and Make New Parties.—The authority of the referee to allow amendments to pleadings and to make new parties is expressly given by this section. *Sheffield v. Alexander*, 194 N. C. 744, 140 S. E. 726 (1927), citing *Koonce v. Pelletier*, 115 N. C. 233, 20 S. E. 391 (1894); *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035 (1900); *Rosenbacher & Bro. v. Martin*, 170 N. C. 236, 86 S. E. 785 (1915). See note under § 1-163.

Cited in *Gillam v. Life Ins. Co.*, 121 N. C. 369, 28 S. E. 470 (1897).

§ 1-193. Testimony reduced to writing.—The testimony of all witnesses on both sides must be reduced to writing by the referee, or under his direction, and signed by the witnesses, and the evidence so taken and signed shall be filed in the cause and constitute a part of the record. (1807, c. 237, s. 3; Rev., s. 523; C. S., s. 577.)

The referee should ordinarily enter his rulings on each objection to the evidence taken before him; but where the exceptions are very numerous and relate to a single ground of objection, it is a sufficient compliance with this rule if the referee incorporates in his report a general statement of his rulings sufficient to give the parties and the reviewing judge full opportunity to consider the referee's rulings on,

§ 1-194. Report; review and judgment.—The referee shall make and deliver a report, within the time ordered by the court, to the clerk of the court in which the action is pending. Either party, during the term or upon ten days' notice to the adverse party out of term, may move the judge to review the report, and set aside, modify or confirm it in whole or in part, and no judgment may be entered on any reference except by order of the judge. (C. C. P., s. 247; Code, s. 423; Rev., s. 524; C. S., s. 578.)

Cross Reference.—See note under § 1-195.

Editor's Note.—Originally, as cited in Code of Civil Procedure, § 247, the time limit of the referee's report was 60 days, and in default thereof either party could end the reference. *Maxwell v. Maxwell*, 67 N. C. 383 (1872).

Power of Judge—Recommittal of Case.—The supervisory power of the trial judge over the referee's report under this section is broad and comprehensive. *Dumas v. Morrison*, 175 N. C. 431, 95 S. E. 775 (1918). In the exercise of the power the trial judge may recommit the report for the correction of errors and irregularities, or for more definite statement of facts or conclusions of law, and such order recommitting the report for such purpose is not appealable. *Mills v. Apex Ins., etc., Realty Co.*, 196 N. C. 223, 145 S. E. 26 (1928), citing *Commissioners v. Magnin*, 85 N. C. 115 (1881); *Lutz v. Cline*, 89 N. C. 186 (1883); *State v. Jackson*, 183 N. C. 695, 110 S. E. 593 (1922); *Coleman v. McCullough*, 190 N. C. 590, 130 S. E. 508 (1925); *Carolina Mineral Co. v. Young*, 211 N. C. 387, 190 S. E. 520 (1937).

Reference to Another Referee.—Where a compulsory reference is made, and the report filed containing findings of fact and conclusions of law, the trial judge may not refer it to another referee with partial approval thereof for action upon the unapproved parts. *Mills v. Apex Ins., etc., Co.*, 196 N. C. 223, 145 S. E. 26 (1928).

Judge May Set Aside Reference.—The judge, in his discretion, may set aside a reference after the report is filed and pro-

ceed and try the case. *Cummings v. Swepson*, 124 N. C. 579, 32 S. E. 966 (1899).

Cited in *American Trust Co. v. Jenkins*, 196 N. C. 428, 146 S. E. 68 (1929); *Texas Co. v. Phillips*, 206 N. C. 355, 174 S. E. 115 (1934); *Bakami Constr., etc., Co. v. Thomas*, 230 N. C. 516, 53 S. E. (2d) 519 (1949).

When Decisions Reviewable.—The decision of the judge in revising the report of a referee, is available as to questions of law, but not as to the findings of fact. *Vaughan v. Lewellyn*, 94 N. C. 472 (1886).

The Supreme Court has no power to review the conclusions of fact as found by the referee and sustained by the judge, unless it appears that such findings have no evidence to support them. *Boyle v. Stallings*, 140 N. C. 524, 53 S. E. 346 (1906); *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528 (1946).

The court retains the cause and its jurisdiction in every case of reference, with power to review and reverse the conclusions of law of the referee; and a discretion to modify or set aside the report, and its ruling in the latter respect is not reviewable unless it appears that such discretion has been abused. *Cummings v. Swepson*, 124 N. C. 579, 32 S. E. 966 (1899).

Under this section the superior court, on exceptions taken to the referee's report, may affirm, set aside, make additional findings, modify, or disaffirm the report. *Wallace v. Benner*, 200 N. C. 124, 156 S. E. 795 (1931). But the findings of fact of a referee approved by the trial judge cannot be reviewed upon appeal if supported by any competent evidence. *Cummings v. Swepson*, 124 N. C. 579, 32 S. E. 966 (1899); *Anderson v. McRae*, 211 N. C. 197, 189 S. E. 639 (1937); *Dent v. English Mica Co.*, 212 N. C. 241, 193 S. E. 165 (1937);

Holder v. Home Mtg. Co., 214 N. C. 128, 198 S. E. 589 (1938).

Upon appeal in a consent reference the superior court has the power to confirm the findings of the referee in whole or in part, to set aside the findings in whole or in part and substitute other findings supported by the evidence. *Ramsey v. Nebel*, 226 N. C. 590, 39 S. E. (2d) 616 (1946).

Upon the filing of the report of the referee in a consent reference, as well as in a compulsory one, the trial court has the power to affirm, amend, modify, set aside, make additional findings and confirm, in whole or in part, or disaffirm the report of the referee, and where the court has made

additional findings and there is evidence to sustain them the action of the court will be given the effect of a verdict of a jury and will not ordinarily be disturbed on appeal. *Thigpen v. Farmers' Banking, etc., Co.*, 203 N. C. 291, 165 S. E. 720 (1932).

The referee's findings are subject to review by the district judge and where exceptions are not filed in the district court to the admission of testimony before the referee, they will not be considered by the circuit court of appeals. *Fruit Growers' Exp. Co. v. Plate Ice Co.*, 59 F. (2d) 605 (1932).

§ 1-195. Report, contents and effect.—The referee must state the facts found and the conclusions of law separately. His decision must be given, and may be excepted to by either party within thirty days from the filing of the report and reviewed in like manner and with like effect in all respects as in cases of appeal; and he may in like manner settle a case or exceptions. The report of the referee upon the whole issue stands as the decision of the court, and judgment may be entered thereon upon application to the judge. When the reference is to report the facts, the report has the effect of a special verdict. (C. C. P., s. 246; Code, s. 422; Rev., s. 525; C. S., s. 579; 1943, c. 222.)

Cross Reference.—As to reviewing, on appeal, findings of fact by referee, see § 1-194 and the note thereto.

For reference by consent, see annotations under § 1-188. As to compulsory reference, see annotations under § 1-189.

Editor's Note.—The 1943 amendment inserted in the second sentence of this section the following words: "by either party within thirty days from the filing of the report."

The referee must state in his report his findings of fact and law separately, and when the judge, who hears exceptions to the report, makes no special finding of fact, it is presumed that he adopts those of the referee which are considered *prima facie* correct. In such cases the Supreme Court will not review the findings of fact made or adopted by the judge below, its appellate jurisdiction being confined to the review of matters of law. This is so even though the action is one cognizable in a court of equity prior to 1868. *Barcroft & Co. v. Roberts & Co.*, 91 N. C. 363 (1884); *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384 (1889).

In the exercise of the power conferred by this section, as well as in the application of general principles of procedure of courts of equity, the court has authority to set aside, modify, or confirm, in whole or in part, the report of the referee, and the appellate jurisdiction attaches to the ruling in matters of law only, *Vaughan v. Lewellyn*, 94 N. C. 472 (1886). The court may modify

the report and recommit the matter to the referee. *Morisey v. Swinson*, 104 N. C. 555, 10 S. E. 754 (1889). Also see *Patterson v. Wadsworth*, 89 N. C. 407 (1883); *Barcroft & Co. v. Roberts & Co.*, 91 N. C. 363 (1884).

One valid objection may be raised to the findings of fact by the referee adopted by the judge, directly or by failure to modify them, or to those of the judge substituted for the referee's, but this raises in reality only a question of law, i. e., whether there is any evidence to support the conclusions of fact. When no such objection is made in apt time, the findings of the judge, whether made or adopted, are final and cannot be reviewed in the Supreme Court. If, upon hearing such exceptions when taken, it appears in the Supreme Court that there is no evidence to sustain the finding it will be deemed conclusive. *Usry v. Suit*, 91 N. C. 406 (1884); *Reaves v. Davis*, 99 N. C. 425, 6 S. E. 715 (1888).

In cases of reference by consent if no exceptions be taken before the referees, and their report goes up without exceptions, and either party desires to except, then and there in term time he must be permitted to do so. And then his honor must pass upon the exceptions as if they had been taken before the referees. The practice is the same in compulsory references, except that when a report is made, exceptions filed, and issues made by the exceptions, either party has the right to have the issues submitted to a jury; be-

cause, not having waived a jury trial, as is done when the reference is by consent, the party has a constitutional right to a trial by jury. And in a case where the reference is by consent, if issues arise on exceptions which the judge is unwilling to try himself he may order a jury to find the issue to aid him, but it is not a right which the party has. *Green v. Castlebury*, 70 N. C. 20 (1874).

Exceptions to the order of the court should conform to the ruling of the Supreme Court in *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895). For a striking illustration of the confusion and uncertainty into which the rights of the parties litigant are thrown by a failure to observe the provisions of this section and the holdings thereunder, see *Kerr v. Hicks*, 133 N. C. 175, 45 S. E. 529 (1903).

Referee's Duty under This Section.—It is the duty of a referee to state positively and definitely all the facts constituting the grounds of action or defence, and not to leave to inference what is the precise fact intended to be found. Conclusions of law and fact must be stated separately; otherwise the appellate court cannot review the referee's conclusions of law, and the report of the referee will be set aside as being defective. *State v. McKenzie*, 65 N. C. 102 (1871); *Earp v. Richardson*, 75 N. C. 84 (1876).

Findings of Fact Conclusive.—The findings of fact by a referee, adopted by the trial judge, are conclusive. *Joyner v. Stancill*, 108 N. C. 153, 12 S. E. 912 (1891), following *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384 (1889).

Presumption.—The findings of fact reported by a referee are presumed to be right unless shown to be wrong. If there is no evidence to support them, they will not be sustained. *Green v. Jones*, 78 N. C. 265 (1878).

Report Has Effect of Special Verdict.—Where the reference is by consent the referee's report has the effect of a special verdict. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384 (1889). Subject however to the right of either party, on notice, to move the court to review his report, to set it aside, to modify or confirm it. *Barrett v. Henry*, 85 N. C. 322 (1881).

Agreement to Arbitrate Made Out of Court.—Where an agreement to submit the matters in controversy in a pending action is made out of court, and no order of court is made to make the award when filed a rule of court, the court has no power to enter a judgment on the award, but the remedy is by a new action on the

award. *Jackson v. McLean*, 96 N. C. 474, 1 S. E. 785 (1887).

Judge May Submit Issues to Jury.—It is not the duty of a judge, in passing on exceptions to a referee's report, to decide all questions of fact without a jury, but on the contrary, if the facts depend upon doubtful and conflicting testimony, he may cause issues to be framed and submitted to a jury for information. *Maxwell v. Maxwell*, 67 N. C. 383 (1872).

Unfinished Report.—It is error for the judge to pass upon exceptions to an unfinished report. *White v. Utley*, 86 N. C. 415 (1882).

Right to Jury Trial.—In case of a compulsory reference a litigant can renew his demand for a jury trial by excepting to the report of the referee and pointing out the findings so excepted to as a basis for the issues. *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124 (1897).

But to avail himself of this right he should, by exceptions made in apt time, distinctly designate the controverted facts that he demands shall thus be determined. *Yelverton v. Coley*, 101 N. C. 248, 7 S. E. 672 (1888).

Conclusiveness—Exception to Report.—Construing this section and § 1-195 together as being in *pari materia*, it is held that a party moving for a reference to report the facts is not bound by the findings of the report as if a special verdict, and he is entitled to except to the report of the referee. *Hardaway Contracting Co. v. Western Carolina Power Co.*, 195 N. C. 649, 143 S. E. 241 (1928).

Exceptions to Referee's Report Must Be Specific.—An exception to the report of a referee must be specific; it must point out the conclusion at which it is aimed and the precise error complained of. *Battle v. Mayo*, 102 N. C. 413, 9 S. E. 384 (1889).

An exception to the admission of evidence by a referee, which is not specific, but is vague and indefinite in form, will not be considered. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621 (1889).

Exceptions to a referee's report made the basis of a demand for a trial by jury should be explicit enough for the opposing party to see clearly what the issue will be, so as to prepare to meet it with his evidence. *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124 (1897).

An exception, "The plaintiff excepts to such rulings adverse to it and appeals," is too general to be considered. *Commissioners v. Erwin*, 140 N. C. 193, 52 S. E. 785 (1905).

Exceptions before Court.—If no excep-

tions be taken before the referees and their reports go up without exceptions and either party desires to except then and there in term time, he must be permitted to do so. The court must then pass upon them as if they had been taken before the referees. *Green v. Castlebury*, 70 N. C. 20 (1874); *Green v. Castleberry*, 77 N. C. 164 (1877).

Failure to Specify Objection Constitutes Waiver.—Although a party has his objection to a compulsory reference entered in apt time, he may waive his right to a trial by jury by failing to assert it definitely and specifically in each exception to the referee's report. *Keystone Driller Co. v. Worth*, 117 N. C. 515, 23 S. E. 427 (1895).

Exceptions Should Be to Court Action.—Where an appeal is taken from the action of the trial court in passing upon exceptions to the report of a referee, exceptions should be taken and stated in the record to the rulings of the court which

it is sought to have reviewed, and the case ought not to be sent to the Supreme Court to be heard only on the exceptions taken to the ruling of the referee. *Traders Nat. Bank v. Lawrence Mfg. Co.*, 96 N. C. 298, 3 S. E. 363 (1887).

All Evidence Not Reported.—That the referee has not reported all the evidence is not a ground of exception. If all the evidence is not sent up, the remedy of the prejudiced party is, by application to the judge for an order directing the referee to send up that which has been omitted. *Perkins v. Berry*, 103 N. C. 131, 9 S. E. 621 (1889).

No Appeal from Order Recommitting Report.—Where the court orders a compulsory reference, an appeal does not lie from an order recommitting the report of the referee for the correction of errors and irregularities. *State v. Magnin*, 85 N. C. 115 (1881).

Cited in *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528 (1946).

ARTICLE 21.

Issues.

§ 1-196. **Defined.**—Issues arise upon the pleadings, when a material fact or conclusion of law is maintained by one party and controverted by the other. They are of two kinds:

1. Of law.

2. Of fact.

(C. C. P., s. 219; Code, s. 391; Rev., s. 544; C. S., s. 580.)

In General.—An issue is a single, certain and material point, arising out of the allegations or pleadings of the parties, and, generally, should be made up by an affirmative and negative. *Simonton v. Witner*, 5 Pet. (30 U. S.) 141, 8 L. Ed. 75 (1831).

Form of Issues.—Defendant can not complain of the form of the issues where he did not except or submit other issues. *Drennan v. Wilkes*, 178 N. C. 512, 103 S. E. 9 (1919).

Issues submitted are sufficient when they present to the jury proper inquiries as to all determinative facts in dispute, and afford the parties opportunity to introduce all pertinent evidence and to apply it fairly. *Cherry v. Andrews*, 231 N. C. 261, 56 S. E. (2d) 703 (1949).

Failure to Submit Issue.—Where defendant in a processioning proceeding did not tender any issues, and did not except to the one submitted, he can not complain on appeal that no issue of title was submitted, particularly where he offered no

evidence to support his allegations of title. *Exum v. Chase*, 180 N. C. 95, 104 S. E. 67 (1920).

Province of Judge and Jury.—The province of the jury is restricted to passing upon issues of fact raised by the pleadings in the light of the testimony offered. When no testimony is offered, it is the duty of the trial judge to determine the issues of law, if any are raised, and then to proceed to enter such judgment as either of the parties may have the right to demand upon the admissions of fact contained in the pleadings and the determination of the controverted questions of law. *McQueen v. Peoples Nat. Bank*, 111 N. C. 509, 16 S. E. 270 (1892).

Cited in *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911 (1891); *Piedmont Wagon Co. v. Byrd*, 119 N. C. 460, 26 S. E. 144 (1896); *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45 (1897); *Dees v. Apple*, 207 N. C. 763, 178 S. E. 557 (1935).

§ 1-197. **Of law.**—An issue of law arises upon a demurrer to the complaint.

answer or reply, or to some part thereof. (C. C. P., s. 220; Code, s. 392; Rev., s. 545; C. S., s. 581.)

§ 1-198. **Of fact.**—An issue of fact arises—

1. Upon a material allegation in the complaint controverted by the answer; or,
2. Upon new matter in the answer, controverted by the reply; or,
3. Upon new matter in the reply, unless an issue of law is joined thereon. (C. C. P., s. 221; Code, s. 393; Rev., s. 546; C. S., s. 582.)

Pleadings Must Raise Issues.—The issues in a cause are made by the pleading, and it is not error to refuse to submit an issue which the pleadings do not raise. *McElwee v. Blackwell & Co.*, 82 N. C. 345 (1880); *Wright v. Cain*, 93 N. C. 296 (1885); *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 1 S. E. 863 (1887). But see *Lackett v. Rumbaugh*, 45 F. 23 (1891). See also, *Ellis Motor Co. v. Belcher*, 204 N. C. 769, 169 S. E. 708 (1933).

An issue should be directed to the matter alleged on the one side and denied on the other. The judge may, in addition to the issue, submit a question to the jury pertinent to the matters in controversy, but he is not compelled to do so and his refusal is not reviewable. *Crawford v. Masters*, 140 N. C. 205, 52 S. E. 663 (1905).

However, it is error to submit an issue as to a contract different from that alleged in the complaint. *Dickens v. Perkins*, 134 N. C. 220, 46 S. E. 490 (1904).

In an action for the recovery of land, if the defendant wishes to disclaim as to any portion of the locus in quo and put in issue the title to only a specific portion, he should do so in his answer. *Crawford v. Masters*, 140 N. C. 205, 52 S. E. 663 (1905).

Error to Submit Issue Not Raised by Pleadings.—It is error for the court to submit to the jury issues not arising on the pleadings. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948).

Where the contract sued on is admitted

in the answer, an issue as to the existence of the contract does not arise upon the pleadings, and it is error for the court to submit such issue to the jury. *Fairmont School v. Bevis*, 210 N. C. 50, 185 S. E. 463 (1936).

Issue Cannot Be Raised by Evidential Fact.—Where there are no allegations in the pleadings which suggest the matter set out in the issue, it is improper to submit such an issue to the jury nor can an issue be raised by evidential facts. *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910 (1890), citing *Miller v. Miller*, 89 N. C. 209 (1883); *Howard v. Early*, 126 N. C. 170, 35 S. E. 258 (1900).

Issues Should Be Material.—It is only necessary to submit such issues as arise out of the pleadings material to be tried and such as will admit all material evidence upon the whole matter in controversy. *Cecil v. Henderson*, 121 N. C. 244, 28 S. E. 481 (1897).

Refusal to Submit Defendant's Issue.—Where an issue raised by the new matter in the answer, controverted by the reply, is material to the defense, there is error in refusing to submit the issue tendered by defendants, or at least an issue involving the matters relied upon by the defendants, and alleged in their answer. *Brown v. Ruffin*, 189 N. C. 262, 126 S. E. 613 (1925).

Cited in *Abbott v. Georgia, etc., R. Co.*, 90 N. C. 462 (1884).

§ 1-199. **Order of trial.**—Issues both of law and of fact may arise upon different parts of the pleadings in the same action. In these cases the issues of law must be first tried, unless the court otherwise directs. (C. C. P., s. 222; Code, s. 394; Rev., s. 547; C. S., s. 583.)

Editor's Note.—Pleas in bar must be tried before a reference is ordered. See annotations under §§ 1-188, 1-189.

§ 1-200. **Form and preparation.**—Issues shall be framed in concise and direct terms, and prolixity and confusion must be avoided by not having too many issues. The issues arising upon the pleadings, material to be tried, must be made up by the attorneys appearing in the action, or by the judge presiding, and reduced to writing, before or during the trial. (Code, ss. 395, 396; Rev., ss. 548, 549; C. S., s. 584.)

Editor's Note.—The Supreme Court in construing this section has laid down three rules: (1) only issues of fact raised by the pleadings must be submitted; (2) the

verdict, whether in response to one or many issues must establish facts sufficient to enable the court to proceed to judgment; (3) of the issues raised by the pleadings, the judge may, in his discretion, submit one or many, provided that neither of the parties to the action is denied the opportunity to present to the jury any view of the law arising out of the evidence through the medium of pertinent instructions on some issues passed upon.

This section is mandatory and where no issues are tendered by either party it is the duty of the judge either to compel counsel to prepare the proper issues or to prepare them himself and submit them to the jury. Such an adherence to the statute is absolutely essential, not only to the fair trial of the case, but to an intelligent appreciation of its merits upon an appeal. *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 12 S. E. 54 (1890); *Burton v. Rosemary Mfg. Co.*, 132 N. C. 17, 43 S. E. 480 (1903); *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 36 S. E. (2d) 225 (1945). See *Stanback v. Haywood*, 209 N. C. 798, 184 S. E. 831 (1936), citing *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45 (1897).

It should be borne in mind that the code system contemplates distinct findings upon material issues. These should be submitted where it can be done without repetition or confusion. *Emery v. Raleigh, etc., R. Co.*, 102 N. C. 209, 9 S. E. 139 (1889). It is not necessary that the language of the pleadings should be incorporated in the issues, or that it should be clearly followed in drawing them.

While the pleadings are to be construed liberally with a view to substantial justice between the parties, the proof must conform substantially to the allegation. As was said by the Supreme Court in *Parsley v. Nicholson*, 65 N. C. 207 (1871), "The rules of pleadings at common law have not been abrogated by the Code of Civil Procedure, the essential principles still remain and have only been modified as to the technicalities and matters of form. The object of pleading, both in the old and the new system, is to produce proper issues of law and fact, so that justice may be administered between the parties litigant with regularity and certainty." See *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911 (1891); *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45 (1897).

For an excellent discussion by the Supreme Court of the provisions and requirements of this section see *Piedmont*

Wagon Co. v. Byrd, 119 N. C. 460, 26 S. E. 144 (1896).

Ordinarily the form and number of issues in a civil action are left to the sound discretion of the judge and a party cannot complain because a particular issue was not submitted to jury in the form tendered. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 36 S. E. (2d) 225 (1945).

It is within the sound discretion of the trial judge to determine what issues shall be submitted, and to frame them subject to the restrictions, first, that only issues of fact raised by the pleadings are submitted; secondly, that the verdict constitutes a sufficient basis for a judgment; and thirdly, that it does not appear that a party was debarred for want of an additional issue or issues of the opportunity to present to the jury some view of the law arising out of the evidence. *Stanback v. Haywood*, 209 N. C. 798, 184 S. E. 831 (1936).

When Sufficient.—It seems that the law is settled that if the issues submitted by the court are sufficient in form and substance to present all phases of the controversy, there is no ground for exception to the same. *Bailey v. Hassell*, 184 N. C. 450, 115 S. E. 166 (1922).

The issues submitted together with the answers thereto must be sufficient to support a judgment disposing of the whole case. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 36 S. E. (2d) 225 (1945), citing *Tucker v. Satterthwaite*, 120 N. C. 118, 27 S. E. 45 (1897).

Issues Precede Testimony.—This section contemplates that the issues shall be drawn before the introduction of testimony. *Beasley v. Surles*, 140 N. C. 605, 53 S. E. 360 (1906).

Multiplicity of Issues.—This section does not contemplate or require that an issue shall be submitted to the jury as to every important material fact controverted by the pleadings, nor is it necessary, expedient, or proper to do so. *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 1 S. E. 863 (1887).

The only issues proper to be submitted to the jury are those raised by the constitutive facts alleged on the one side and denied on the other; and those issues which are merely evidential, when found by the jury only furnish facts which would be evidence to prove the main issue, should never be submitted. *Patton v. Western N. C. R. Co.*, 96 N. C. 455, 1 S. E. 863 (1887).

Separate Causes of Action.—Where the plaintiff brings a single suit on two distinct causes of action a separate issue

should be submitted as to the damages arising on each separate cause of action. *Kelly v. Durham Tract. Co.*, 133 N. C. 418, 45 S. E. 826 (1903).

Complaint Differs with Issue.—Where a contract alleged in the complaint is different from that submitted in the issue, an instruction that if the contract was as alleged, the issue should be answered in the affirmative, is error. *Dickens v. Perkins*, 134 N. C. 220, 46 S. E. 490 (1904).

Issues Not Determinative.—A judgment upon the verdict of the jury upon issues raised by the pleadings which are not determinative of the controversy between the parties, is erroneously entered. *Merchants Nat. Bank v. Carolina Broom Co.*, 188 N. C. 508, 125 S. E. 12 (1924).

Single Issue Sufficient.—It is not error for the court, to submit only an issue involving the question whether a plaintiff has been injured and has sustained damage through the negligence of a defendant, even where contributory negligence is set up as a defense. *McAdoo v. Richmond, etc., R. Co.*, 105 N. C. 140, 11 S. E. 316 (1890); *Boyer v. Teague*, 106 N. C. 576, 11 S. E. 665 (1890).

Insufficient Issues.—When issues of fact are raised by the pleadings it is error to submit only the question whether the plaintiff is entitled to recover; that is a question of law arising after verdict and addressed solely to the court. *Braswell v. Johnston*, 108 N. C. 150, 12 S. E. 911 (1891).

Example of Insufficient Issues.—Where in an action for damages, the defendant tendered the issues: (1) Were plaintiff's injuries caused by the defendant's negligence? (2) Was there contributory negligence on the part of the plaintiff? (3) What damage is the plaintiff entitled to recover? And the court declined to submit these, but substituted instead a single issue—

What damages, if any, is the plaintiff entitled to recover? It was held to be error. *Denmark v. Atlantic, etc., R. Co.*, 107 N. C. 185, 12 S. E. 54 (1890).

Case Remanded for Insufficient Issues.—In an action to recover on policy of life insurance, where there were issues squarely raised by the pleadings, supported by evidence, as to valid delivery and payment of first premium, and court declined to submit such issues or to submit others of similar import, which would be determinative of questions presented, Supreme Court will remand for new trial. *Griffin v. United Services Life Ins. Co.*, 225 N. C. 684, 36 S. E. (2d) 225 (1945).

Inconsistent Causes of Action.—Where the plaintiff alleged inconsistent causes of action in different counts of his complaint, it was error for the court to submit the case on a single issue as to whether plaintiff was injured by defendant's negligence, as alleged in the complaint. *Griffin v. Atlantic, etc., R. Co.*, 134 N. C. 101, 46 S. E. 7 (1903).

Court Adding Issue of Contributory Negligence.—Where the plaintiff brought suit against two defendants as joint tortfeasors, one defendant answering alleging contributory negligence and one defendant not filing an answer, and where the plaintiff tendered issues of negligence of the answering defendant, the court adding the issue of contributory negligence arising upon the pleading of this defendant, it was held that as a rule the court must submit the issue arising on the pleadings, but the plaintiff waived this by tendering only one issue as to the answering defendant, and allowing the case to be tried on that theory. *Ammons v. Fisher*, 208 N. C. 712, 182 S. E. 479 (1935).

Cited in *Wilson v. Featherstone*, 120 N. C. 446, 27 S. E. 124 (1897); *Howard v. Early*, 126 N. C. 170, 35 S. E. 258 (1900).

ARTICLE 22.

Verdict and Exceptions.

§ 1-201. **General and special.**—A general verdict is that by which the jury pronounce generally upon all or any of the issues, either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only, leaving the judgment to the court. (C. C. P., s. 232; Code, s. 408; Rev., s. 550; C. S., s. 585.)

- I. General Consideration.
- II. Rendition and Reception.
- III. Polling Jury.

I. GENERAL CONSIDERATION.

General Verdict.—The verdict is general when the jury, under appropriate instruc-

tions from the court as to the law applicable, simply respond affirmatively or negatively to the issues submitted. *Morrison v. Watson*, 95 N. C. 479 (1886); *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 591 (1887).

Same—Embodies Law and Fact.—A gen-

eral verdict embodies both the law and facts. The jury, taking the law as given by the court, apply that law to the facts as they find them to be and express their conclusions in the verdict. *Walker v. New Mexico, etc., R. Co.*, 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897).

Special Verdict.—The adoption of this section wrought a radical change upon the old practice in regard to what should be stated in special verdicts. Under the former practice, after the finding as to all the facts necessary in determining the rights of the parties, with a prayer for the advice of the court as to the law arising thereon, the special verdict concluded conditionally, that if, upon the whole matter, the court shall be of opinion that the plaintiff has a cause of action, they then find for the plaintiff; if otherwise, for the defendant. Under the law as it now stands it is no longer necessary for the condition to be included.—Ed. Note.

See 13 N. C. Law Rev. 321, for note on special verdict in criminal procedure.

Special Verdict Cannot Be Added to.—“In any case, the trial judge may decline to receive a special verdict, and insist that the jury return a general verdict of guilty or not guilty; but when a special verdict is found by the jury, neither the trial court nor the appellate court can add any fact not directly found, nor can its existence be presumed.” *State v. Colonial Club*, 154 N. C. 177, 69 S. E. 771 (1910).

Where Findings of Jury in Conflict.—If there be an irreconcilable conflict in the findings of the jury upon the issues submitted, or between the verdict and the judgment, a new trial will be awarded. *Morrison v. Watson*, 95 N. C. 479 (1886). And where such is the case, the rule that requires a special verdict to prevail over a general (under section 1-202) one has no application. *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581 (1887).

Applied in *State v. Lovelace*, 228 N. C. 186, 45 S. E. (2d) 48 (1947).

II. RENDITION AND RECEPTION.

Presence of Court.—A special verdict requires the presence and assent of the court. *Suydam v. Williamson*, 20 How. (61 U. S.) 427, 15 L. Ed. 978 (1857).

If it is not received by the court, nor in any way made matter of record, and where, with the assent of the attorney of the party in whose favor it was given, the jury retire by the court's direction and consider further of their verdict and return another verdict of which ouster is entered, it is of no weight as evidence for any pur-

pose. *United States v. Addison*, 6 Wall. (73 U. S.) 291, 18 L. Ed. 919 (1867).

Presence of Parties.—A party has the right to be present upon the rendition of the verdict. *State v. Jones*, 91 N. C. 654 (1884). This right is personal to the parties themselves and the absence of the counsel at the rendition is not a ground for a new trial. *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612 (1914).

But the entry of a verdict against a plaintiff, who is not present either in person or by attorney, is irregular. *Graham v. Tate*, 77 N. C. 120 (1877).

Waiver of Right to Be Present—(1) In Civil Cases.—The right of the parties to be present when the verdict is returned in a civil case is waivable. *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612 (1914).

Same — (2) Criminal Cases.—In the trial of capital felonies the rule of practice seems to be uniform in all the states that the prisoner must be present during the whole trial. See *State v. Paylor*, 89 N. C. 539 (1883), which contains also a full discussion of the application of the principle in regard to felonies of a lower nature and as to misdemeanors.

Verdict Received by Clerk.—A clerk of the court may by consent receive a verdict, even if the judge is not in the courtroom, provided it was done before the expiration of the term. *Ferrell v. Hales*, 119 N. C. 199, 25 S. E. 821 (1896); *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612 (1914).

III. POLLING JURY.

Not Indispensable but May Be Asked for.—It is not essential to the validity of the proceedings that the jury be polled, this being merely a privilege which may be asked for by either party. *State v. Toole*, 106 N. C. 736, 11 S. E. 168 (1890); *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348 (1903).

The right of a party to have the jury polled after the rendition of its verdict exists in civil as well as criminal cases. *State v. Young*, 77 N. C. 498 (1877); *State v. Toole*, 106 N. C. 736, 11 S. E. 168 (1890); *Smith v. Paul*, 133 N. C. 66, 45 S. E. 348 (1903).

Dissent or Disagreement of Jurors.—On a poll of the jury, the dissent of one juror renders the verdict invalid. *Owens v. Southern R. Co.*, 123 N. C. 183, 31 S. E. 383 (1898); but mere reluctance on the part of one juror will not be fatal to the verdict. *Lowe v. Morgan*, 125 N. C. 301, 34 S. E. 442 (1899).

§ 1-202. **Special controls general.**—Where a special finding of facts is

inconsistent with the general verdict, the former controls, and the court shall give judgment accordingly. (C. C. P., s. 234; Code, s. 410; Rev., s. 552; C. S., s. 586.)

Editor's Note.—It is well settled by the reported cases in other states, construing provisions of their codes similar to this section, that a general verdict should stand unless the special findings are necessarily repugnant to it. To be inconsistent with the general verdict it must appear that the special findings are irreconcilable, in a legal sense, with the general verdict; and

to justify the court in setting aside the general verdict on the ground that it is inconsistent with such findings the conflict must be clear and irreconcilable. See 69 Ohio State Reports 101.

See note of *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581 (1887), under § 1-201, analysis line "General Consideration."

§ 1-203. Character of, for different actions.—In an action for the recovery of specific personal property, if the property has not been delivered to the plaintiff, or the defendant by his answer claims a return thereof, the jury shall assess the value of the property, if their verdict is in favor of the plaintiff; or if they find in favor of the defendant, and that he is entitled to a return thereof, they may at the same time assess the damages, if any are claimed in the complaint or answer, which the prevailing party has sustained by reason of the detention or taking and withholding the property. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases, the court may direct the jury to find a special verdict in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general verdict, to find upon particular questions of fact, to be stated in writing, and may direct a written finding thereon. The special verdict or finding shall be filed with the clerk, and entered upon the minutes. (Rev., s. 551; Code, s. 409; C. C. P., s. 233; C. S., s. 587.)

Cross References.—As to the provisional remedy of claim and delivery for personal property, see §§ 1-472 et seq. As to judgment in action for recovery of possession of personal property, see § 1-230.

When Character of the Verdict Discretionary with Jury.—The section contains two specific cases in which the jury may, in their discretion, render either a general or special verdict, they being for the recovery of, (1) money only or (2) specific real property. In every other case the court may insist upon a special verdict upon any or all the issues. See *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581 (1887).—Ed. Note.

Injuries to Personal Property in Seizure.—In claim and delivery, when for any cause judgment cannot be given for the recovery of the property in specie, as where pendente lite the property was sold under order of the court, judgment should be rendered for the recovery of the value of the property at the time of the tortious taking, with interest thereon, in lieu of

damages for deterioration and detention, and for the costs. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745 (1892).

Time of Assessment of Damages.—In an action for claim and delivery of personal property, when the property cannot be redelivered by plaintiff in specie, the value thereof, in case of a judgment for the defendant, should be assessed at the time of the trial and not at the time of its seizure by the sheriff. *Holmes v. Godwin*, 69 N. C. 467 (1873).

Account and Settlement of Trust Fund.—The court has the power under this section, to direct a special finding upon an issue in an action for an account and settlement of a trust fund, and so also, in all other cases except where the suit is for "money only" or "specific real property." *Commissioners v. Lash*, 89 N. C. 159 (1883); *Porter v. Western, etc., R. Co.*, 97 N. C. 66, 2 S. E. 581 (1887). See also, *Bean v. Western, etc., R. Co.*, 107 N. C. 731, 12 S. E. 600 (1890).

§ 1-204. Jury to assess damages; counterclaim.—When a verdict is found for the plaintiff in an action for the recovery of money, or for the defendant when a counterclaim for the recovery of money is established beyond the amount of the plaintiff's claim as established, the jury must also assess the amount of the recovery; they may also, under the direction of the court, assess the amount of the recovery when the court gives judgment for the plaintiff on the answer.

If a counterclaim, established at the trial, exceeds the plaintiff's demand so established, judgment for the defendant must be given for the excess; or if it appears that the defendant is entitled to any other affirmative relief, judgment must be given accordingly. (C. C. P., s. 235; Code, s. 411; Rev., s. 553; C. S., s. 588.)

Editor's Note. — Great difficulty has been encountered in the decision of the question whether an affirmative judgment can be given in favor of a defendant upon a counterclaim, the amount of which is not within the jurisdiction of the court. This section serves as an additional guidepost for the courts and its chief purpose would seem to be to carry out the provisions of the Code to the effect that the superior court may render such judgment as is necessary to do justice between the parties in administering both law and equity, thus placing the decision of this much disputed question in the same category with those cases falling within the accepted construction of the general provisions of the Code. This being the true interpretation of the section, then, as was said in 1 N. C. Law Rev. 229:

"These decisions (falling under and bearing on this section) fix the rule of practice in North Carolina in accordance with the practice declared to exist in other jurisdictions. In a court of limited jurisdiction, the defendant may use his demand as setoff or recoupment to defeat or reduce the plaintiff's demand, but he cannot obtain an affirmative judgment upon his counterclaim, when the amount exceeds the jurisdiction. In a court of general ju-

risdiction, judgment may be rendered for the excess of defendant's claim, although no original action could have been brought thereon in such court."

Allowance of "Interest to Date."—The verdict must be understood in connection with the charge, and when it allows "interest to date," it must be taken to intend it, and in conformity with the instruction, and thus the time for which the computation is to be made is rendered definite and certain. *Greenleaf v. Norfolk, etc., R. Co.*, 91 N. C. 33 (1884).

Reduction of Verdict.—The trial judge has no power to reduce a verdict without the consent of the party in whose favor the verdict is rendered, but when the trial judge thinks injustice has been done it is his duty to set aside the verdict, and he may set it aside as to damages either excessive or inadequate. *Shields v. Whitaker*, 82 N. C. 516 (1880); *Isley v. Bridge Co.*, 143 N. C. 51, 55 S. E. 416 (1906).

Punitive Damages. — The question of punitive damages is one properly to be submitted to the jury as one within their discretion, under a proper charge of the law applicable, and is not a matter of law for the court. *Blow v. Joyner*, 156 N. C. 140, 72 S. E. 319 (1911).

§ 1-205. Entry of verdict and judgment.—Upon receiving a verdict, the clerk shall make an entry in his minutes, specifying the time and place of the trial, the names of the jurors and witnesses, the verdict, and either the judgment rendered thereon or an order that the cause be reserved for argument or further consideration. If a different direction is not given by the court, the clerk must enter judgment in conformity with the verdict. (C. C. P., s. 236; Code, s. 412; Rev., s. 554; C. S., s. 589.)

To Whom Returnable. — The verdict should be returned before the presiding judge, *Zagier v. Southern Exp. Co.*, 171 N. C. 692, 89 S. E. 43 (1916), but by consent of the counsel, the clerk of the superior court can represent the judge in taking the verdict of the jury. *Barger Bros. v. Alley*, 167 N. C. 362, 83 S. E. 612 (1914).

The discretionary act of the trial judge in rendering judgment upon a verdict of the jury returned during recess of the court without the consent of counsel will not be reviewed on appeal when it appears from the finding of the court that the jury had not discussed the case before delivering it to the clerk, though several had done so thereafter with appellee's attorney; that

the verdict was agreed to before the jurors separated, no improper influence had induced it, and the issues were not recorded until after the verdict was returned to the judge. *Zagier v. Southern Express Co.*, 171 N. C. 692, 89 S. E. 43 (1916).

An agreement empowering the judge to sign judgment "out of terms" gave him no power after the adjournment of the term to hear and pass upon a motion to set the verdict aside. *Knowles v. Savage*, 140 N. C. 372, 52 S. E. 930 (1906).

Verdict Must Be Accepted. — Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record, and it is the duty of the judge to look after the form and substance

of a verdict, so as to prevent a doubtful or insufficient finding from passing into the records. *State v. Godwin*, 138 N. C. 582, 50 S. E. 277 (1905).

Informal and Irregular Verdict.—When a jury returns an informal, insensible, or a repugnant verdict, or one that is not re-

sponsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a verdict in proper form; but it is incumbent upon the judge not even to suggest the alteration of a verdict in substance. *State v. Godwin*, 138 N. C. 582, 50 S. E. 277 (1905).

§ 1-206. Exceptions.—1. If an exception is taken upon the trial, it must be reduced to writing at the time with so much of the evidence or subject matter as may be material to the exception taken; the same must be entered in the judge's minutes and filed with the clerk as a part of the case upon appeal.

2. If there is error, either in the refusal of the judge to grant a prayer for instructions, or in granting a prayer, or in his instructions generally, the same is deemed excepted to without the filing of any formal objections.

3. In any trial or hearing no exception need be taken to any ruling upon an objection to the admission of evidence. Such objection shall be deemed to imply an exception by the party against whom the ruling was made. (C. C. P., s. 236; Code, s. 412; Rev., s. 554; C. S., s. 590; 1949, c. 150.)

I. Exceptions Generally.

II. Instructions.

Cross References.

As to exceptions in case on appeal, see § 1-282. As to instructions generally, see §§ 1-180, 1-181, 1-182.

I. EXCEPTIONS GENERALLY.

Editor's Note.—The 1949 amendment added subsection 3. For brief comment on the amendment, see 27 N. C. Law Rev. 435.

Exceptions as Condition for Appeal.—See § 1-282 and the notes thereto—analysis line, "Requisites of Case on Appeal," III.

Time for Exception.—It is a general rule, applicable alike to criminal and civil causes, that exceptions must be taken in apt time on the trial, *State v. Ballard*, 79 N. C. 627 (1878), and unless so taken it will be deemed to have been waived. *Byrd v. Hudson*, 113 N. C. 203, 18 S. E. 209 (1893).

It is too late after the trial to make exceptions to the evidence, remarks of the judge, or other matters occurring during the trial, except as to the charge. *Alley v. Howell*, 141 N. C. 113, 53 S. E. 821 (1906) (decided prior to the 1949 amendment).

Where, however, evidence is made incompetent by statute, exception thereto may be made after verdict. *Broom v. Broom*, 130 N. C. 562, 41 S. E. 673 (1902) (decided prior to the 1949 amendment).

Misstatements of the evidence or the contentions of the parties arising on the evidence must be called to the trial court's attention in time to afford opportunity for correction, and in event the request for correction is refused, appellant must note an immediate exception to such ruling in order to present the matter for review on

appeal. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

Taking and Noting.—Under this section, the trial judge is not required to take down the exceptions himself, but may require the attorneys for the excepting party to prepare them in writing. *Buckner v. Madison County R. Co.*, 164 N. C. 201, 80 S. E. 225 (1913).

Exception Should Be Specific.—Exceptions taken upon the trial should be as specific as possible and should point out the nature of the error complained of. *Williams v. Johnston*, 94 N. C. 633 (1886); *State v. English*, 164 N. C. 497, 80 S. E. 72 (1913), and cases cited.

Indefinite Exception.—An indefinite exception will be overruled. *Streator v. Streator*, 145 N. C. 337, 9 S. E. 112 (1907); *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011 (1913).

A "broadside" exception cannot be entertained on appeal. *Kelly v. Johnson*, 135 N. C. 650, 47 S. E. 672 (1904); *Jackson v. Williams*, 152 N. C. 203, 67 S. E. 755 (1910).

Motion for Judgment.—If an answer or reply is insufficient, the opposite party may move for judgment, and if the motion is refused he can have his exception noted. If he fails to do this, the objection is usually waived. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364 (1890).

II. INSTRUCTIONS.

Where Exceptions Taken Orally.—Where the judge below, in instructing the jury, submitted a phase of a question which there was no evidence to support, an oral exception to the question immediately taken and noted and assigned as error for the case on appeal is sufficient to present the matter on appeal, though no written instruction on the subject was

prayed for by the excepting counsel. *Lee v. Williams*, 112 N. C. 510, 17 S. E. 165 (1893).

Errors in Charge.—An exception taken for the first time in the appellant's assignment of error will not be considered on appeal, except under this section as to the charge of the court, etc., when it is required that the record show that the exception had been duly and properly taken. *Brown v. Brown*, 182 N. C. 42, 108 S. E. 380 (1921).

Errors in the charge of the court, or in granting or refusing to grant prayers for instruction, shall be deemed excepted to without the filing of any formal objections, if specifically raised and properly presented in the case on appeal, prepared and tendered in proper time; and when exceptions are taken they should be considered and passed upon by the trial court, and upon being overruled, made to appear in the record on the appeal to the Supreme Court. Sections 1-278, 1-279, 1-282, and this section. *Paul v. Burton*, 180 N. C. 45, 104 S. E. 37 (1920). See *Rice v. Swannanoa-Berkeley Hotel Co.*, 209 N. C. 519, 184 S. E. 3 (1936).

Time for Exceptions to Instructions.—In regard to the trial court's instructions as to applicable law and as to the contentions of the parties with respect to such law, a party is not required to except at the trial but may set out exceptions for the first time in his case on appeal. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

Exceptions to the judge's charge taken for the first time after the trial, but set

out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of § 1-282, and this section. And an exception to a previous intimation of the judge made upon the trial to the effect objected to, is not required. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361 (1923).

Failure to Give Charge Requested.—An omission to give a charge to which a party would have been entitled is not error, unless the same was requested on the trial and refused. *Fry v. Currie*, 91 N. C. 436 (1884). See § 1-182.

Effect of Failure to Object or Except.—Instructions, the giving or refusal of which was not excepted to on the trial, and where the attention of the court was not called to anything objectionable therein, will not be considered on appeal. *White v. Clarke*, 82 N. C. 6 (1880).

An assignment of error cannot be considered if it appears from the record that neither objection nor exception, as provided by this section, was made at the trial. *Stadium v. Harvell*, 208 N. C. 103, 179 S. E. 448 (1935).

An exception to a charge by the court must point out some specific part thereof as erroneous, and an exception to a portion of the charge embracing a number of propositions is insufficient if any of the propositions are correct. *State v. Lambe*, 232 N. C. 570, 61 S. E. (2d) 608 (1950).

Cited in Metropolitan Life Insurance Co. v. Boddie, 196 N. C. 666, 146 S. E. 598 (1929); *La Vecchia v. North Carolina Joint Stock Land Bank*, 218 N. C. 35, 9 S. E. (2d) 489 (1940).

§ 1-207. Motion to set aside.—The judge who tries the cause may, in his discretion, entertain a motion, to be made on his minutes, to set aside a verdict and grant a new trial upon exceptions, or for insufficient evidence, or for excessive damages; but such motion can only be heard at the same term at which the trial is had. When the motion is heard and decided upon the minutes of the judge, and an appeal is taken from the decision, a case or exceptions must be settled in the usual form, upon which the argument of the appeal must be had. (C. C. P., s. 236; Code, s. 412; Rev., s. 554; C. S., s. 591.)

Sufficiency, Scope, and Time for Taking Exceptions.—See note to § 1-206.

Discretion of the Judge.—A motion to set aside a verdict as not in conformity with the evidence is addressed to the discretion of the trial judge, when the evidence is conflicting, and will not be considered on appeal. *Hoke v. Tilley*, 174 N. C. 658, 94 S. E. 446 (1917); *Ziglar v. Ziglar*, 226 N. C. 102, 36 S. E. (2d) 657 (1946); *King v. Byrd*, 229 N. C. 177, 47 S. E. (2d) 856 (1948); *Carolina Coach Co. v. Central Motor Lines*, 229 N. C. 650, 50 S. E. (2d) 909 (1948).

A discretionary order entered at the term of the trial setting aside a verdict as contrary to the weight of the evidence is not reviewable, and an appeal therefrom will be dismissed in the absence of abuse of discretion. *Anderson v. Holland*, 209 N. C. 746, 184 S. E. 511 (1936).

The discretion given by this section to the trial judge to set aside a verdict, is not an arbitrary one to be capriciously exercised, but reasonably with the view to an equitable result in the correct administration of justice, and will not be reviewed on appeal except in cases of abuse thereof.

Baily v. Dibbrell Mineral Co., 183 N. C. 525, 112 S. E. 29 (1922). See also, Goodman v. Goodman, 201 N. C. 808, 161 S. E. 686 (1931); Strayhorn v. Fidelity Bank, 203 N. C. 383, 166 S. E. 312 (1932); Harrison v. Metropolitan Life Ins. Co., 207 N. C. 487, 177 S. E. 423 (1934).

The trial judge has the discretionary power during the term to set aside a verdict as being against the weight and credibility of the evidence, and his action in so doing is not ordinarily reviewable, but an order setting aside the verdict on such grounds at a succeeding term of court upon a continuance of the defendant's motion therefor will be reversed on appeal where the record shows that the plaintiff did not consent to the continuance and did not waive his right to except thereto. *Manufacturers' Finance Accept. Corp. v. Jones*, 203 N. C. 523, 166 S. E. 504 (1932).

The power of a trial court to set aside a verdict and to order a new trial, in its discretion, is inherent, and is necessary to the proper administration of justice, which is after all the function of a court, and is recognized by this section; its exercise at any time during the term at which the action was tried has been uniformly approved by this court. *Brantley v. Collie*, 205 N. C. 229, 171 S. E. 88 (1933).

The discretionary action of the trial court in setting aside a verdict on the issue of damages because excessive or contrary to the weight of the evidence is not appealable in the absence of a denial of some legal right. It is likewise a matter of discretion as to whether the verdict should be set aside in whole or in part. *Hawley v. Powell*, 222 N. C. 713, 24 S. E. (2d) 523 (1943); *Alligood v. Shelton*, 224 N. C. 754, 32 S. E. (2d) 350 (1944).

Where motion to set aside a verdict involves no question of law or legal inference, the motion is addressed to the sound discretion of the trial court, and its ruling thereon is not subject to review in the absence of abuse of discretion. *Pruitt v. Ray*, 230 N. C. 322, 52 S. E. (2d) 876 (1949).

Same—Reduction of Verdict.—The discretionary power of the trial judge to set aside the verdict of the jury for "excessive" or "inadequate" damages, does not extend to his authority to reduce the verdict and render judgment accordingly, unless assented to by the party against whose interest it has been done, and without this consent the Supreme Court, on appeal, will direct that the amount of the judgment be entered according to the verdict. *Hyatt v.*

McCoy, 194 N. C. 760, 140 S. E. 807 (1927).

Where Jury Commits Palpable Error.—When it appears from the evidence, the charge of the court, and the verdict, that the jury has committed a palpable error in the answer to one of the issues, it is the duty of the trial judge to set it aside to prevent a miscarriage of justice. *Hussey v. Atlantic Coast Line R. Co.*, 183 N. C. 7, 110 S. E. 599 (1922).

Court Not Empowered to Change Verdict.—The trial judge has the authority to set aside the verdict of the jury as to matters in his sound discretion or as a matter of law, leaving the cause at issue, but he may not change the verdict and thereupon dismiss the action as a matter of law, the exercise of such power being allowed only for want of jurisdiction or upon the ground that no cause of action has been sufficiently alleged in the complaint. *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922).

The court under this section has the power to set aside the verdict, but none to reverse the answers of the jury. *Bundy v. Sutton*, 207 N. C. 422, 177 S. E. 420 (1934).

While the trial court has the power to set aside a verdict when he is of the opinion that it is not supported by the evidence or is against the weight of the evidence, under this section, he has no power to change or modify a verdict because in his opinion the jury made an error in computing the amount returned in their answer, and a new trial will be awarded upon appeal from a judgment rendered on the verdict as modified by the court. *Edwards v. Upchurch*, 212 N. C. 249, 193 S. E. 19 (1937).

Agreement Made by Attorney for Client.—Where the trial judge has announced his decision to set aside a verdict unless the parties should agree in a certain particular, to which the plaintiff's attorney agreed without the consent of his client and against her instructions, and the judgment so agreed upon has been accordingly entered, the plaintiff may not thereafter repudiate the agreement made in her behalf by her attorney, and also repudiate the result thereby attained, and she is estopped from resisting the entry of judgment setting aside the verdict nunc pro tunc. *Bizzell v. Auto Tire, etc., Co.*, 182 N. C. 98, 108 S. E. 439 (1921).

Where Matter Determined Out of Term.—Where the losing party moves to set aside a verdict after the trial, as within the statutory discretion of the trial judge, and the judge intimates he will grant the mo-

tion, but the parties agree that he may determine the matter out of the term, in view of attempting to compromise the disputed matter; and not hearing from the parties the judge renews his previous intimation, and sets a time and place for hearing, at which one of the parties appears and refuses the suggestion of the judge as a basis of a just settlement, his then setting the verdict aside within his

reasonable discretion deals with the record as it originally stood, and is not abuse of the discretion given him by this section. *Bailey v. Dibbrell Mineral Co.*, 183 N. C. 525, 112 S. E. 29 (1922).

Stated in *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219 (1944).

Cited in *Gregory v. Travelers Ins. Co.*, 223 N. C. 124, 25 S. E. (2d) 398, 147 A. L. R. 283 (1943) (con. op.).

SUBCHAPTER VIII. JUDGMENT.

ARTICLE 23.

Judgment.

§ 1-208. **Defined.**—A judgment is either interlocutory or the final determination of the rights of the parties in the action. (C. C. P., s. 216; Code, s. 384; Rev., s. 555; C. S., s. 592.)

Definition of Final Judgment.—A judgment is final which decides the case upon its merits without reservation for other and future directions of the court. *Flemming v. Roberts*, 84 N. C. 532 (1881); *Sanders v. May*, 173 N. C. 47, 91 S. E. 526 (1917); *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

A final judgment is one which disposes of the cause as to all the parties, leaving nothing to be judicially determined between them in the trial court. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

Definition of Interlocutory Order.—An interlocutory order or decree is provisional or preliminary only. It does not determine the issues joined in the suit, but merely directs some further proceedings preparatory to the final decree. *Johnson v. Robertson*, 171 N. C. 194, 88 S. E. 231 (1916); *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

It remains in the control of and in the breast of the court, and upon good cause shown they may be amended, modified, changed or rescinded, as the court may think proper. *Maxwell v. Blair*, 95 N. C. 317 (1886).

An interlocutory order is one made during the pendency of an action, which does not dispose of the case, but leaves it for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

An interlocutory order or judgment differs from a final judgment in that an interlocutory order or judgment is "subject to change by the court during the pendency of the action to meet the exigencies of the case." *Russ v. Woodard*, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Nature of Judgment.—In its ordinary acceptance, a judgment is the conclusion of the law or facts admitted or in some way established. *Sedbury v. Southern Exp. Co.*, 164 N. C. 363, 79 S. E. 286 (1913).

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are recorded for the purpose of perpetuating them. They are the foundation of legal repose. *Williams v. Woodhouse*, 14 N. C. 257 (1831).

Sanction of Court.—Every judgment should and must have the sanction of the court, except in case of consent judgments, and those must be entered with its knowledge and permission. *Branch v. Walker*, 92 N. C. 87 (1885).

Relief Granted.—Since the gist of the accepted definition of a judgment is "the final determination of the rights of the parties to an action," courts are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. *Lee v. Pearce*, 68 N. C. 77 (1873); *Hutchinson v. Smith*, 68 N. C. 354 (1873); *McCown v. Sims*, 69 N. C. 159 (1873).

A judgment may grant to the defendant any affirmative relief to which he may be entitled. *Hutchinson v. Smith*, 68 N. C. 354 (1873).

Judgment as a Contract.—While judgments are sometimes spoken of as contracts, they are not in reality contracts, and are never so considered in reference to the clause in the federal Constitution which forbids that contracts should be impaired by state legislation. *Mottu v. Davis*, 151 N. C. 237, 65 S. E. 969 (1909).

However, judgments are considered as contracts to distinguish a cause of action

thereon from one *ex delicto*. *Moore v. Nowell*, 94 N. C. 265 (1886).

Cited in *Never Fail Land Co. v. Cole*, 197 N. C. 452, 149 S. E. 585 (1929); *McFetters v. McFetters*, 219 N. C. 731, 14 S.

E. (2d) 833 (1941); *Moore v. Moore*, 224 N. C. 552, 31 S. E. (2d) 690 (1944); *Seawell v. Purvis*, 232 N. C. 194, 59 S. E. (2d) 572 (1950).

§ 1-209. Judgments authorized to be entered by clerk; sale of property; continuance pending sale; writs of assistance and possession.—

The clerks of the superior courts are authorized to enter the following judgments:

(a) All judgments of voluntary nonsuit. (b) All consent judgments. (c) In all actions upon notes, bills, bonds, stated accounts, balances struck, and other evidences of indebtedness within the jurisdiction of the superior court. (d) All judgments by default final and default and inquiry as are authorized by §§ 1-211, 1-212, 1-213, and in this section provided. (e) In all cases where the clerks of the superior court enter judgment by default final upon any debt secured by mortgage, deed of trust, conditional sale contract or other conveyance of any kind, either real or personal property, or by a pledge of property, the said clerks of the superior court are authorized and empowered to order a foreclosure of such mortgage, deed of trust, conditional sale contract, or other conveyance, and order a sale of the property so conveyed or pledged upon such terms as appear to be just; and the said clerks of the superior court shall have all the power and authority now exercised by the judges of the superior court to appoint commissioners to make such sales, to receive the reports thereof, and to confirm the report of sale or to order a resale, and to that end they are authorized to continue such causes from time to time as may be required to complete the sale, and in the final judgment in said causes they shall order the execution and delivery of all necessary deeds and make all necessary orders disbursing the funds arising from the sale, and may issue writs of assistance and possession upon ten days' notice to parties in possession. The commissioners appointed to make foreclosure sales, as herein authorized, may proceed to advertise such sales immediately after the date of entering judgment and order of foreclosure, unless otherwise provided in said judgment and order.

In any tax foreclosure action pending on March 15, 1939 or thereafter brought under the provisions of § 105-414 in which there is filed no answer which seeks to prevent entry of judgment of sale, the clerk of the superior court may render judgment of sale and make all necessary subsequent orders and judgments to the same extent as permitted by this section in actions brought to foreclose a mortgage. All such judgments and orders heretofore rendered or made by a clerk of the superior court in such tax foreclosure actions are hereby, as to the authority of said clerk, ratified and confirmed. (1919, c. 156; C. S., s. 593; Ex. Sess. 1921, c. 92, s. 12; 1929, cc. 35, 49; 1939, c. 107; 1943, c. 301, s. 1.)

Local Modification.—Vance: 1941, c. 139, § 1.

Editor's Note.—The primary object of this section is to effect a speedy hearing and determination of uncontested rights involved in the particular class of actions enumerated herein. It was settled even when the section provided for a different return day, that this section was not repugnant to § 1-89 which purports to apply to "all civil actions in the superior court," and hence the general repealing clause of that section did not serve to repeal the remedy herein provided for in these specially designated cases. The courts, in their endeavor to discover the legislative intent, have construed the two sections together and § 1-209, although ratified four

days prior to the amendment of § 1-89 in 1919, was considered an exception to that section and the remedy prescribed regarded as an additional and more speedy method of relief in the stated classes of suits. *Young v. Davis*, 182 N. C. 200, 108 S. E. 630 (1921).

Prior to the 1921 amendment this section pertained merely to what is now class (c). Classes (a), (b), (d) and (e) were added by the amendment. See 1 N. C. Law Rev. 16. The first 1929 amendment added the last sentence to the first paragraph, and the second 1929 amendment inserted the words "conditional sales contract" in subdivision (e).

The 1939 amendment added the second paragraph.

The 1943 amendment struck out the words "judgments coming within the meaning of (a) and (b) may be entered at any time," which formerly appeared at the end of subdivision (b) of this section.

Constitutionality.—This section is not an unconstitutional interference with the jurisdiction of the judge of the court, as the clerk is a component part of the superior court, and the exercise of the power of the judge is recognized and preserved by the right of appeal. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321 (1922).

An Enabling Act.—This statute is an enabling act and does not deprive the superior court in term of its jurisdiction to render judgments, and the jurisdiction of a judge in term to render judgments upon voluntary nonsuits, by consent of the parties to the action, upon notes, bills, bonds, stated accounts, balances struck, or other evidences of debt within the jurisdiction of the superior court, is not affected by the provisions of this section. The authority of the clerk is concurrent with and additional to that of the judge in term. *Young v. Davis*, 182 N. C. 200, 108 S. E. 630 (1921); *Hill v. Huffines Hotel Co.*, 188 N. C. 586, 125 S. E. 266 (1924); *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925); 1 N. C. Law Rev. 16, 282.

The clerk of the superior court has jurisdiction under this section to sign a consent judgment in an action even while the action is pending before a referee. *Weaver v. Hampton*, 204 N. C. 42, 167 S. E. 484 (1933).

Judgment by default may be entered only when defendant has not answered, and therefore when answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Judgment by Default When Plaintiff Fails to Answer.—Where the parties are properly before the court and the subject matter of the action is also jurisdictional in the superior court, the clerk, having authority under the provisions of this section, may render a judgment against the plaintiff by default for want of a reply to an answer setting up affirmative relief. *Finger v. Smith*, 191 N. C. 818, 133 S. E. 186 (1926).

Judgment of Voluntary Nonsuit.—While a plaintiff, in cases where nothing more than costs can be recovered against him, may elect to be nonsuited, the nonsuit must be effected by a judgment of the

clerk of superior court, under this section, or by the judge at term. *McFetters v. McFetters*, 219 N. C. 731, 14 S. E. (2d) 833 (1941).

Under this section, conferring on the clerks of the superior court authority to enter judgments of nonsuit, the authority is limited to judgments of voluntary nonsuit. *Moore v. Moore*, 224 N. C. 552, 31 S. E. (2d) 690 (1944).

In wife's action against husband for separate maintenance and counsel fees, judgment entered by clerk, upon findings of fact that parties had resumed marital relations, dismissing the action as of voluntary nonsuit, was a nullity and void upon its face, as it was manifestly not voluntary. *Moore v. Moore*, 224 N. C. 552, 31 S. E. (2d) 690 (1944).

Jurisdiction of clerk of superior court to order foreclosure of mortgages is given by this section, in connection with § 1-211, and is an incidental jurisdiction conditioned upon the rendition by the clerk of a judgment by default for the debt secured by the mortgage in favor of the mortgage creditor and against the mortgage debtor. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31 (1946).

Effect of Judgments Entered by Clerk.—Judgments entered by the clerk as authorized by this section, are judgments of the superior court, and are of the same force and effect, in all respects, as if entered in term and before a judge of the superior court. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925).

Judgment Entered without Authority May Be Set Aside.—A judgment by default final entered by the clerk in an instance in which he is without authority to enter such judgment is subject to attack, and may be set aside and vacated upon motion in the cause. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690 (1941).

Action to Cancel Deed of Trust and Surrender Notes Secured Thereby.—The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690 (1941).

Appeals from Clerk to Judge.—There is no provision in the statute regulating an appeal from a judgment entered by the clerk under the authority of the statute upon the ground that such judgment is erroneous. It would seem that the appeal from such judgment, upon this ground,

may be taken from the clerk to the judge, as provided by the statute for appeals from orders and judgments upon other grounds. The proper practice, we think, is for the complaining party to except to the judgment, as entered by the clerk, and to appeal therefrom to the judge, as in other cases provided for in the statute. An appeal will then lie from the judge of the superior court to the Supreme Court. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925).

In *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451 (1927), cited in *Howard v. Queen City Coach Co.*, 211 N. C. 329, 190 S. E. 478 (1937), it was said that in the absence of statutory provision to that effect, the resident judge of a judicial district has no jurisdiction to hear and determine an appeal from a judgment of the clerk of the superior court of any county in his district,

rendered pursuant to the provisions of this section, except when such judge is holding the courts of the district by assignment under the statute, or is holding a term of court by exchange, or under a special commission from the Governor.

Statutory Lien. — See note to § 1-211, analysis line "Definite Debt."

Stated in *Buncombe County v. Penland*, 206 N. C. 299, 173 S. E. 609 (1934).

Cited in *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451 (1927); *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928); *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928); *Beaufort County v. Bishop*, 216 N. C. 211, 4 S. E. (2d) 525 (1939); *Keen v. Parker*, 217 N. C. 378, 8 S. E. (2d) 209 (1940); *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945).

§ 1-210. Return of execution; order for disbursement of proceeds.

—In all executions issued by the clerk of the superior court upon judgment before the clerk of the superior court, under § 1-209, and execution issued thereon, the sheriff shall make his return to the clerk of the superior court, who shall make the final order directing the sheriff to disburse the proceeds received by him under said execution: Provided, that any interested party may appeal to the superior court, where the matter shall be heard de novo. (1925, c. 222, s. 1.)

§ 1-211. By default final.—Judgment by default final may be had on failure of defendant to answer—

1. Where the complaint sets forth one or more causes of action, each consisting of the breach of an express or implied contract to pay, absolutely or upon a contingency, a sum or sums of money fixed by the terms of the contract, or capable of being ascertained therefrom by computation. Upon proof of personal service of summons, or of service of summons by publication, on one or more of the defendants, and upon the complaint being verified, judgment shall be entered for the amount mentioned in the complaint, against the defendant or defendants, or against one or more of several defendants.

2. Where the defendant, by his answer in such action, does not deny the plaintiff's claim, but sets up a counterclaim, amounting to less than the plaintiff's claim, judgment may be had by the plaintiff for the excess of his claim over the counterclaim, in like manner in any such action, upon the plaintiff's filing with the court a statement admitting the counterclaim, which statement must be annexed to and be a part of the judgment roll. Or the court may in its discretion, order the pleadings to be so amended and the action severed as to entitle the plaintiff to judgment upon all of the claims admitted over and above the setoff or counterclaim pleaded by the defendant; and, upon application of the plaintiff, shall enter judgment for the plaintiff for so much of the claim as is admitted. The action shall thereupon be continued as to subsequent proceedings, as if it had been brought for the remainder of the claim, and the counterclaim or setoff as pleaded by the defendant shall apply thereto. Said remainder of the claim shall in any event be sufficient to cover the full amount of the principal and interest set up by the defendant in the counterclaim or setoff, and an amount in excess thereof, if in the discretion of the court the same is necessary, the court being empowered to designate and determine what part of the plaintiff's claim shall be held for the subsequent proceedings herein referred to.

3. In actions where the service of the summons was by publication, the plain-

tiff may, in like manner, apply for judgment, and the court must thereupon require proof to be made of the demand mentioned in the complaint, and if the defendant is not a resident of the State, must require the plaintiff or his agent to be examined on oath respecting any payments that have been made to the plaintiff, or to any one for his use on account of such demand, and may render judgment for the amount which he is entitled to recover. Before rendering judgment the court may in its discretion require the plaintiff to cause to be filed satisfactory security to abide the order of the court touching the restitution of any estate or effects which may be directed by such judgment to be transferred or delivered, or the restitution of any money that may be collected under and by virtue of said judgment, in case the defendant or his representatives apply and are admitted to defend the action, and succeed in such defense.

4. In actions for the recovery of real property, or for the possession thereof, upon the failure of the defendant to file the undertaking required by law, or upon failure of his sureties to justify according to law, unless the defendant is excused from giving such undertaking before answering.

5. In actions for the recovery of personal property, or for the possession thereof, or to have the plaintiff or plaintiffs adjudged the owner or owners thereof if the complaint be verified. (C. C. P., s. 217; 1869-70, c. 193, s. 4; 1870-1, c. 42; Code, ss. 385, 390; Rev., s. 556; 1919, c. 26; C. S., s. 595; 1929, c. 66.)

I. In General.

- A. Failure to File Answer.
- B. The Complaint.

II. Nature and Essentials.

- A. Definite Debt.
- B. Service of Summons.

III. Affirmative Relief by Defendant.

IV. Real Property.

V. Personal Property.

VI. Setting Aside.

I. IN GENERAL.

A. Failure to File Answer.

Cross Reference.—See also, § 1-209.

Against State.—It has been held in several instances by the United States Supreme Court that judgment by default for want of appearance may be entered against a state. *United States v. Girault*, 11 How. (52 U. S.) 22, 13 L. Ed. 587 (1850).

Time to Answer.—As to time for answering, see § 1-89 and the notes thereto. As to time of filing complaint and extension thereof, see § 1-121 and notes thereto.

In a suit to set aside certain deeds alleged to be void and to declare the plaintiff the owner of the title to lands, a judgment by default is regularly entered when the defendant has failed to file an answer within the statutory time, and the summons has been duly served. *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184 (1919).

Where a complaint in an action set up two causes of action, one for indebtedness due on a note and the other for fraudulent conversion of money, the court may, where the defendant makes no appearance or defense, enter judgment by default final as to the first charge but not as to the second. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18 (1897).

Where Answer Insufficient.—

When matters are alleged in the complaint to be in the personal knowledge of the defendant, an averment in the answer thereto that he "has no knowledge or information sufficient to form a belief as to the truthfulness thereof and, therefore, denies the same," is insufficient, and judgment can be rendered for want of an answer if such allegation goes to the cause of action. *Streator v. Streator*, 145 N. C. 337, 59 S. E. 112 (1907).

Effect of Failure Promptly to Take Judgment by Default.—A failure to take a judgment by default as soon as the same is allowable does not work a discontinuance. *Governor v. Lassiter*, 83 N. C. 38 (1880).

In action on note and to foreclose trust deed failure of plaintiffs to move promptly for judgment after they are entitled by lapse of prescribed time or the expiration of the time allowed by consent order does not work a discontinuance. *King v. Rudd*, 226 N. C. 156, 37 S. E. (2d) 116 (1946).

Where the plaintiff is entitled to judgment by default before the clerk for failure of defendant to answer within the statutory time, he waives this right by waiting until after the clerk has permitted an answer to be filed and the matter has been transferred to the civil issue docket for trial. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Applied in *Hodges v. Hodges*, 227 N. C. 334, 42 S. E. (2d) 82 (1947).

Cited in *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946); *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949); *Lindsey-Robinson & Co. v. Jones*, 230 N. C. 756, 55 S. E. (2d) 80 (1949).

B. The Complaint.

Should Conform to the Complaint.—Judgment by default should be so drawn as to be in strict conformity with the complaint filed. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

Complaint Should Be Definite.—A pleader desiring a judgment by default must set forth clearly the facts upon the admission of which, by failure to answer, he bases his right to relief, that the court may, upon the interpretation of his complaint, adjudge his rights to correspond with such facts, for otherwise the judgment would be irregular. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

Court Must Construe Complaint.—Upon motion made before the clerk to set aside a judgment by default final for the want of an answer, under this section, and also heard on appeal in the superior court, the failure of the defendant to have filed his answer only admits the truth of the facts alleged in the complaint, leaving the court to construe the complaint to ascertain if the facts alleged are sufficient to sustain the judgment, and if not, the judgment will be set aside. *Beard v. Sovereign Lodge*, 184 N. C. 154, 113 S. E. 661 (1922).

New Parties.—Where a complaint was filed against the defendant, and in the progress of the action another party defendant is brought in, the complaint must be amended or another complaint filed as to him, unless he waive his right to the same by answering the original complaint. If no complaint is filed as to such new parties the judgment is irregular and may be set aside. *Vass v. Building, etc., Ass'n*, 91 N. C. 55 (1884).

Verification of Complaint Essential.—A complaint which is not verified as required by statute is insufficient and must be regarded as unverified, upon which a final judgment by default can not be rendered, for it is only proper to render a final judgment when the complaint is verified. *Witt v. Long*, 93 N. C. 388 (1885).

Same—Substantial Compliance Sufficient.—While it is essential that the complaint be verified it is not necessary that it be subscribed by the party making it, and a substantial compliance is sufficient, and meets the requirements when it appears that the plaintiff swore to the complaint before an officer authorized to administer oaths. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980 (1911); *Miller v. Curl*, 162 N. C. 1, 77 S. E. 952 (1913).

Same — Where Complaint Improperly Verified.—Where a properly verified complaint would entitle a plaintiff to a judg-

ment final, for want of an answer, if the complaint is not properly verified, the judgment should be by default and inquiry. *Cole v. Boyd*, 125 N. C. 496, 34 S. E. 557 (1899).

Breach of Contract.—In order to authorize a judgment by default final in an action based on the contract the complaint must set forth not only the agreement of the parties, but the alleged breach, so that the court may determine whether the action as stated can be maintained. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928).

II. NATURE AND ESSENTIALS.

A. Definite Debt.

Editor's Note.—This section, authorizing the clerk to enter judgment in all cases where the defendant fails to answer, carries out the general intent of the statute, namely, to effect a speedy settlement of the controversies in litigation. To warrant the granting of a judgment by default final the debt must be definite; when it is for an unascertained amount, the judgment is by default and inquiry, the case going up to the term for the inquiry. See 1 N. C. Law Rev. 17.

Express Promise to Pay.—When personal service on the defendant has been properly made, a judgment by default for want of an answer may be obtained, if the complaint alleges an express promise to pay a sum due. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

If the verified complaint alleges a breach of an express promise to pay absolutely a definite sum of money particularly specified for valuable consideration, judgment by default final is proper. *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928).

Implied Promise to Pay.—Where the allegation is of a sum certain expended for the benefit of the defendant and therefore upon an implied promise to repay, and the complaint is verified and no answer filed, the judgment is properly by default final. *Cowles v. Cowles*, 121 N. C. 272, 28 S. E. 476 (1897).

Same—Goods Sold and Delivered.—Where the action is on an implied contract to pay for goods sold and delivered the judgment rendered should be by default and inquiry and not by default final. *Jefries v. Aaron*, 120 N. C. 167, 26 S. E. 696 (1897).

A judgment by default final is irregular when rendered for the want of an answer filed in an action upon contract for goods sold and delivered when the alleged cause, as appearing from the complaint, is not

upon an expressed contract, but for the reasonable value of the goods, in which event a judgment by default and inquiry is the proper one, unless it is made to appear that the defendant has by his acts or conduct or in some recognized legal way admitted owing the amount in suit. *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928).

Goods Sold under Consignment.—In an action to recover for goods sold under consignment upon allegations that the purchaser failed to properly account and that he was guilty of fraudulent misappropriation, plaintiff is not entitled to judgment by default final upon failure of answer, but only to judgment by default and inquiry. *Chozen Confections v. Johnson*, 218 N. C. 500, 11 S. E. (2d) 472 (1940).

On Note.—A judgment by default on a note for the payment of money only, against one who fails to appear and answer the complaint, is regular in all respects. *Morehead Banking Co. v. Duke*, 121 N. C. 110, 28 S. E. 191 (1897).

Failure to Allege Promise to Pay.—Where the complaint only alleges the value of the goods sold without also alleging a promise to pay, upon a failure to answer, the judgment should be by default and inquiry. *Hartman v. Farrier*, 95 N. C. 177 (1886).

Damages Must Be Certain.—When the amount of the debt is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. *Adrian v. Jackson*, 75 N. C. 536 (1876).

Same—Breach of an Official Bond.—In an action on an official bond, on failure of a defendant to answer, a judgment entered against him on default cannot be final since the action is not for the breach of an express or implied contract to pay a definite sum of money. *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896).

Same—Bail Bond.—A judgment by default final for want of an answer in a suit upon a bail bond cannot be sustained. It should be by default and inquiry. *Roulhac v. Miller*, 90 N. C. 175 (1884).

Sum Certain or Computable.—A judgment by default final is irregularly entered upon a pleading that does not allege a sum certain or computable, due upon contract, express or implied. *Byerly v. Acceptance Corporation*, 196 N. C. 256, 145 S. E. 236 (1928).

Under this section, default judgment can be made only upon a failure to answer a verified pleading where the sum due is "capable of being ascertained by computa-

tion," and where it is necessary to hear evidence to ascertain title to mortgage debt and the amount of the debt, clerk is without jurisdiction to order foreclosure. *Johnston County v. Ellis*, 226 N. C. 268, 38 S. E. (2d) 31, 38 (1946).

Action to Cancel Deed of Trust and Surrender Notes Secured Thereby.—The clerk of the superior court is given no authority to render a judgment by default final for want of an answer in an action for the cancellation of a deed of trust and for surrender of notes secured thereby upon payment by plaintiffs to defendant of the balance claimed by plaintiffs to be due upon the notes. *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690 (1941).

Services Rendered Decedent.—In order for the plaintiff to be entitled to a judgment by default final upon the complaint for the want of an answer in his action to recover from the estate of the deceased for services rendered before her death, in taking care of and providing a support for her, at her request and promise to pay for them, there must have been a definite price fixed upon and understood and agreed to by both of the parties; and where the complaint alleges merely an estimate by the parties of a reasonable price to be paid for such services it supports a judgment by default and inquiry only. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928).

Where Complaint States More than One Cause of Action.—Where a complaint states two or more causes of action arising from the same default, and any one is sufficient to uphold a judgment by default final for the want of an answer, which has been entered in the due course of practice of the courts, such judgment will be upheld. *Bostwick & Bros. v. Laurinburg R. Co.*, 179 N. C. 485, 102 S. E. 882 (1920).

Same—Separate Notes Sued on in Same Complaint.—Where two notes are set out in the complaint, each being used as a separate cause of action, and no defense is interposed as to one, it is error to refuse judgment as to this one, and from such refusal, since it is a denial of a substantial right, an appeal may be taken. *Curran v. Kerchner*, 117 N. C. 264, 23 S. E. 177 (1895).

Where Complaint Sets Up Matter Constituting Statutory Lien.—Where the complaint declares upon a contract and alleges damages for its breach in a sum certain, and sets up matters that would constitute a statutory lien upon the subject matter of the contract, the clerk of the court, under the provisions of our statute, has authority to render judgment by default for the want of an answer in the specific amount de-

manded, and to declare and enforce the lien (§§ 1-209, 1-211), and issue an execution thereunder, and order a distribution of the funds so received. *Crye v. Stoltz*, 193 N. C. 802, 138 S. E. 167 (1927).

B. Service of Summons.

Cross Reference.—As to summons generally, see §§ 1-88 et seq.

Necessity for Service of Summons.—As in the case of judgments and decrees generally it is essential to the rendition of a valid decree pro confesso, for failure to appear, that the court shall have acquired jurisdiction of the defendant by due service of sufficient process. *Thomson v. Wooster*, 114 U. S. 104, 5 S. Ct. 788, 29 L. Ed. 105 (1885).

Judgments by default form no exception to the general rule that in order to render a valid judgment or decree a court must have jurisdiction of the person as well as of the subject matter, and it is essential that jurisdiction of the person shall have been obtained by the due service of process. *Wetmore v. Karrick*, 205 U. S. 141, 27 S. Ct. 434, 51 L. Ed. 745 (1907).

When Personal Service Required.—Where a personal judgment is sought against a defendant it is essential that personal service of summons be made on him. *Currie v. Mining and Milling Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

Charged with Notice.—Notice to the adverse party of a motion in term for a judgment by default for the want of an answer is not necessary, for in legal contemplation the defendant is in court by service of a summons and is charged with notice of whatever action the court takes during the pendency of the suit. *Reynolds v. Greensboro Boiler, etc., Co.*, 153 N. C. 342, 69 S. E. 248 (1910); *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184 (1919).

Judgment Void Where No Process Had.—Where there is no service of process the court has no jurisdiction and its judgment is void. *Bank v. Wilson*, 80 N. C. 200 (1879); *Stancill v. Gay*, 92 N. C. 455 (1885).

III. AFFIRMATIVE RELIEF BY DEFENDANT.

Judgment by Default Not Allowed Where Court Permits Formal Denial.—The defendant is not entitled to judgment by default on his counterclaim where the court in the exercise of its discretion allows a formal denial to be entered. *Tillinghast Co. v. Cotton Mills*, 143 N. C. 268, 55 S. E. 621 (1906); *Bernhardt v. Dutton*, 146 N. C. 206, 59 S. E. 651 (1907).

IV. REAL PROPERTY.

Recovery of the Property Sought.—Where in an action to recover land, the de-

fendant fails to file, or is not excused from filing the required bond, a judgment by default may be entered; and this is true even if there has been a failure to file an answer arising from excusable neglect. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64 (1898).

Possession of the Property.—In an action to recover possession of land, where the defendant fails to file an answer or the required bond, and does not ask leave to answer without giving bond until the time for answering has expired, it is proper to enter judgment by default. *Jones v. Best*, 121 N. C. 154, 28 S. E. 187 (1897).

Where a tenant is joined with his landlord as codefendant, and the tenant fails to give the required undertaking, judgment may be entered against him. *Harkey v. Houston*, 65 N. C. 137 (1871).

Time of Filing.—The trial judge, in his discretion, may permit a defendant at the trial to file the required bond. *Carraway v. Stancill*, 137 N. C. 472, 49 S. E. 957 (1905).

Notice.—Upon the failure of the defendant to file the necessary bond, it is error to strike out his answer and enter judgment by default without due notice and an opportunity to show cause. *Cooper v. Warlick*, 109 N. C. 672, 14 S. E. 106 (1891). See also, *McMillan v. Baker*, 92 N. C. 111 (1885).

Waiver of Bond.—The bond required of the defendant is for the benefit of the plaintiff and he can waive it, and will be deemed to have done so, if he allows a number of terms of court to pass without demanding it. If not waived entirely, it is waived until demanded. *McMillan v. Baker*, 92 N. C. 111 (1885).

Failure to "Justify" Bond.—A failure to file a "justified" bond, as is required, does not necessarily avoid the bond, but it is a defect which may be cured by waiver. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905).

Suit Pending for Further Relief.—Where the clerk enters a default judgment declaring plaintiff to be the owner of an undivided interest in lands in accordance with the facts alleged in the complaint, but does not appoint a receiver or make provision for an accounting as prayed for, the judgment is conclusive as to title, but the suit remains pending in the superior court for such further relief to which plaintiff may be entitled consequent upon the adjudication of title. *Ionic Lodge v. Ionic, etc., Co.*, 232 N. C. 252, 59 S. E. (2d) 829 (1950).

V. PERSONAL PROPERTY.

Editor's Note.—The Act of 1929 added subsection 5.

VI. SETTING ASIDE.

Sections 1-272, 1-273 and 1-274 Are Inapplicable.—Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-212, since the jurisdiction of the judge under this and the following section is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

For Jurisdiction of Judge to Set Aside Default Judgment Is Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

Meritorious Defense.—A judgment by default final for want of an answer, when it is made to appear on appeal that one by default and inquiry should have been entered, is an irregular judgment, but on defendant's motion to set aside, he must

show a meritorious defense. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928); *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928).

Remand for Determination of Question.—Where on appeal from the setting aside an irregular judgment of default final it does not appear that the question of a meritorious defense was considered or passed upon, and that the movant intended to allege one, the case will be remanded for the determination of this question as to whether the defendant has such meritorious defense as calls for the vacating of the judgment. *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928).

Judgment Is Valid Lien When No Attack Made.—Where a judgment by default final instead of by default and inquiry has been rendered for goods sold and delivered on open account, the judgment is not void but is merely irregular, and when no attack is made upon it at the hearing, it constitutes a valid lien upon the lands of the judgment debtor. *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

§ 1-212. By default and inquiry.—In all other actions, except those mentioned in § 1-211, when the defendant fails to answer and upon a like proof, judgment by default and inquiry may be had, and inquiry shall be executed at the next succeeding term. If the taking of an intricate or long account is necessary to execute properly the inquiry, the court, at the return term, may order the account to be taken by the clerk of the court or some other fit person, and the referee shall make his report at the next succeeding term; in all other cases the inquiry shall be executed by a jury, unless by consent the court is to try the facts as well as the law. (Code, s. 386; Rev., s. 557; C. S., s. 596.)

Cross References. — See note under § 1-211. See also, § 1-209.

Nature in General.—“A judgment by default is one thing; a judgment by default and inquiry consists of two things. There are two kinds of judgments by default—one final, the other interlocutory. In actions sounding in damages the interlocutory judgment, which is rendered for want of an answer, is an admission or confession of the cause of action; and there follows a writ of inquiry by means of which the damages are to be assessed.” *Junge v. MacKnight*, 137 N. C. 285, 49 S. E. 474 (1904). See also, *Bowie v. Tucker*, 206 N. C. 56, 173 S. E. 28 (1934), also referring to §§ 1-209 through 1-211.

A judgment by default and inquiry for the want of an answer establishes the cause of action and leaves the question of the amount of damages open to the inquiry. *Farmer-Cole Plumbing Co. v. Wilson Hotel Co.*, 168 N. C. 577, 84 S. E. 1008 (1915); *Armstrong v. Ashbury*, 170 N. C.

160, 86 S. E. 1038 (1915); but the burden of proving any damages beyond such as are nominal still rests upon the plaintiff. *Hill v. Hotel Co.*, 188 N. C. 586, 125 S. E. 266 (1924).

A judgment by default and inquiry is conclusive that the plaintiff has a cause of action and entitles him to nominal damages without further proof. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36 (1929).

The effect of the failure of the defendants to appear in response to the summons and complaint personally served upon them was to establish pro confesso in the plaintiff a right of action of the kind properly pleaded in the complaint and thereupon the plaintiff became entitled as a matter of law to recover on the cause of action set out in his complaint. *Presnell v. Beshears*, 227 N. C. 279, 41 S. E. (2d) 835 (1947).

A judgment by default final as authorized by § 1-211, is different in effect and result from a judgment by default and inquiry as authorized by this section. The former

establishes the allegations of the complaint and concludes by way of estoppel, while the latter "establishes a right of action in the plaintiff of the kind stated in the complaint" the precise character and extent of which remain to be determined by a hearing in damages and final judgment thereon. *DeHoff v. Black*, 206 N. C. 687, 175 S. E. 179 (1934).

Where Action Sounds in Damages.—In an action sounding in damages, for an unliquidated money demand, the judgment should be by default and inquiry. *Moore v. Mitchell*, 61 N. C. 304 (1867).

In actions sounding in damages, as in assumpsit, covenant and trespass, a judgment by default is only interlocutory, and the amount of damages must be ascertained by a jury. But in actions not sounding in damages, it is held that if the plaintiff's claim for damages is precise and final by the agreement of the parties, or can be rendered certain by mere computation, there is no need of proof, as the judgment by default admits the claim. An inquiry is necessary only where the claim is uncertain. *Adrian v. Jackson*, 75 N. C. 536 (1876).

Where a complaint has been properly filed showing a right of action for unliquidated damages, a judgment by default and inquiry establishes plaintiff's right of action and that he is entitled at least to nominal damages. And in this State it is further held that such a judgment concludes on all issuable facts properly pleaded and that evidence in bar of plaintiff's right of action is not admissible on the inquiry as to damages. *DeHoff v. Black*, 206 N. C. 687, 175 S. E. 179 (1934).

Action on Official Bond.—See note of *Battle v. Baird*, 118 N. C. 854, 24 S. E. 668 (1896), under § 1-211, analysis line "Definite Debt."

Action on Contract for Goods Sold and Delivered.—See note of *Jeffries v. Aaron*, 120 N. C. 167, 26 S. E. 696 (1897), under § 1-211, analysis line "Definite Debt."

Where Amount Cannot Be Ascertained by Computation.—Where it appears that the amount of the final judgment on default of answer could not be ascertained by com-

putation or be fixed by the terms of the contract sued on, it is proper to enter judgment by default and inquiry. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118 (1890).

Time of the Inquiry.—An inquiry as to damages cannot be executed at the same term or that at which judgment by default is rendered, unless it is expressly allowed by statute. *Brown v. Rinehart*, 112 N. C. 772, 16 S. E. 840 (1893).

Where it appears on appeal that the inquiry was made at the same term the cause will be remanded so that the inquiry may be made as this section provides. And this is true although the defendant was in the courtroom and did not except to the inquiry or to the submission of the issues there in the capacity of a witness for plaintiff. As to whether a party may waive this provision of the statute, *quaere?* *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36 (1929).

Appeals from Judgments Entered by Clerk.—Sections 1-272, 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, are inapplicable to appeals from orders or judgments entered by the clerk pursuant to this section or § 1-211, since the jurisdiction of the judge under this and the preceding section is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

Jurisdiction of Judge Is Concurrent and Original.—The judge of a superior court has concurrent jurisdiction with the clerk of the court to enter judgments by default, and to vacate such judgments, and the jurisdiction of the judge on motion to set aside a default judgment entered by the clerk is original as well as appellate. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

Cited in *Ward & Ward v. Agrillo*, 196 N. C. 95, 144 S. E. 697 (1928); *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945); *Russell v. Edney*, 227 N. C. 203, 41 S. E. (2d) 585 (1947); *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949); *Lindsey-Robinson & Co. v. Jones*, 230 N. C. 756, 55 S. E. (2d) 80 (1949).

§ 1-213. By default for defendant.—If the answer contains a statement of new matter constituting a counterclaim, and the plaintiff fails to reply or demur thereto, the defendant may move for such judgment as he is entitled to upon such statement; and if the case requires it, an order for an inquiry of damages by a jury may be made. (C. C. P., s. 106; Code, s. 249; Rev., s. 558; C. S., s. 597.)

Editor's Note.—In the dissenting opinion by Walker, J., in *Wilmington v. Bryan*, 141 N. C. 666, 54 S. E. 543 (1906), it is in-

timated that in view of the fact that the section does not expressly make provision for the defendant taking judgment for the

excess of his counterclaim, as is the case of the plaintiff whose claim exceeds the defendant's counterclaim, it is contemplated that there be rendered a separate judgment for the respective claims of the parties. But there was an inclination to construe the section so as to conform with the general spirit of the code that all controversies should be settled in one action and as far as possible by one judgment.

Section Applicable Only Where Affirmative Relief Sought.—It is only when a counterclaim is relied on as grounds for substantial relief that the plaintiff's failure to reply may afford grounds for a judgment for want of a replication, but not when the matter constitutes a defense to the action merely. *Barnhardt v. Smith*, 86 N. C. 473 (1882).

Where Defendant's Counterclaim Unanswered.—Where the defendant seeks substantial relief in his answer, by way of counterclaim, and the plaintiff fails to reply (or demur) thereto in apt time, the defendant is entitled to judgment for such relief as the facts therein set forth may warrant, *Dempsey v. Rhodes*, 93 N. C. 120 (1885), and the defendant is entitled to judgment even though the objection to

his counterclaim would have been granted if it had been made in apt time and form. *Rountree v. Britt*, 94 N. C. 104 (1886).

Where in an action in which defendants set up a counterclaim, the plaintiff failed to reply thereto, and the defendants failed to except to a refusal of their motion for judgment by default, it was held, that the defendants had waived the right to judgment on their counterclaim for failure to except. *Faucette v. Ludden*, 117 N. C. 170, 23 S. E. 173 (1895).

Recovery by Administrator Prior to That on Defendant's Counterclaim.—

Where an administrator recovers judgment upon his cause of action, and the defendant also upon his counterclaim, the former is entitled to an execution for the entire amount of his recovery; but the execution on the defendant's judgment will be stayed until it is ascertained what amount of the assets of the estate of the intestate is applicable thereto. *Rountree v. Britt*, 94 N. C. 104 (1886).

Cited in *Baker v. Corey*, 195 N. C. 299, 141 S. E. 892 (1928); *Standard Supply Co. v. Vance Plumbing, etc., Co.*, 195 N. C. 629, 143 S. E. 248 (1928); *Bowie v. Tucker*, 206 N. C. 56, 173 S. E. 28 (1934).

§ 1-214. Judgment by default where no answer filed; record; force; docket.—If no answer is filed, the plaintiff shall be entitled to judgment by default final or default and inquiry as authorized by §§ 1-211, 1-212, and 1-213, and all present or future amendments of the said sections; and all judgments by default final shall be duly recorded by the clerk and be docketed and indexed in the same manner as judgments rendered in term, and in all respects be and become judgments of the superior court and be of the same force and effect as if rendered in term and before a judge of the superior court; and in all cases of judgment by default and inquiry rendered by the clerk, the clerk shall docket the case in the superior court at term time for trial upon the issues raised before a jury, or otherwise, as provided by law, and all judgments by default and inquiry shall be of the same force and effect as if rendered in term and before a judge of the superior court. (Ex. Sess., 1921, c. 92, s. 9; C. S., s. 597(a).)

When answer has been filed, even though after time for answering has expired, the clerk is without authority, so long as the answer remains filed of record, to enter judgment by default. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Cited in *Earle v. Earle*, 198 N. C. 411, 151 S. E. 884 (1930); *Cook v. Bradsher*, 219 N. C. 10, 12 S. E. (2d) 690 (1941); *Presnell v. Beshears*, 227 N. C. 279, 41 S. E. (2d) 835 (1947).

§ 1-215. Time for rendering judgments and orders.—Judgments and orders may be rendered by the clerk on any day of the week except Sundays. All judgments rendered by the clerk in any county on the same day and docketed on that day, or within ten days thereafter, are held and deemed to have been rendered and docketed on the same day for the purpose only of establishing equal priority as among such judgments. In a special proceeding, the clerk may enter any judgment or order, either interlocutory or final, and confirm any sale on any day of the week except Sundays. (Ex. Sess. 1921, c. 92, s. 10; 1923, c. 68; C. S., s. 597(b); 1943, c. 301, s. 2.)

Local Modification.—Vance: 1941, c. 139, § 2.

Cross References.—As to judgments authorized to be entered by clerk, see § 1-209.

As to validation of certain deeds and judgments made after foreclosure of mortgages and deeds of trust wherein confirmation of sale was made on a day other than the first or third Monday of the month, see § 45-21.41.

Editor's Note.—Prior to the 1943 amendment, which made this section applicable to orders, judgments were required to be en-

tered by the clerk on Mondays.

Under the former statute, providing that no judgment shall be entered by the clerk except on Monday, unless otherwise provided, a judgment rendered by the clerk on any other day was void. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521 (1944).

§ 1-215.1. Judgments or orders not rendered on Mondays validated.—In any case where, prior to the ratification of this section, any judgment or order, required to be rendered or signed on Monday, has been rendered or signed by any clerk of the superior court on any day other than Monday, such judgment or order is hereby declared to be valid and of the same force and effect as if the day on which it was signed or rendered had been a Monday; and any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the confirmation of sale was made on a day other than Monday, is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1943, c. 301, s. 4.)

Legislature Cannot Validate Void Judgment.—This section was directly intended to validate judgments not rendered on Monday as required by the former statute.

However, it is well understood that the legislature has no power to validate a void judgment. *Ange v. Owens*, 224 N. C. 514, 31 S. E. (2d) 521 (1944).

§ 1-215.2. Time within which judgments or orders signed on days other than Mondays may be attacked.—From and after the 30th day of September, 1951, no action shall be brought or no motion in the cause shall be made to attack any judgment or order of any clerk of the superior court by reason of such judgment or order having been signed by such clerk of the superior court on any day other than Monday. (1951, c. 895, s. 1.)

§ 1-215.3. Validation of conveyances pursuant to orders made on days other than Mondays.—From and after the 30th day of September, 1951, any conveyance executed by any commissioner or other person authorized to make a conveyance in any action or special proceeding where the appointment of the commissioner or other person, the order of sale, the order of resale, or the order of confirmation of sale was made on a day other than Monday is hereby declared to be valid and to have the same force and effect as if the day on which such judgment or order was rendered had been a Monday. (1951, c. 895, s. 2.)

§ 1-216: Repealed by Session Laws 1943, c. 301, s. 3.

§ 1-217. Certain default judgments validated.—In every case where, prior to the first day of January, one thousand nine hundred and twenty-seven, a judgment by default final has been entered by the clerk of the superior court of any county in this State on a day other than Monday, contrary to §§ 1-215 and 1-216, such judgment shall be deemed to have been entered as of the first Monday immediately following the default and is hereby to all intents and purposes validated; provided, however, nothing in this section shall be construed to affect the rights of any interested party, as provided in section 1-220 other than for irregularity as to date of entry of the judgment by the clerk of the court. (1927, c. 187.)

§ 1-217.1. Judgments based on summons erroneously designated alias or pluries validated.—In all civil actions and special proceedings where the defendants were served with summons and judgment thereafter entered, or any final decree made, the said judgments or decrees shall not be invalidated

by reason of the fact that the summons, although designated an alias or pluries summons, was not actually such: Provided, that this section shall not apply where the first summons was issued more than five years preceding March 6, 1943. (1943, c. 532.)

§ 1-218. Rendered in vacation.—In all cases where the superior court in vacation has jurisdiction, and all of the parties unite in the proceedings, they may apply for relief to the superior court in vacation, or in term time, at their election. (1871-2, c. 3; Code, s. 230; Rev., s. 559; C. S., s. 598; 1937, c. 361; 1949, c. 719, s. 2.)

Cross References.—As to jurisdiction, in vacation and at term, see § 7-65. As to appeal from decision of Utilities Commissioner, at term or in vacation, see §§ 62-20, 62-22. As to relief in mandamus, at term or in vacation, see § 1-513.

Editor's Note.—The 1949 amendment struck out the former second paragraph relating to confirmation of judicial sales which had been added by the 1937 amendment.

For article discussing the 1937 amendment, see 15 N. C. Law Rev. 338.

Judgment May Be Taken Out of Term by Consent.—By consent of the counsel of

both sides, a judgment may be entered in vacation. *Westhall v. Hoyle*, 141 N. C. 337, 53 S. E. 863 (1906), and cases cited.

Amendment of Judgment after Adjournment without Consent Invalid.—An amendment of a judgment made by a judge after the last session of the court, in his room at a hotel, without the consent, and in the absence of the opposing counsel, is invalid. *Hinton v. Insurance Co.*, 116 N. C. 22, 21 S. E. 201 (1895).

Cited in *Edmundson v. Edmundson*, 222 N. C. 181, 22 S. E. (2d) 576 (1942); *Grady v. Parker*, 228 N. C. 54, 44 S. E. (2d) 449 (1947).

§ 1-219. On frivolous pleading.—If a demurrer, answer or reply is frivolous, the party prejudiced thereby may apply to the court or judge for judgment thereon, which may be given accordingly. (C. C. P., s. 218; Code, s. 388; Rev., s. 560; C. S., s. 599.)

Cross References.—As to sham or irrelevant defenses, stricken out on motion, see § 1-126. As to irrelevant or redundant matter in pleading, stricken on motion, see § 1-153.

Purpose of the Section.—The main object of this section is to prevent the rights of one of the parties from being prejudiced by the impertinent and unwarranted pleadings of the other, and to accomplish this result the provision of the section, when brought into operation, simply sets the demurrer (or answer) aside, and leaves the party prejudiced by it to obtain his judgment as if it had not been filed. *Shinner v. Terry*, 107 N. C. 103, 12 S. E. 118 (1890).

Nature of Frivolous Answer.—A frivolous answer, entitling the plaintiff to a judgment on the pleadings, is one which is manifestly impertinent, as alleging matters which do not affect the plaintiff's right to recover. *Dail & Bros. v. Harper*, 83 N. C. 5 (1880).

When the answer is filed in good faith, and the matter of it is not manifestly impertinent, the defendant is entitled to have the facts alleged therein admitted by demurrer or passed on by the jury. *Dail & Bros. v. Harper*, 83 N. C. 5 (1880).

Its Bad Character Should Be Apparent.—An answer should never be held frivolous

unless it is so clearly and palpably bad as to require no argument or illustration to show its character. *Hull Co. v. Carter*, 83 N. C. 249 (1880).

Manner of Objecting.—On the refusal of the court to hold the answer frivolous, no appeal lies, but the plaintiffs should have their exception noted in the record, and if they should lose their case at the trial term the exception would then come up on appeal from the final judgment, or by motion for judgment non obstante veredicto. *Joyner v. Roberts*, 112 N. C. 111, 16 S. E. 917 (1893); *Walters v. Starnes*, 118 N. C. 842, 24 S. E. 713 (1896); *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271 (1898).

Judgment on Frivolous Answer.—When the complaint in an action on a note is verified, judgment may be rendered on a frivolous answer. *Bank v. Pearson*, 119 N. C. 494, 26 S. E. 46 (1896).

Nature of Frivolous Demurrer.—A demurrer is not frivolous that raises a question fit for consideration or discussion. *New Bern Banking Co. v. Duffy*, 156 N. C. 83, 72 S. E. 96 (1911).

Relief.—When a demurrer to the complaint is frivolous, the plaintiff is entitled to judgment by default, unless the trial court is of the opinion that in the exercise of a discretion the facts justify permission

to answer over. *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381 (1906).

Cited in *Shuford v. Yarbrough*, 198 N. C. 5, 150 S. E. 618 (1929).

§ 1-220. **Mistake, surprise, excusable neglect.**—The judge shall, upon such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment, order, verdict or other proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect, and may supply an omission in any proceeding. The clerk may hear and pass upon motions to set aside judgments rendered by him, whether for irregularity or under this section, and an appeal from his order on such motion shall lie to the judge at the next term, who shall hear and pass upon such motion *de novo*: Provided, however, nothing in this section shall be construed to affect the rights of innocent purchasers for value in foreclosure proceedings where personal service is obtained. (C. C. P., s. 133; Code, s. 274; 1893, c. 81; Rev., s. 513; C. S., s. 600; Ex. Sess. 1921, c. 92, s. 14.)

I. In General.

II. The Relief.

III. Application of the Principles.

A. Neglect of Party.

B. Neglect of Counsel.

C. Omissions.

IV. Pleading and Practice.

Cross Reference.

As to authority of a judge to enlarge time for pleadings, etc., in his discretion, see § 1-152.

I. IN GENERAL.

Editor's Note.—See notes to §§ 1-211, 1-212. As to opening default judgment for negligence of attorney, see 26 N. C. Law Rev. 84.

The proviso at the end of this section was added by the 1921 amendment.

The older decisions indicate that this section received, at first, a rather strict construction and the party seeking relief hereunder was required to show that his case fell within the accepted definition, which was a rigid one, of the particular term on which he based his request. However, the courts, in the more recent cases, have been far more liberal. The statute is remedial in its nature and bespeaks the legislative intent for the courts to discover the substantial rights and equities of the parties and to prevent as far as possible the miscarriage of justice because of some technical rule of law.

In reference to the conflicting decisions under this section, the court in *Depriest v. Patterson*, 85 N. C. 376 (1881), said: "The cases are numerous and not in entire harmony upon the proper rendering of this statute, which enlarges the authority of the court over its own judgments, and permits, in specified cases, their reversal [or modification] within a year after notice of their rendition, at the discretion of the court."

Applies Only to Matters of Fact.—This

section does not extend to mistakes as to the law applicable, but only as to matters of facts by which the party may reasonably be misled or surprised. *Skinner v. Terry*, 107 N. C. 103, 12 S. E. 118 (1890); *Crissman v. Palmer*, 225 N. C. 472, 35 S. E. (2d) 422 (1945).

The relief given under this section, on the ground of "mistake, inadvertence, surprise or excusable neglect" refers to mistake of fact and not of law. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

However, the larger part of the court's jurisdiction under this section is invoked under "excusable neglect" where there is neither mistake of law nor fact. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

So a judgment may be set aside for excusable neglect irrespective of whether the neglect is induced by mistake of fact or law. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

The remedy provided by this section is restricted to the parties aggrieved by the judgment or order sought to be set aside, and the superior court has no power to set aside a judgment or order once rendered upon motion of a stranger to the cause. *In re Hood*, 208 N. C. 509, 181 S. E. 621 (1935), citing *Smith v. New Bern*, 73 N. C. 303 (1875); *Edwards v. Phillips*, 91 N. C. 355 (1884).

Applicable to Both Adult and Infant Parties.—In application for relief under this section no distinction is made between adult and infant parties, provided the latter are represented according to the requirements of the law and the practice of the court. *Mauney v. Gidney*, 88 N. C. 200 (1883).

This section applies only when the judgment is rendered according to the course and practice of the court. And a motion in a cause to set aside a default judgment

on the ground that the time it was rendered by the clerk a duly filed answer appeared of record was held not a motion to set aside for surprise and excusable neglect. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Not Applicable to Irregular Verdicts.—Where an irregular verdict is rendered by the court the same cannot be set aside or altered under the provisions of this section. *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905); *Gough v. Bell*, 180 N. C. 268, 104 S. E. 535 (1920); *Hood v. Stewart*, 209 N. C. 424, 184 S. E. 36 (1936).

Nor to Irregular Judgment.—*Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554 (1942), citing *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905); *Duffer v. Brunson*, 188 N. C. 789, 125 S. E. 619 (1924).

Where Judgment Rendered on Verdict.—The statute, in conferring the power, confines its exercise to judgments rendered under the specified conditions, and does not embrace such as necessarily follow the verdict, and the setting aside of which, without at the same time disturbing the verdict, would be of no advantage to the party, for it must again be entered in response to the jury findings. *Flowers v. Alford*, 111 N. C. 248, 16 S. E. 319 (1892). Hence, where a judgment has been rendered on a verdict the judgment and verdict may not be set aside for excusable neglect under this section. *Clemmons v. Field*, 99 N. C. 400, 6 S. E. 790 (1888); *Brown v. Rhinehart*, 112 N. C. 772, 16 S. E. 840 (1893).

Applicable Only to Judgments Rendered at Prior Terms.—A motion to set aside a judgment for excusable neglect, made at the time the judgment was signed, will be denied, such matters being in fieri during the term, as this section applies only to judgments rendered at prior terms. *Gold v. Maxwell*, 172 N. C. 149, 90 S. E. 115 (1916).

The surprise contemplated by this section is some condition or situation in which a party to a cause is unexpectedly placed to his injury, without any fault or negligence of his own, which ordinary prudence could not have guarded against. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

Excusable Neglect and Meritorious Defense.—A judgment may be set aside under this section if the moving party can show excusable neglect, and that he has a meritorious defense. *Dunn v. Jones*, 195 N. C. 354, 142 S. E. 320 (1928). And see *Henderson Chevrolet Co. v. Ingle*, 203 N. C. 158, 162 S. E. 219 (1932); *Bowie v. Tucker*, 206 N. C. 56, 173 S. E. 28 (1934),

affirming 197 N. C. 671, 150 S. E. 200; *Jones v. Craddock*, 211 N. C. 382, 190 S. E. 224 (1937).

The action of the trial court in setting aside the judgment for surprise and excusable neglect, etc., and placing the parties in statu quo, will be upheld on appeal, under this section, the record disclosing that the answer of the defendant set up a meritorious defense. *Cagle v. Williamson*, 200 N. C. 727, 158 S. E. 391 (1931).

Court held without discretion to vacate default judgment except upon a finding of fatal irregularity or excusable neglect and meritorious defense. *Wilson v. Thaggard*, 225 N. C. 348, 34 S. E. (2d) 140 (1945).

Where the answer and record disclose a meritorious defense the denial of the trial court of a motion to set aside the judgment under this section because defendant had offered no evidence of a meritorious defense, is erroneous. *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133 (1951).

The court's order setting aside the judgment by default against the corporation that had not been properly served with summons on the ground of excusable neglect was not error, the motion having been made in apt time and a meritorious defense also being found as a fact upon supporting evidence. *Hershey Corp. v. Atlantic Coast Line R. Co.*, 203 N. C. 184, 165 S. E. 550 (1932).

Where service of summons was had on defendant bus company by service on an employee of the lessees of a bus station who sold tickets for the bus companies using the station in compliance with § 1-97(1) but the ticket saleswoman failed to notify defendant, and judgment by default final was taken against it, it was held that the neglect of the ticket saleswoman will not be imputed to defendant, and the trial court had discretionary power to set aside the judgment upon a showing of meritorious defense. *Townsend v. Carolina Coach Co.*, 231 N. C. 81, 56 S. E. (2d) 39 (1949).

The question of meritorious defense becomes immaterial in the absence of sufficient showing of excusable neglect. *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945); *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946).

Where a cause has been remanded to the State from the federal court by the latter court, and the clerk of the former court has had entered, without notice to defendant, a judgment by default and inquiry for the want of an answer, pending the disposition of the cause in the federal court, and the order of remand has been regularly made, upon motion of the plaintiff's at-

torney, the judge of the superior court of the State having jurisdiction may set aside the judgment by default and inquiry upon the ground of mistake, inadvertence, surprise, or excusable neglect, upon the showing of a meritorious defense. *Abbitt v. v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928).

Where the judge presiding at a term of the superior court corrects a judgment he has inadvertently signed dismissing the action, and in the absence of the defendant, enters a judgment sustaining a demurrer to the complaint and granting the parties additional time in which to file amended pleadings, and the plaintiff files an amended complaint, a copy of which the defendant fails to receive, and the clerk grants a judgment by default and inquiry thereon, the action of the trial court at a succeeding term setting aside such judgment for excusable neglect without a finding of a meritorious defense will be reversed. *Bowie v. Tucker*, 197 N. C. 671, 150 S. E. 200 (1929).

Excusable Neglect Alone Is Insufficient.

—A party, moving in apt time under the provisions of this section, to set aside a judgment taken against him, on the ground of excusable neglect, not only must show excusable neglect, but also must make it appear that he has a meritorious defense to the plaintiff's cause of action. *Hanford v. McSwain*, 230 N. C. 229, 53 S. E. (2d) 84 (1949). See *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133 (1951).

Meritorious Defense or Cause of Action Must Be Shown.

—In order to set aside a judgment for mistake, surprise or excusable neglect, there must be a showing of a meritorious defense so that the courts can reasonably pass upon the question whether another trial, if granted, would result advantageously for the defendant. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1 (1924); *Hill v. Huffines Hotel Co.*, 188 N. C. 586, 125 S. E. 266 (1924). See also, *Fellos v. Allen*, 202 N. C. 375, 162 S. E. 905 (1932); *Hooks v. Neighbors*, 211 N. C. 382, 190 S. E. 236 (1937); *Garrett v. Trent*, 216 N. C. 162, 4 S. E. (2d) 319 (1939).

Existence of a meritorious cause of action is a prerequisite to relief on motion to vacate former judgment. *Craver v. Spough*, 226 N. C. 450, 38 S. E. (2d) 525 (1946).

A party seeking to have a judgment set aside on the ground of excusable neglect, must at least set forth in his application such a case as *prima facie* amounts to a valid defence; whether the defence is valid, is a question to be determined by the court,

not the party. *Mauney v. Gidney*, 88 N. C. 200 (1883).

A denial of a motion to set aside a judgment under this section, will not be disturbed on appeal when there is neither allegation nor finding of a meritorious defense, and the supreme court will not consider affidavits for the purpose of finding facts in motions of this sort. *Clayton v. Clark*, 212 N. C. 374, 193 S. E. 404 (1937).

Where defendant was indicted for breaking and entering, and upon his failure to appear judgment nisi was entered against him and his surety, and *sci. fa.* issued and served upon defendant surety, and upon return of the *sci. fa.* judgment absolute was entered against defendant and his surety, and subsequently, defendants made a motion to set the judgment aside because of surprise and excusable neglect alleging that they had been misled because the motion for judgment absolute did not appear for hearing on the printed calendar of cases to be heard at that term, it was held that the motion was properly denied since defendants made no allegation that they had any meritorious defense, and none was presented on the hearing of their motion. *State v. O'Connor*, 223 N. C. 469, 27 S. E. (2d) 88 (1943).

Same — When Defendant Non Compos Mentis.—A judgment obtained against one who was non compos mentis is not void, but voidable, and can only be set aside for excusable neglect and the showing of a meritorious defense. *Farmers, etc., Bank v. Duke*, 187 N. C. 386, 122 S. E. 1 (1924).

Under this section a verification of a complaint which is sworn to with uplifted hand rather than on the Bible is not a sufficient ground for setting aside a judgment entered by default. *Fellos v. Allen*, 202 N. C. 375, 162 S. E. 905 (1932).

Where the trial court upon conflicting evidence finds as a fact that the summons in the action was in fact served on the defendant, the finding is conclusive. *Hooker v. Forbes*, 202 N. C. 364, 162 S. E. 903 (1932).

Consent Judgment. — Where the court enters a judgment on its record appearing to have been by the consent of the parties, it cannot thereafter be changed or altered, or set aside, without the consent of the parties to it, unless it appears, upon proper allegation and proof and a finding of the court wherein it had been entered, that it was obtained by fraud or mutual mistake, or that consent had not in fact been given. The burden is on the party attacking the judgment to show facts which will entitle

him to relief. *Gardiner v. May*, 172 N. C. 192, 89 S. E. 955 (1916).

Where, upon a motion to set aside a judgment for surprise and excusable neglect as provided by this section, on the ground that the judgment was a consent judgment and was signed by movant's attorney without authority, and a motion to set aside the consent judgment for such want of authority by movant's attorney, the court finds, upon evidence by affidavits, that the attorney was duly authorized to sign the judgment for movant, the finding is conclusive on the Supreme Court upon appeal, and the order refusing the motions will be upheld. *Alston v. Southern Ry. Co.*, 207 N. C. 114, 176 S. E. 292 (1934).

Valid Judgment Regularly Entered.—In order for the trial judge to set aside a judgment of the clerk of court, for default of an answer, under this section, the judgment must be a valid one and regularly entered. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928).

The "Mistake, etc.," Must Be of the Party Seeking Relief. — This section applies only where the mistake, surprise, etc., is that of the party seeking relief and has no application where the mistake, and surprise arises from the fraudulent conduct of another, *Boyden v. Williams*, 80 N. C. 95 (1879); nor where a motion is made to correct an erroneous judgment rendered at a former term if it appears that the error committed was that of the court and not that of the party. *Simmons v. Dowd*, 77 N. C. 155 (1877).

Time. — A party operating under this section has a right to set aside a judgment rendered against him within a year after notice thereof, *Howell v. Harrell*, 71 N. C. 161 (1874); *Long v. Cole*, 74 N. C. 267 (1876); and where the motion is not made within such time it is fatal to the proceedings. *Young v. Greenlee*, 85 N. C. 593 (1881). But an irregular judgment need not be set aside within this period. *Monroe v. Whitted*, 79 N. C. 508 (1878).

Same—Estimation of Period Allowed.—Where the judgment complained of is rendered on a summons personally served within the jurisdiction, this one-year period shall be estimated from its rendition. *McLean v. McLean*, 84 N. C. 366 (1881); *Lee v. McCracken*, 170 N. C. 575, 87 S. E. 497 (1916).

Personal Notice Required. — The language "through his" contained in this section indicates personal knowledge. *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648 (1926). Where not personally served,

the party may make his motion within twelve months after actual notice of the judgment. *McLean v. McLean*, 84 N. C. 366 (1881); *Jernigan v. Jernigan*, 178 N. C. 84, 100 S. E. 184 (1919).

Where a party has been brought into court by the personal service of a summons, or voluntarily does so as a party defendant, he is presumed to take notice of all the various legal steps in the proceedings, and when he seeks to have a judgment therein rendered set aside after notice, etc., he must show the surprise, mistake or excusable neglect necessary for his purpose within one year, under the provisions of this section. *Askew v. Capehart*, 79 N. C. 17 (1878); *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648 (1926).

Where judgment was rendered against the defendant in a justice's court, from which he appealed to the superior court, where judgment was again rendered against him, he making no defence to the action, and more than one year after the docketing of the judgment the judge of the superior court set the same aside and ordered the case to be reopened on the ground that defendant had no notice of the judgment, it was held to be error. *McDaniel v. Watkins*, 76 N. C. 399 (1877).

Same—Where Service Had by Publication. — Where the summons is served by publication the rights of the parties are more directly affected and controlled by § 1-108 and not under this section. *Bank v. Palmer*, 153 N. C. 501, 69 S. E. 507 (1910); *Foster v. Allison Corp.*, 191 N. C. 166, 131 S. E. 648 (1926).

Applicable in Supreme Court.—Although this section, in terms, applies only to a judge of the superior court, the spirit and equity of its provisions extend equally to the Supreme Court, and the same power resides here to relieve from a judgment taken against a party through "mistake, inadvertence, surprise or excusable negligence." *Wade v. New Bern*, 73 N. C. 318 (1875).

Facts Must Be Stated.—Before a judge can vacate a judgment under this section on the grounds of excusable neglect he must find and state the facts. *Clegg v. New York White Soapstone Co.*, 66 N. C. 391 (1872); *Powell v. Weith*, 66 N. C. 423 (1872).

Nature of Question Involved.—The mistake, surprise, inadvertence or excusable neglect, as a ground for relieving a party from a judgment, etc., is a question of law, and if the judge below errs in his ruling in regard thereto, his decision is subject to

review. *Powell v. Weith*, 68 N. C. 342 (1873).

Where deed with the notary's certificate showed his commission expired before date of deed and grantee had been in possession thereof approximately twenty years, and the plaintiff in his reply, on file some time before the trial, had denied that there had been a valid registration of the deed under which defendant claimed mineral interests, and the record of the commissioning of notaries was at all times available to grantee, he could not claim surprise or inadvertence because record showed notary's commission had not expired. *Crissman v. Palmer*, 225 N. C. 472, 35 S. E. (2d) 422 (1945).

Applied in *Anderson v. National Union Fire Ins. Co.*, 202 N. C. 835, 162 S. E. 922 (1932); *Spell v. Arthur*, 205 N. C. 405, 171 S. E. 171 (1933); *Craver v. Spaugh*, 226 N. C. 450, 38 S. E. (2d) 525 (1946); *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

Quoted in *Southern Butane Gas Corp. v. Bullard*, 232 N. C. 730, 62 S. E. (2d) 335 (1950).

Cited in *Buchanan v. B. & D. Coach Line*, 194 N. C. 812, 140 S. E. 439 (1927); *Union Nat. Bank v. Hagaman*, 208 N. C. 191, 179 S. E. 759 (1935); *O'Briant v. Bennett*, 213 N. C. 400, 196 S. E. 336 (1938); *Rosser v. Mathews*, 217 N. C. 132, 6 S. E. (2d) 849 (1940); *State v. Pelley*, 222 N. C. 684, 24 S. E. (2d) 635 (1943); *Tomlins v. Cranford*, 227 N. C. 323, 42 S. E. (2d) 100 (1947).

II. THE RELIEF.

Discretionary with the Judge.—The application for relief under this section is addressed to the discretion of the judge presiding. *Bank v. Foote*, 77 N. C. 131 (1877).

The discretion to set aside a judgment is not given by this section, unless there has been excusable neglect. If the judge finds correctly that the negligence was inexcusable, that ends the motion; if he finds correctly that the negligence was excusable or not, his discretion to set aside is not reviewable, unless in case of gross abuse of discretion. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269 (1899). As to setting aside the judgment see note of *Beck v. Bellamy*, 93 N. C. 129 (1885)—analysis line, "Pleading and Practice."

The setting aside of a judgment under this section is in the sound legal discretion of the trial judge. *Dunn v. Jones*, 195 N. C. 354, 142 S. E. 320 (1928).

The discretionary power of the trial

court to set aside a default judgment for mistake, inadvertence, surprise or excusable neglect is a legal discretion and reviewable. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

Nature of Relief.—A judgment may be set aside, in whole or in part; the court is invested by the statute with full legal discretion over the matter. *Geer v. Reams*, 68 N. C. 197 (1883).

Refusal to Entertain Motion.—The provisions of this section make it discretionary with a judge whether he will relieve a party against a judgment taken against him through his "inadvertence, mistake, surprise, or excusable neglect." If a judge refuses to entertain a motion to set aside a judgment for any of the enumerated causes, because he thinks he has no power to grant it, then there is error, and he has failed to exercise the discretion conferred on him by law. *Hudgins v. White*, 65 N. C. 393 (1871).

Injunction Improper.—An injunction to restrain plaintiff from executing his judgment against defendant will not be granted. The proper remedy to remove an alleged grievance is an application to modify the terms of the judgment. *Walker v. Gurley*, 83 N. C. 429 (1880); *Parker v. Bledsoe*, 87 N. C. 221 (1882).

Modification by One Judge of Judgment Rendered by Another.—Where on notice and showing that there was on the part of the complainant a mistake, inadvertence, surprise or excusable neglect by which he was injured, the judgment rendered against him may be modified by a judge other than the one by whom it was rendered. *Johnson v. Marcom*, 121 N. C. 63, 28 S. E. 58 (1897).

Effect of Availability of Other Relief.—The fact that a plaintiff may, when non-suited, bring a new action within a year does not prevent the judgment from being set aside, like any other judgment, on the ground of excusable neglect, but to authorize the court to set aside such a judgment excusable neglect must clearly appear. *Stith v. Jones*, 119 N. C. 428, 25 S. E. 1022 (1896).

III. APPLICATION OF THE PRINCIPLES.

A. Neglect of Party.

For the personal inattention of a suitor no relief can be granted under this section. *Royster & Co. v. Wicker*, 87 N. C. 14 (1882).

Where Summons Regularly Served.—A party is guilty of inexcusable neglect, and

is not entitled to relief against a judgment rendered against him, where it appears that a summons was regularly served, and he paid no attention to the case either in person or by attorney, even although he supposed he was not required by the law to answer the complaint until served with a copy. *Churchill v. Brooklyn Life Ins. Co.*, 88 N. C. 205 (1883).

Where, notwithstanding the summons and complaint in a civil action were duly served on defendant and copies left with him, defendant failed for a period of thirty days to acquaint himself with their contents and to file an answer or other defense, attributing his inattention and neglect to the similarity of the title of the case to a former action and to his preoccupation in the duties of his profession, there is no evidence in law to constitute such excusable neglect as would relieve an intelligent and active businessman from the consequences of his conduct as against diligent suitors proceeding in accordance with the statute. *Johnson v. Sidbury*, 225 N. C. 208, 34 S. E. (2d) 67 (1945).

Mistake as to Nature of Summons.—The fact that a defendant supposed a summons which was served on him to be a paper in another cause pending between himself and plaintiff, and for that reason did not take any measure to answer the same, is not such excusable neglect as entitled him to relief. *White v. Snow*, 71 N. C. 232 (1874). See *Holden v. Purefoy*, 108 N. C. 163, 12 S. E. 848 (1891), where relief was granted a party who thought he was being summoned as a witness when in fact he was summoned as the defendant.

Failure to File Proper Answer.—Where there are no findings of fact which would show excusable neglect on the part of defendants, or that the failure to file proper answer and undertaking was due to excusable neglect, it is error for court to allow defendant's motion to set aside judgment. *Whitaker v. Raines*, 226 N. C. 526, 39 S. E. (2d) 266 (1946).

Where Party Very Old and Forgetful.—That the defendants were old and feeble, although of sound mind, and that they forgot about the service of summons upon them, and therefore took no steps to defend the action does not show excusable neglect. *Pierce v. Eller*, 167 N. C. 672, 83 S. E. 758 (1914).

Sickness of Party.—Where the defendant was of sound mind, and, though his bodily infirmities confined him, carried on business and defended other suits, a de-

fault judgment against such defendant will not be vacated on account of excusable neglect, because of his infirmities. *Jernigan v. Jernigan*, 179 N. C. 237, 102 S. E. 310 (1920).

Sickness of Attorney.—Findings that the neglect of the defendant was due to the incapacity of her lawyer induced by serious illness, that she had used due diligence and that the attorney's neglect should not be imputed to her, and that defendant has a meritorious defense, is sufficient to support the court's order setting aside a default judgment under this section. *Rierson v. York*, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

Sickness of Family.—Where the defendant indorser of a note was required by the illness of his wife to be outside the State, and the complaint was filed on the first day of the term, and judgment by default was entered two days later, there was sufficient excuse for failure to answer to justify the opening of the default. *Bank v. Brock*, 174 N. C. 547, '94 S. E. 301 (1917).

Where Party Obligated to Question His Counsel.—While, as a general rule a client will be relieved against a judgment by default taken against him through the negligence of his attorney, yet where it devolves upon the client to question his counsel in regard to his case, his failure to do so is inexcusable neglect and relief will be denied. *Holland v. Edgecombe Benev. Ass'n*, 176 N. C. 86, 97 S. E. 150 (1918).

Where the defendant, upon the suggestion of his counsel, allows judgment by default to go against him, he cannot, upon discovering that the recovery is greater than he had anticipated, seek relief under this section for his action does not amount to excusable neglect. *State v. Matthews*, 81 N. C. 289 (1879).

Where Endeavor Is Made to Compromise.—Judgment by default for the want of an answer will not be set aside for excusable neglect, when it was regularly entered at the preceding term of the court, and it appears that the moving party, after endeavoring to compromise, promised to send at once the amount sued for, failed to do so, and his attorney had been notified before the commencement of the term at which the judgment was entered that this course would be taken. *Union Guano Co. v. Middlesex Supply Co.*, 181 N. C. 210, 106 S. E. 832 (1921).

Misled by Conversation of Counsel.—The fact that the party was misled by a conversation between his counsel and the

attorney for the adversary does not entitle him to relief under this section. *Hutchinson v. Rumfelt*, 83 N. C. 441 (1880).

Change of Postoffice.—A judgment by default will not be set aside on the ground of excusable neglect, when it appears that defendants changed their postoffice and did not receive the answer mailed to them by their counsel until eleven months after it was mailed, no inquiry for letters having been made by them at their former postoffice, and no communication being addressed to their counsel concerning the matter until eleven months after the time for answering the complaint had expired. *Vick v. Baker*, 122 N. C. 98, 29 S. E. 64 (1898).

Attorney's Death within Knowledge of Client.—Where an attorney, in whose hands a cause has been placed, dies and the client has notice of such fact and fails to file his answer at the proper time, he cannot later claim relief under this section on the ground of excusable neglect. *Simpson v. Brown*, 117 N. C. 482, 23 S. E. 441 (1895).

Under this section wife's neglect to file answer upon assurances of her husband that he would do so is excusable in joint action against them. *Wachovia Bank, etc., Co. v. Turner*, 202 N. C. 162, 162 S. E. 221 (1932).

Absence from Trial.—It is the duty of a party to be present in court at the trial of his cause for the performance of matters outside the proper duties of his attorney, and where he without cause remains out of court, he cannot claim relief under this section as his act amounts to inexcusable neglect. *Cobb v. O'Hagan*, 81 N. C. 293 (1879).

But the fact that an order in the cause which in effect deprived the plaintiff of the right of appeal, was made at midnight when the plaintiff was absent and did not know, and had no reason to believe that the court was in session, and his counsel not being able to attend to the trial, constitutes a case of "excusable neglect." *Long v. Cole*, 74 N. C. 267 (1876).

Where it appears that a party was in the courtroom at the time the court announced that motions in his case would be heard the following day, his motion to set aside an order made on the day stipulated on the ground of excusable neglect is properly denied. *Abernethy v. First Security Trust Co.*, 211 N. C. 450, 190 S. E. 735 (1937).

Failure to Defend after Denial of Motion for Continuance.—Where the trial court finds that defendants and their at-

torney were present in court, that defendants' motion for a continuance was refused, and that defendants and their attorney thereupon left the courtroom without definite agreement with the court or opposing counsel, and did not return to defend the case, and that both defendants and their attorney had failed to exercise due diligence, the court's refusal of the motion to set aside the judgment will be affirmed on appeal. *Carter v. Anderson*, 208 N. C. 529, 181 S. E. 750 (1935).

Applied in *Colt Co. v. Martin*, 201 N. C. 354, 160 S. E. 287 (1931).

B. Neglect of Counsel.

Editor's Note.—As to what acts of an attorney are or are not attributable to the client, the courts do not appear to be entirely in accord. All seem to adhere to the same general principles, but an almost irreconcilable conflict arises upon the application of these principles to the particular cases. The ruling in each case had been predicated upon one or two outstanding features found therein, and the great weight attached thereto by the courts. A few of the leading cases illustrative of the applicability of the provisions of this section to this particular subject are found in the following paragraphs.

Dividing Line between the Cases Difficult to Determine.—It is difficult to deduce any distinct practical principle from the numerous adjudications, or to run a well-defined line separating those neglects that are, from those that are not excusable in the sense of the statute, and hence the facts relied on must be arranged on the one and then on the other side of that line, in each case as they arise. *Mebane v. Mebane*, 80 N. C. 34 (1879).

Gross Negligence of Attorney.—The omission of an attorney, retained as counsel in a cause, to perform his duty as such in the conduct of the cause is excusable neglect in the party, and the judgment may be vacated under this section. *Griel v. Vernon*, 65 N. C. 76 (1871); *Wiley v. Logan*, 94 N. C. 564 (1886); and this is especially true where the counsel is insolvent and unable to respond in damages for his negligence. *Ice Mfg. Co. v. Raleigh, etc., R. Co.*, 125 N. C. 17, 34 S. E. 100 (1899). This view was adopted in *English v. English*, 87 N. C. 497 (1882), and also in *Deal v. Palmer*, 68 N. C. 215 (1873).

Where Reputable Counsel Employed.—Where a party to an action employs a reputable attorney and is guilty of no negligence himself, the attorney's negligence

in failing to appear and answer will not be imputed to such parties in proceeding to vacate default judgment, but the law will excuse the party and afford him relief. *Stallings v. Spruill*, 176 N. C. 121, 96 S. E. 890 (1918).

Where defendants who employed counsel, learned in the law, and skillful and diligent in its practice, whose zeal and fidelity to the cause of a client are unquestioned, verified their answers promptly and intrusted them to their attorneys for filing, attorneys' failure to file the answers within time required by law was not due to such negligence on part of defendants as deprived the judge of power to grant them relief from a default judgment under this section. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928).

Where a defendant has employed a licensed, reputable attorney of good standing, residing in one county of the State, to defend an action brought in another county, and has put him in possession of the facts constituting his defense, and the attorney has prepared and duly filed an answer, and the case has been calendared and called for trial without notice to the defendant or his attorney, upon a judgment being obtained by default against the defendant, the defendant may, upon his motion aptly made, have the judgment set aside for surprise, excusable neglect, etc., under this section upon a showing of a meritorious defense, the negligence of the attorney, if any, not being imputed to the client, and the latter being without fault. *Meece v. Commercial Credit Co.*, 201 N. C. 139, 159 S. E. 17 (1931).

This section has no bearing on a case of neglect to file answer to a summons and complaint. *Washington v. Hodges*, 200 N. C. 364, 156 S. E. 912 (1931).

Where Counsel Instructed to Employ Other Counsel.—Where the defendant in an action has retained an attorney for his defense, of high character and reputation for diligence and faithfulness in the practice of his profession, with instructions to employ an attorney local to the litigation, and has fully relied on him to notify him of the steps necessary to be taken in his defense, and seeks to set aside a judgment by default therein entered against him for his failure to answer, the laches of the attorney, if any, nothing else appearing, is not attributable to the defendant and the order of the superior court setting aside the judgment for his excusable neglect when otherwise correct will be sustained on appeal. *Helderman*

v. Hartsell Mills Co., 192 N. C. 626, 135 S. E. 627 (1926).

Where Counsel Notified by Mail.—The refusal of a motion as provided by this section, to set aside a judgment for surprise and excusable neglect will be upheld where the trial court finds from competent evidence that notice of the time set for trial was duly sent movant's counsel through the mail, but was not received by him. *Clayton v. Adams*, 206 N. C. 920, 175 S. E. 185 (1934).

Client Misinformed by Attorney as to Time of Trial.—When a defendant moved to vacate a judgment, upon the ground of excusable neglect, and the excuse assigned was that his counsel, by mistake, had misinformed him as to the time of holding court whereby he failed to answer, it was held that the excuse was not sufficient, when the facts show that the defendant did not suffer harm by the mistake of his counsel. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302 (1872).

Where an attorney has ample notice as to the day of the trial, the continued absence of the client for two successive calls is inexcusable neglect for which no relief can be had under this section. *Henry v. Clayton*, 85 N. C. 372 (1881).

Disqualification of Counsel During Pendency of Trial.—Pending a reference, the counsel for a party to the action became disqualified, but the client, although having notice of the subsequent orders, proceedings, etc., in the cause, neglected to retain another counsel. It was held, that this did not require the court to set aside the report and recommit the matter passed upon therein. *Smith v. Smith*, 101 N. C. 461, 8 S. E. 128 (1888).

The withdrawal of defendant's attorney from the case by leave of court when the case is called for trial constitutes "surprise" within the meaning of this section. *Perkins v. Sykes*, 233 N. C. 147, 63 S. E. (2d) 133 (1951).

Though an attorney may withdraw from a case with the permission of the court in proper instances, his client is entitled to such specific notice, either before or after the withdrawal, as will permit him to protect his rights, and where for the failure of such notice a judgment upon a verdict has been obtained against the client and he was without laches in moving to set it aside for surprise and excusable neglect upon a showing of a meritorious defense, it is correct for the trial judge to grant his motion under this section. *Gosnell v. Hilliard*, 205 N. C. 297, 171 S. E. 52 (1933).

Where the court finds that defendant in claim and delivery proceedings was in court when his attorney was allowed to withdraw the case, and was told he would have to employ other counsel, and the case continued to the next term, the refusal of the motion made by himself and the surety on his replevin bond to set aside the judgment taken at the next succeeding term on the ground of mistake, surprise, and excusable neglect is properly refused. *Baer v. McCall*, 212 N. C. 389, 193 S. E. 406 (1937).

The court's permitting counsel for defendant to withdraw from the case, upon the calling of the case for trial, in the absence of notice to defendant constitutes "surprise" but does not entitle defendant to have the judgment set aside in the absence of a showing of a meritorious defense. *Roediger v. Sapos*, 217 N. C. 95, 6 S. E. (2d) 801 (1940).

Mistaken Legal Advice.—Mistaken legal advice by counsel acted on by client, is not remediable under this section—being a mistake of law and not of fact. *Phiher v. Travellers Ins. Co.*, 123 N. C. 405, 31 S. E. 715 (1898).

Attorney Prevented from Examining Complaint.—On motion to set aside a judgment on the ground of excusable negligence, it appeared that the defendant had twice called on the clerk to enter upon the docket the name of the attorney whom he had employed, and the clerk promised to do so. The attorney himself applied to the clerk to examine the plaintiff's complaint, but was unable to see it, and during the remainder of the term was absent in obedience to a summons as a witness, it was held that the defendant's neglect was excusable. *Wynne v. Prairie*, 86 N. C. 73 (1882).

Where Negligence of Attorney Attributable to Party.—A judgment will not be set aside for irregularity and surprise when it appears that it had come to issue and was regularly set upon the trial docket, and judgment entered in the due course and practice of the court, the only grounds upon which relief is sought being the employment of nonresident local attorneys, who were not notified, though means of easy communication in ample time were available, the neglect of the attorneys being personally attributable to the party of the action, whose duty it was also to attend to the action himself, as well as to employ attorneys for the purpose. *Hyde County Land, etc., Co. v. Thomasville Chair Co.*, 190 N. C. 437, 130 S. E. 12 (1925).

Excusable neglect of an attorney, who fails to file an answer for the defendants, may not be attributable to his clients. *Gunter v. Dowdy*, 224 N. C. 522, 31 S. E. (2d) 524 (1944).

Where plaintiff issued summons and filed complaint, serving both on defendant, who in apt time employed an attorney to make answer and resist the suit, and judgment by default was taken by plaintiff, no answer having been filed in consequence of the illness and death of the wife of defendant's attorney and the prolonged illness of the attorney himself, such circumstances constitute excusable neglect under this section. *Gunter v. Dowdy*, 224 N. C. 522, 31 S. E. (2d) 524 (1944).

Where it appears upon the defendant's motion to set aside a judgment by default, pursuant to this section, that the same was regularly calendared for trial, the defendant had notice thereof and was afforded full opportunity to file his answer, but that his attorney had failed to do so, and that the judgment was accordingly rendered, he has not shown such excusable neglect as will entitle him to have the judgment set aside on his motion under the provisions of the statute. *Gaster v. Thomas*, 188 N. C. 346, 124 S. E. 609 (1924); but where no laches are attributable to the client he will be granted relief. *Geer v. Reams*, 88 N. C. 197 (1883).

Removal to Federal Court.—Where the clerk has erroneously granted defendants' motion to remove a cause to the federal court under § 1-584, the moving defendants may assume that no further proceedings will be had in the State court until the cause has been remanded from the federal court, and where a judgment by default and inquiry has been entered therein for the want of an answer, without notice, nothing else appearing to show laches on the part of defendants' attorneys upon relevant findings of the trial judge, including that of meritorious defense, the action of the trial judge in setting aside the judgment and permitting the defendant to file answer will not be disturbed on appeal. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928).

C. Omissions.

Duty of Court to Supply Omissions.—It is the duty of every court to supply the omissions of its officers in recording its proceedings and to see that its record truly sets forth its action in each and every instance; and this it must do upon the application of any person interested, and

without regard to its effect upon the rights of parties, or of third persons; and neither is it open to any other tribunal to call in question the propriety of the action or the verity of its records, as made — and no lapse of time will debar the court of the power to discharge this duty. *Walton v. Pearson*, 85 N. C. 35 (1881).

May Not Be Collaterally Attacked.—The effect of an amendment made by the court cannot be collaterally considered; but must be done in a proceeding brought for that purpose. *Foster v. Woodfin*, 65 N. C. 29 (1871).

IV. PLEADING AND PRACTICE.

Burden of Proof.—A party seeking to vacate a judgment under this section is always at default and the burden is upon him to show facts which would make the refusal to vacate appear to be an abuse of discretion. *Kerchner v. Baker*, 82 N. C. 169 (1880).

Filing of Affidavits.—In hearing a motion to set aside judgments under this section, there is no rule requiring the affidavits to be filed before the hearing of the motion is entered on. *Jones v. Swepson*, 94 N. C. 700 (1886).

Failure of Judge to State the Facts Found.—When, in setting aside a judgment for excusable negligence, the judge does not state the ground on which he founded his order, his action will be upheld if in any aspect of the case it would be proper. *Foley, Bro. & Co. v. Blank*, 92 N. C. 476 (1885).

In setting aside a judgment under this section, the court is required to find the facts not only in regard to the excusable neglect relied on, but also the facts in regard to meritorious defense, and a finding of a "meritorious defense" without finding the facts showing a meritorious defense, is insufficient. *Parnell v. Ivey*, 213 N. C. 644, 197 S. E. 128 (1938).

Rehearing.—A rehearing under this section is not a matter of right, but rests in the sound discretion of the court. *Williams v. Alexander*, 70 N. C. 665 (1874).

Appeal from Order of Clerk.—A motion to set aside and vacate a judgment entered by the clerk, as authorized by statute, may be made before and passed upon by either the judge or the clerk. From an order made by the judge, upon such motion, an appeal may be taken to this court, which has jurisdiction to pass upon and determine all matters of law or legal inference duly presented by appeal. Const. of N. C., Art. 4, § 8. From an order made by the clerk, upon such motion, an appeal will lie to the

judge, who shall hear and pass upon the motion, *de novo*. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925).

The clerk of the superior court has authority to relieve a party from an irregular judgment or one taken against him by mistake, inadvertence, surprise, or excusable neglect; and, on appeal in such cases from the clerk, the judge shall hear and pass upon the matter *de novo*, finding the facts and entering his judgment accordingly. *Gunter v. Dowdy*, 224 N. C. 522, 31 S. E. (2d) 524 (1944).

The findings of fact by the trial judge upon an appeal from an order of the clerk denying defendant's motion to set aside a judgment under this section, are not reviewable when supported by competent evidence. *Kerr v. North Carolina Joint Stock Land Bank*, 205 N. C. 410, 171 S. E. 367 (1933).

Presumption on Appeal.—When the court below refused a party permission to file an answer at a term subsequent to the time allowed by a former order, the appellate court must assume that the question of "excusable neglect" was passed upon. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302 (1872).

Where no evidence appears in the case on appeal from an order setting aside a judgment for surprise and excusable neglect under this section, it will be presumed that the findings of fact are based upon sufficient evidence in the absence of exceptions to the findings, and the order will be affirmed where the findings sustain the court's holding that movants have shown excusable neglect and meritorious defense. *Radeker v. Royal Pines Park*, 207 N. C. 209, 176 S. E. 285 (1934).

Right of Appeal May Be Lost.—The right of appeal from a judgment, and a review thereof for errors of law in it, cannot be restored to a party who has lost the right by a mere motion to vacate and an appeal from the refusal, whether founded on irregularity or for the causes under this section. *Badger v. Daniel*, 82 N. C. 468 (1880).

Same—Certiorari.—The writ of certiorari, as a substitute for an appeal lost, as alleged in this case, will be granted only when the petitioner shows that he has been diligent, and there has been no laches on his part in respect to his appeal, and further, that his failure to take and perfect the same was occasioned by some act or misleading representation on the part of the opposing party, or some other person or cause in some way connected with it and not within his control. *Williamson v.*

Boykin, 99 N. C. 238, 5 S. E. 378 (1888); Graves v. Hines, 106 N. C. 323, 11 S. E. 362 (1890).

Questions Reviewable on Appeal.—Whether upon the facts found by the judge, the neglect of attorneys for defendants to file answers to the complaint within the time required by statute was excusable, or whether, in any event, such neglect was imputable to defendants, are questions of law, with respect to which the conclusions of the judge are reviewable on appeal. Abbit v. Gregory, 195 N. C. 203, 141 S. E. 587 (1928).

Discretion of Judge Not Reviewable on Appeal.—The Supreme Court can review on appeal what is a mistake, surprise or excusable neglect under this section, but it cannot review the discretion exercised by a judge of the superior court under the section. Branch v. Walker, 92 N. C. 87 (1885); Foley, Bro. & Co. v. Blank, 92 N. C. 476 (1885). But should the judge set aside a judgment upon a state of facts which did not bring the case within the scope of the statute, his action would be subject to correction on appeal. Beck v. Bellamy, 93 N. C. 129 (1885).

When the judge grants the relief, in the exercise of his discretion, that conclusion is also not reviewable; but whether the facts found constitute, in law, mistake, inadvertence, surprise, or excusable neglect, may be reviewed, and if it be determined that the court below erred therein, the judgment will be corrected, and the motion remanded, to the end that the trial judge may exercise the discretion conferred on him alone by the statute. Weil & Bro. v. Woodard, 104 N. C. 94, 10 S. E. 129 (1889).

Where, on a motion to set aside a default judgment under this section the trial court finds facts sufficient to support the conclusion that the litigant's neglect was excusable, objection to the order setting aside the default judgment on the ground that the facts were insufficient to show a mistake of fact, is untenable, the finding of excusable neglect and meritorious defense being sufficient to support the judgment, and the Supreme Court being bound

by the findings when supported by evidence. Rierison v. York, 227 N. C. 575, 42 S. E. (2d) 902 (1947).

Same—Abuse of Discretionary Power.—The refusal of a motion to set aside a judgment on the grounds of surprise or excusable neglect is a matter of discretion with the judge below and cannot be reviewed on appeal, unless it should appear that such discretion was abused. Cowles v. Cowles, 121 N. C. 272, 28 S. E. 476 (1897).

After hearing the evidence and finding the facts under this section, the action of the judge is conclusive upon the parties, from which there is no appeal; yet this discretion, however, is not arbitrary, but implies a legal discretion. As for instance, if the judge mistake the meaning of the statute as to what is "mistake, inadvertence, surprise, or excusable neglect." In such cases his judgment is the subject of appeal and review. Hudgins v. White, 65 N. C. 393 (1871); Albertson v. Terry, 108 N. C. 75, 12 S. E. 892 (1891).

Findings of Trial Court Conclusive.—The findings of fact by the trial court upon the hearing of a motion to set aside a judgment for excusable neglect are conclusive on appeal when supported by any competent evidence. Carter v. Anderson, 208 N. C. 529, 181 S. E. 750 (1935).

Upon motion to set aside a judgment under this section, the findings of the court as to excusable neglect and meritorious defense are conclusive on appeal when supported by evidence, but such findings are not conclusive if made under a misapprehension of the law, in which instance the cause will be remanded to the end that the evidence be considered in its true legal light. Hanford v. McSwain, 230 N. C. 229, 53 S. E. (2d) 84 (1949). See Perkins v. Sykes, 233 N. C. 147, 63 S. E. (2d) 133 (1951).

Where Remedy Sought by Independent Action.—The institution of an independent action in lieu of a renewal of the motion is such an abandonment of the remedy by motion as worked a discontinuance of the same. Norwood v. King, 86 N. C. 81 (1882).

§ 1-221. Stands until reversed.—Every judgment given in a court of record having jurisdiction of the subject is, and continues to be, in force until reversed according to law. (4 Hen. IV, c. 23; R. C., c. 31, s. 103; Code, s. 935; Rev., s. 561; C. S., s. 601.)

Editor's Note.—See 13 N. C. Law Rev. 251, for note on the "Effect of judgment pending" with reference to this section.

Irregular Judgments.—Even though the judgment be irregular it stands until va-

cated or reversed, Stafford v. Gallops, 123 N. C. 19, 31 S. E. 265 (1898); and such judgment may be corrected only in a direct proceeding. Pinnell v. Burroughs, 168 N. C. 315, 84 S. E. 364 (1915); Brown v.

Harding, 170 N. C. 253, 86 S. E. 1010 (1915).

Applied in Myers v. Wilmington-Wrightsville, etc., Causeway Co., 204 N. C. 260,

167 S. E. 858 (1933).

Cited in Tallassee Power Co. v. Peacock, 197 N. C. 735, 150 S. E. 510 (1929).

§ 1-222. For and against whom given; failure to prosecute.—1. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may determine the ultimate rights of the parties on each side, as between themselves.

2. It may grant to the defendant any affirmative relief to which he may be entitled.

3. In an action against several defendants, the court may, in its discretion, render judgment against one or more of them, leaving the action to proceed against the others, whenever a several judgment is proper.

4. The court may also dismiss the complaint, with costs in favor of one or more defendants, in case of unreasonable neglect on the part of the plaintiff to serve the summons on other defendants, or to proceed in the cause against the defendant or defendants served. (C. C. P., s. 248; Code, s. 424; Rev., s. 563; C. S., s. 602.)

Editor's Note.—The primary object of the provisions of this section is to prevent as far as possible multiplicity of actions, and to settle in a single suit all the controverted matter arising or likely to arise out of the transaction. That this end may be accomplished the courts, wherever the particular case can be justly and equitably brought within the provisions of this section, have allowed, and sometimes compelled, the parties to submit and litigate all the issuable matters in one suit, whether the respective claim be against a party on the same side or against one on the other side. See Hurst, etc., Co. v. Everett, 91 N. C. 399 (1884); Smith & Co. v. French, 141 N. C. 1, 53 S. E. 435 (1906); Cooper v. Evans, 174 N. C. 412, 93 S. E. 897 (1917); Allen v. Salley, 179 N. C. 147, 101 S. E. 545 (1919).

Both Legal and Equitable Rights Recognized.—The courts in North Carolina are required to recognize both the legal and equitable rights of the parties, and to frame their judgments so as to determine all the rights of the parties, equitable as well as legal. Hutchinson v. Smith, 68 N. C. 354 (1873); Melvin v. Stephens, 82 N. C. 284 (1880). And this is true of any relief to which the facts alleged and proved entitle him, whether demanded in the prayer for relief or not. McNeill v. Hodges, 105 N. C. 52, 11 S. E. 265 (1890).

Anyone or All May Be Compelled to Answer.—The proper construction of this section is that when the plaintiffs bring the defendant into court to answer a claim for a debt which he owes them, he cannot only require them, but either one of them, to answer for a debt due him, whether it is connected specially with their debt against him or is an independent claim.

Sloan & Co. v. McDowell, 71 N. C. 356 (1874).

The Rights and Liabilities of the Defendants May Be Determined.—The court is fully empowered under this section to determine the rights and liabilities of the defendants, not to the plaintiff but among themselves. Clark v. Williams, 70 N. C. 679 (1874). And when in the exercise of their power a judgment is rendered in favor of a plaintiff and an affirmative one in favor of a defendant, they constitute but one judgment though written and attested separately. Hall v. Younts, 87 N. C. 285 (1882).

Where the Defense Set Up Applies to Entire Res.—When a bill is filed for the specific performance of a contract to convey a tract of land, and the defendant alleges that the tract consists of two parts, of which he admits that he is the owner of one, but avers that the other belongs to his wife, and sets up a defense which, if good, applies to the whole contract, it is erroneous to make a decree in favor of the plaintiff as to the part of which the defendant admits he is the owner, and to reserve the question as to the other part. Swepson v. Rouse, 65 N. C. 34 (1871).

Primary and Secondary Liability.—The primary and secondary liability as between two joint tort-feasors should be adjusted in the same action, where there are two defendants sued for the same negligent act alleged in the complaint, and judgment in the consolidated cases accordingly may be rendered under this section. Bowman v. Greensboro, 190 N. C. 611, 130 S. E. 502 (1925).

Where Another Suit Pending.—The entire spirit of our code procedure is to avoid multiplicity of actions and where an

action for damages arising by tort from a collision between automobiles has been brought by one of the parties, he may successfully plead the pendency of this action to one brought against him by the opposing party in another county, and have it dismissed, the remedy of the defendant in the second action being by way of counterclaim, pursuant to this section; and that relief may be asked for by each in his own action does not affect the fact that the subject of both actions is the same acts or transactions, to be determined by one judgment either for the plaintiff or defendant in the case. *Allen v. Salley*, 179 N. C. 147, 101 S. E. 545 (1919).

The rule that a new and independent action may not be set up by cross action does not preclude the owner of property sued for damage to adjacent property caused by excavation for the erection of a building, from joining and setting up the primary liability of his contractor on the theory that the contractor was guilty of positive and active negligence producing the damage, since such cross action is relevant and germane to the main action, and is also sanctioned by this section. *Wright's Clothing Store v. Ellis Stone & Co.*, 233 N. C. 126, 63 S. E. (2d) 118 (1951).

"Cross Complaint" Allowed.—Under this section the defendant is entitled to file a "cross complaint" to establish his rights in the premises and to seek the appropriate relief. *Dillon v. Raleigh*, 124 N. C. 184, 32 S. E. 548 (1899).

Same—Conformity to Original Complaint Required.—A cross action by a defendant against a co-defendant or third party must be in reference to the claim made by the plaintiff and based upon an adjustment of that claim. Independent and unrelated causes of action cannot be litigated by cross actions. *Bowman v. Greensboro*, 190 N. C. 611, 130 S. E. 502 (1925).

A defendant may file a cross action against a codefendant only if such cross action is founded upon or is necessarily connected with the subject matter and purpose of plaintiff's action, and while this section permits the determination of questions of primary and secondary liability and the right to contribution as between joint tort-feasors, it does not permit cross actions between defendants which are independent of the cause alleged by plaintiff. *Montgomery v. Blades*, 217 N. C. 654, 9 S. E. (2d) 397 (1940).

Cross Action Relating to Plaintiff's Claim.—Where a retailer of an article, sold in the original package, is sued for

breach of implied warranty that the product is wholesome and fit for human consumption, he may have his distributor joined as a codefendant and file cross action against the distributor on the ground that the distributor had impliedly warranted to it that the article was fit for human consumption and that the distributor is primarily liable for injury resulting from breach of this warranty, since the cross action relates to plaintiff's claim and is based upon an adjustment of that claim, and the defendants are entitled to have their ultimate rights as between themselves determined in the one action. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822 (1951).

Recovery on 'Counterclaim.—Where an action on contract has originally and properly been brought in the superior court because of an equity involved, or its being for the possession of personal property, the recovery on a counterclaim, in the superior court, will not be denied for want of jurisdiction on the ground that the demand thereof was for a less sum than two hundred dollars, the jurisdiction as to matters of counterclaim coming within the provisions of G. S. §§ 1-135, 1-137, and this section. *Singer Sewing Mach. Co. v. Burger*, 181 N. C. 241, 107 S. E. 14 (1921).

Where There Is Concert of Action Among the Defendants.—Where an injury is caused by the separate action of several persons whose interests are adverse to the plaintiff, it is proper under this section, to join them as defendants in an action for damages. *Long v. Swindell*, 77 N. C. 176 (1877).

Where, however, there is no unity of design or concert of action, and the separate action of each defendant causes the single injury, the share of each in causing it is separable and may be accurately measured. In such case the jury can properly assess several damages. *Long v. Swindell*, 77 N. C. 176 (1877).

In an action against a railroad company and the Director General of Railroads, following the opinion of the Supreme Court of the United States, there is no liability upon the railroad company, but the action may be continued against the Director General under the provisions of this section, that a several judgment may be entered. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11 (1921), cited and applied. *Smith v. Seaboard Air Line R. Co.*, 182 N. C. 290, 109 S. E. 22 (1921).

Dismissal "as of Nonsuit."—A nonsuit under § 1-183 is permissible only on de-

murrer to the evidence, and when the court refuses plaintiff's motion for a continuance, it is error for the court to enter an involuntary nonsuit, but the court should order plaintiff to proceed to trial, and if plaintiff should refuse to go to trial, the court may then dismiss the cause "as

of nonsuit" under this section or in its inherent power. *Sykes v. Blakey*, 215 N. C. 61, 200 S. E. 910 (1939).

Cited in *Blades v. Southern Ry. Co.*, 218 N. C. 702, 12 S. E. (2d) 553 (1940); *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648 (1941).

§ 1-223. Against married women.—In an action brought by or against a married woman, judgment may be given against her for costs or damages or both, in the same manner as against other persons, to be levied and collected solely out of her separate estate. (Rev., s. 563; C. S., s. 603.)

Cross Reference.—As to statutes concerning married women generally, see §§ 52-1 et seq.

Where the Wife Can Sue and Be Sued Alone.—It is not required that the wife, as such, prosecute or defend an action concerning the lands by guardian or next friend. *Craddock v. Brinkley*, 177 N. C. 125, 98 S. E. 280 (1919).

Same — Husband, When Joined, Is the Agent of the Wife. — The joinder of the husband in an action maintainable against the wife alone, though unnecessary, makes the husband the agent of the wife, when she is not present in person or by attorney, for the purpose of the suit. *Craddock v. Brinkley*, 177 N. C. 125, 98 S. E. 280 (1919).

§ 1-224. Nonsuit not allowed after verdict.—In actions where a verdict passes against the plaintiff, judgment shall be entered against him. (2 Hen. IV, c. 7; R. C., c. 31, s. 110; Code, s. 936; Rev., s. 1520; C. S., s. 604.)

Cross Reference.—As to entry of verdict and judgment, see § 1-205.

Theory of Nonsuit Explained.—"A plaintiff can at any time before verdict withdraw his suit, or, as it is termed, 'take a nonsuit,' by absenting himself at the trial term. If he does so and fails to answer, when called, by himself or by his attorney, the court directs a nonsuit to be entered, the cost is taxed against him, and that is an end of the case. Even when the plaintiff appears at the trial, takes a part in it by challenging jurors, examining and cross-examining witnesses, and by the argument of his counsel, if he finds from an intimation of the court that the charge will be against him, he may submit to a nonsuit and appeal. This is everyday's practice. It is based upon the idea that the plaintiff announces his purpose not to answer when called to hear the verdict, and the advantage is that the plaintiff can have his Honor's opinion reviewed, and should the decision of the Supreme Court be against him, he can commence another action; whereas if he allows a verdict to be entered it is conclusive unless set aside." *Graham v. Tate*, 77 N. C. 120 (1877);

Southern Cotton Oil Co. v. Shore, 171 N. C. 51, 87 S. E. 938 (1916).

The Principle Stated. — The principle would seem to be that a plaintiff may elect to be nonsuited in every case where no judgment other than for costs can be recovered against him by the defendant, and when such judgment may be recovered he cannot so elect. *McKesson v. Mendenhall*, 64 N. C. 502 (1870).

Retirement of Jury for Correction of Formal Defect.—It is too late after verdict upon an issue or issues of fact for a plaintiff to take a nonsuit; and where the jury, after rendering a verdict, had returned to the jury-room to correct a mere formal defect in the verdict, and as they retired the counsel for plaintiff informed the trial judge that the plaintiff would take a nonsuit, there was no error in refusing it. *Strause v. Sawyer*, 133 N. C. 64, 45 S. E. 346 (1903).

Where Defendant Seeks Affirmative Relief.—When, by the pleadings, the plaintiff ceases to be merely an actor, and becomes also a defendant, as, for example, if the defendant seeks affirmative relief and demands judgment, the right to take a non-

suit ceases. *McKesson v. Mendenhall*, 64 N. C. 502 (1870); *McLean v. McDonald*, 173 N. C. 429, 92 S. E. 148 (1917). But after a plea of tender or payment of money into court the plaintiff may take a nonsuit. *McKesson v. Mendenhall*, 64 N. C. 502 (1870).

Same—Counterclaim Must Be Independent of Plaintiff's Complaint. — When the counterclaim on a cause of action arises independently of that alleged in the complaint, the plaintiff may submit to a voluntary nonsuit as to his own cause of action. *Yellowday v. Perkinson*, 167 N. C. 144, 83 S. E. 341 (1914).

Same—Where Counterclaim Arises Out of Matter Set Forth in Complaint. — Where, however, the defendant's counterclaim arises out of the contract or transaction set forth in the complaint as the grounds of the plaintiff's cause of action, the plaintiff cannot take a nonsuit, this being placed on the principle that it is equitable and just that the right of the par-

ties arising out of such contract be settled in one suit and at the same time. *Yellowday v. Perkinson*, 167 N. C. 144, 83 S. E. 341 (1914).

Where Interlocutory Order Entered. — An interlocutory judgment does not deprive a plaintiff of the right to take a nonsuit. *Piedmont Mfg. Co. v. Buxton*, 105 N. C. 74, 11 S. E. 264 (1890).

Nonsuit Not Allowed Where Defendant Wrongfully Dispossessed. — Whenever a defendant is wrongfully dispossessed of his land by legal process, he is entitled to a writ of restitution and an inquisition of damages in that action of which the plaintiff is not permitted to deprive him by taking a nonsuit. *Lane v. Morton*, 81 N. C. 38 (1879).

Refusal to Allow Nonsuit after Verdict Not Reviewable. — Refusal of the superior court to allow a nonsuit after verdict and judgment will not be reviewed in the Supreme Court. *Brown v. King*, 107 N. C. 313, 12 S. E. 137 (1890).

§ 1-225. **Party dying after verdict.** — In no action shall the death of either party between the verdict and the judgment be alleged for error, if the judgment is entered within two terms after the verdict. (17 Charles II, c. 8; R. C., c. 31, s. 112; Code, s. 938; Rev., s. 564; C. S., s. 605.)

Cross References. — As to rights of action which do not survive, see § 28-175. As to rights of action which survive to and against representative, see § 28-172. As to abatement of action by death of party after verdict, see § 1-74, paragraph 2.

Judgment for or against Deceased Parties. — The great weight of authority in this country is to the effect that where the court has acquired jurisdiction of the subject matter and the person during the lifetime of a party, a judgment for or against a deceased person is not wholly void or open to collateral attack. *De La Vergne, etc., Mach. Co. v. Featherstone*, 147 U. S. 209, 37 L. Ed. 138, 13 S. Ct. 283 (1893).

Judgment neither Void nor Irregular.

§ 1-226. **When limited by demand in complaint.** — The relief granted to the plaintiff, if there is no answer, cannot exceed that demanded in his complaint; but in any other case the court may grant him any relief consistent with the case made by the complaint and embraced within the issue. (C. C. P., s. 249; Code, s. 425; Rev., s. 565; C. S., s. 606.)

Purpose of the Section. — The apparent purpose of this section, while simplifying the method of procedure, is to afford any relief to which the plaintiff may be entitled upon the facts set out in his complaint, although misconceived and not specially demanded in his prayer. *Jones v. Mial*, 79 N. C. 164 (1878).

General Relief Where Answer Filed. — If there be an answer any relief may be

—A judgment in favor of a dead man is not void, and not, on that account, irregular. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49 (1890).

Judgment against Dead Person Voidable. — A judgment against a party to a suit rendered after his death is voidable, even if the fact of death was unknown. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49 (1890).

Parties on Appeal. — If appeal by the adverse party was desired, the proper course was to make the heirs at law parties to the action, and serve notice of appeal upon them. *Wood v. Watson*, 107 N. C. 52, 12 S. E. 49 (1890).

granted which is consistent with the case made by the complaint and embraced within the issue, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. *Wright v. Teutonia Ins. Co.*, 138 N. C. 488, 51 S. E. 55 (1905); *Council v. Bailey*, 154 N. C. 54, 69 S. E. 760 (1910); *Bryan v. Canady*, 169 N. C. 579, 86 S. E. 584 (1915).

Relief Limited to That Demanded Where

No Answer Filed.—Where no answer is filed then the relief shall not exceed that demanded in the complaint. *Jones v. Mial*, 82 N. C. 252 (1880).

Superior court had power, by a default judgment, to declare debtor's deed conveying realty to wife fraudulent and void as to suing creditors, but court acted in excess of its jurisdiction when it ordered wife to reconvey the lands to her husband and attempted to make the judgment effective as a transfer of title, where there was nothing in the cause of action stated by the creditors which rendered such action either necessary, or upon which it could be properly based. *Lane v. Becton*, 225 N. C. 457, 35 S. E. (2d) 334 (1945).

And when judgment grants relief in excess thereof it is irregular and respondents are entitled to have it set aside. *Simms v. Sampson*, 221 N. C. 379, 20 S. E. (2d) 554

(1942).

Where Improper Action Brought. — Where a plaintiff, in his complaint alleged and set out a case in trover, and the proof showed that it should have been in the nature of an assumpsit for money had and received, it was held that the plaintiff was entitled to recover, notwithstanding the variance. *Oats, etc., Co. v. Kendall*, 67 N. C. 241 (1872).

Where Amount Tendered Is Larger than Amount Due. — The verdict of the jury rendered in an action upon a mortgage note will not be affected by a tender of a larger amount made before the commencement of the action, which was refused and not kept good, and the relief will be confined to that found to be due. *DeBruhl v. Hood*, 156 N. C. 52, 72 S. E. 83 (1911).

Cited in *Bowie v. Tucker*, 206 N. C. 56, 173 S. E. 28 (1934).

§ 1-227. When passes legal title.—In any action wherein the court declares a party entitled to the possession of real or personal property, the legal title of which is in another party to the suit, and the court orders a conveyance of such legal title to him so declared to be entitled, or where, for any cause, the court orders that one of the parties holding property in trust shall convey the legal title to be held in trust to another person although not a party, the court, after declaring the right and ordering the conveyance, has power also, to be used in its discretion, to declare in the order then made, or in any made in the progress of the cause, that the effect thereof is to transfer to the party to whom the conveyance is directed to be made the legal title of the said property, to be held in the same plight, condition and estate as though the conveyance ordered were in fact executed; and shall bind and entitle the parties ordered to execute or to take benefit of the conveyance, in and to all such provisions, conditions and covenants as are adjudged to attend the conveyance, in the same manner and to the same extent as the conveyance would if the same were executed according to the order. A party taking benefit under the judgment has the same redress at law on account of the matter adjudged as he might on the conveyance, if the same had been executed. (1850, c. 107; R. C., c. 32, s. 24; 1874-5, c. 17; Code, s. 426; Rev., s. 566; C. S., s. 607.)

Strict Conformity with the Section Required.—A decree does not operate as a conveyance, unless it complies with the requirements of this section and § 1-228 declaring "that it shall be regarded as a deed of conveyance" — and the mere fact that the court, while omitting this statement, intended that the decree should have such effect, is not sufficient for this purpose. *Morris v. White*, 96 N. C. 91, 2 S. E. 254 (1887).

This decision was criticized in the case of *Evans v. Brendle*, 173 N. C. 149, 91 S. E. 723 (1917); it was said that a too narrow construction was being given to the statute. The precise point arose in both cases, namely, the failure of the court to insert in the decree the words "that it shall be regarded as a deed of conveyance," although it was left undecided in the *Evans*

case, the court merely expressing its disfavor as to the former holding and then resting its own decision upon a different ground. In the dissenting opinion in *Evans v. Brendle*, in which two justices concurred, much weight is attached to the argument used by the court in *Morris v. White*, 96 N. C. 91, 2 S. E. 254 (1887).

Same — Where Specific Performance Asked for.—It is not necessary that a decree in favor of the plaintiff in a suit for specific performance should declare that it should operate as a conveyance in order to constitute a complete adjudication of the rights of the holder of the naked legal title — and the failure to make such insertion in no manner affects the equitable title which the plaintiff acquired by decree. *Skinner v. Terry*, 134 N. C. 305, 46 S. E. 517 (1904).

Married Woman May Be Declared Trustee.—Where a married woman admits the execution of a fraudulent deed which does not convey all that was expected by the grantee, she will not be allowed to profit by the fraud but will be declared a trustee of the part of the land not conveyed, the purchase price of which she has received. *Bell v. McJones*, 151 N. C. 85, 65 S. E. 646 (1909).

Consent Decree until Impeached Passes Legal Title.—A decree by consent binds the parties and their privies in estate, but is open to impeachment by the privies on the ground that it was fraudulent to their injury; but until impeached the decree passes a legal title. *Rollins v. Henry*, 78 N. C. 342 (1878).

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929).

§ 1-228. **Regarded as a deed and registered.**—Every judgment, in which the transfer of title is so declared, shall be regarded as a deed of conveyance, executed in due form and by capable persons, notwithstanding the want of capacity in any person ordered to convey, and shall be registered in the proper county, under the rules and regulations prescribed for conveyances of similar property executed by the party. The party desiring registration of such judgment must produce to the register a copy thereof, certified by the clerk of the court in which it is enrolled, under the seal of the court, and the register shall record both the judgment and certificate. All laws which are passed for extending the time for registration of deeds include such judgments, provided the conveyance, if actually executed, would be so included. (1850, c. 107, ss. 2, 4; R. C., c. 32, ss. 25, 27; 1874-5, c. 17, ss. 2, 4; Code, ss. 427, 429; Rev., ss. 567, 568; C. S., s. 608.)

Cross Reference.—See § 1-227 and notes thereto.

Section Is Partially Superseded by § 47-27.—The provision of this section that judgments in which transfers of title are declared shall be registered under the same rules prescribed for deeds is superseded, as to judgments in eminent domain proceedings, by the later enactment of c. 148, Public Laws of 1917 (§ 47-27), exempting decrees of courts of competent jurisdiction in condemnation proceedings from the requirement as to registration. *Carolina Power, etc., Co. v. Bowman*, 228 N. C. 319, 45 S. E. (2d) 531 (1947). See also note to § 40-19.

Consent Decrees Convey Title.—A consent decree for the recovery of the lands in fee has the effect of conveying the legal estate in fee “as between the parties,” and is good as against third persons in the absence of fraud or collusion. *Morris v. Pat-*

terson, 180 N. C. 484, 105 S. E. 25 (1920).

Same—Agreement in Divorce Proceedings.—In an action brought by the wife for a divorce a mensa, an agreement that the wife have a life estate in certain of her husband's lands, is binding as a consent judgment, though a divorce has not been decreed therein; and it is not affected by the fact that an award of the children has therein been made with the sanction of the court. *Morris v. Patterson*, 180 N. C. 484, 105 S. E. 25 (1920).

Marginal Cancellation Not Essential but Advisable.—When a decree of court adjudges a deed to be void, no marginal cancellation of record, as in the case of mortgages and deeds of trust, is required, but it is commendable and convenient practice. *Smith v. King*, 107 N. C. 273, 12 S. E. 57 (1890).

Cited in *Ayden v. Lancaster*, 197 N. C. 556, 150 S. E. 40 (1929).

§ 1-229. **Certified registered copy evidence.**—In all legal proceedings, touching the right of parties derived under such judgment, a certified copy from the register's books is evidence of its existence and of the matters therein contained, as fully as if proved by a perfect transcript of the whole case. (1850, c. 107, s. 3; R. C., c. 32, s. 26; 1874-5, c. 17, s. 3; Code, s. 428; Rev., s. 569; C. S., s. 609.)

§ 1-230. **In action for recovery of personal property.**—In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession, or for the recovery of possession, or for the value thereof in case a delivery cannot be had, and damages for the detention. If the property has been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for a return of the property, or for the

value thereof in case a return cannot be had, and damages for taking and withholding the same. (C. C. P., s. 251; Code, s. 431; Rev., s. 570; C. S., s. 610.)

Cross References.—As to the provisional remedy of claim and delivery for personal property, see §§ 1-472 et seq. As to character of verdict in action for recovery of specific personal property, see § 1-203.

In General. — Where the defendant in claim and delivery replevies the property, the form of the judgment against him should be for the possession of the property with damages for its detention and costs, or for the value thereof if delivery cannot be had and damages for its detention. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451 (1931).

Judgment Should Be Alternative. — In claim and delivery the judgment should be for the delivery of the property or its value, *Oil Co. v. Messick Grocery Co.*, 136 N. C. 354, 48 S. E. 781 (1904); *Hendrick v. Ireland*, 162 N. C. 523, 77 S. E. 1011 (1913); and this is true of a judgment on a forthcoming bond in claim and delivery proceedings. *Grubbs v. Stephenson*, 117 N. C. 66, 23 S. E. 97 (1895).

Same—When Judgment for Defendant. —When the pleadings, in an action to declare valid a sale of property under mortgage, raise questions as to whether the mortgage had been released, and the sale was unlawful, and the property wrongfully seized under claim and delivery proceedings, the defendant, if successful, is entitled to judgment "for a return of the property, or for the value thereof in case return cannot be had, and damages for taking and withholding the same" and issues were properly submitted to the jury to ascertain the value of the property alleged to have been wrongfully converted. *Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 919 (1910).

Applicability of Doctrine of Res Judicata.—Where judgment is rendered against the defendant and the surety on his bond in claim and delivery, and therein no issue is submitted to the jury on the question of damages for the wrongful detention of the property it does not estop the plaintiff from bringing an independent action to recover such damages. *Woody v. Jordan*, 69 N. C. 189 (1873); *Moore v. Edwards*, 192 N. C. 446, 135 S. E. 302 (1926).

Same — Where Judgment Unsatisfied. —Where the plaintiff, who had recovered judgment in an action of claim and delivery (in which he was defendant) for the return of the property, but the same had not been returned, thereafter brought suit against the plaintiff, in such action for damages for the conversion of the prop-

erty, it was held that he was entitled to recover. *Asher v. Reizenstein*, 105 N. C. 213, 10 S. E. 889 (1890).

Same—Applicable Only as to Matters Litigated Upon.—The fundamental reasons for the application of the doctrine of res adjudicata are that there should be an end of litigation and that no one should be vexed twice for the same cause; therefore, when the defendant in claim and delivery proceedings has recovered of the plaintiff therein such damages for his wrongful seizure of the defendant's property as allowed by this section and he has claimed no more, he may, by an independent action, sue for such damages to his business as may have been caused by the malicious prosecution of the plaintiff's action, for such was not the subject of recovery in the claim and delivery proceedings, and the doctrine of res adjudicata has no application. *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228 (1911).

Where Counterclaim Filed.—A suit for maliciously prosecuting a proceeding in claim and delivery for the purpose of breaking up the business of another will not lie before the termination of the claim and delivery proceedings, and the defendant in such proceedings cannot therefore set up a counterclaim in that action for the damages he may have sustained in his business. *Ludwick v. Penny*, 158 N. C. 104, 73 S. E. 228 (1911).

Measure of Damages When Property Beyond Control of Court.—In an action of claim and delivery, where it appears that the defendant was in possession under a contract of purchase, and the property had been placed beyond the control of the court, the equities will be adjusted and judgment rendered against the defendant for the balance of the purchase money, with interest from the date of purchase. *Hall v. Tillman*, 115 N. C. 500, 20 S. E. 726 (1894).

Estimation of Interest.—When the verdict of the jury has only established that the plaintiff has wrongfully converted to his own use an excess of property in a certain sum over that required to pay off defendant's mortgage to him, the judgment thereon should not include interest from the time of the alleged conversion, but only from the date of the judgment, the conversion being a tort and the damages unliquidated; and when on appeal the judgment of the court is erroneous in this respect only, it will be ordered to be

amended and affirmed. *Penny v. Ludwick*, 152 N. C. 375, 67 S. E. 919 (1910).

Where Additional Item Allowed by Consent.—Where the defendant in claim and delivery of crops has replevied the property, and the plaintiff has recovered final judgment, an additional item of expense or cost allowed by consent to the plaintiff will be held as binding upon the parties on appeal. *Hendricks v. Ireland*, 162 N. C. 523, 77 S. E. 1011 (1913).

Liability of Surety.—Where the plaintiff is successful in his action wherein claim and delivery have been issued, the surety on the defendant's replevin bond, given in accordance with this section, is liable for the full amount thereof to be discharged upon the return of the property and the payment of damages and cost recovered by the plaintiff; or second, if the return cannot be had, the judgment should order that the surety be discharged upon the payment to the plaintiff of the amount of his recovery, within the amount limited in the bond, for the value of the property at the time of its wrongful taking and detention, with interest thereon, together with the cost of the action. *Orange Trust Co. v.*

Hayes, 191 N. C. 542, 132 S. E. 466 (1926).

Where the defendant in the action has retained possession of the property in claim and delivery, and the plaintiff is successful in the action, the latter is entitled to summary judgment against the surety on the replevin bond given in accordance with the provisions of the statute. *Orange Trust Co. v. Hayes*, 191 N. C. 542, 132 S. E. 466 (1926).

Issues and Judgment Should Cover Whole Case.—Where the action is brought to recover property conveyed to secure a debt, in order to avoid circuitry of action, when the debt is denied, the issues and judgment should cover the whole case, including the balance due upon the debt, and for the benefit of the sureties upon the undertaking the value of the property at the time of the seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620 (1900).

Cited in *Harrell v. Tripp*, 197 N. C. 426, 149 S. E. 548 (1929); *Green v. Carroll*, 205 N. C. 459, 171 S. E. 627 (1933).

§ 1-231. What judge approves judgments.—In all cases where a judgment, decree or order of the superior court is required to be approved by a judge, it shall be approved by the judge having jurisdiction of receivers and injunctions. (1876-7, c. 223, s. 3; 1879, c. 63; 1881, c. 51; Code, s. 432; Rev., s. 571; C. S., s. 611.)

Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district, or one holding the courts thereof by exchange, at the option of the mover.

Corbin v. Berry, 83 N. C. 28 (1880).

Restraining orders must be made returnable before the judge in the district in which the action is pending. *Galbreath v. Everett*, 84 N. C. 546 (1881).

§ 1-232. Judgment roll.—Unless the party or his attorney furnishes a judgment roll, the clerk, immediately after entering the judgment, shall attach together and file the following papers which constitute the judgment roll:

1. In case the complaint is not answered by any defendant, the summons and complaint, or copies thereof, proof of service, and that no answer has been received, the report, if any, and a copy of the judgment.

2. In all other cases, the summons, pleadings, or copies thereof, and a copy of the judgment, with any verdict or report, the offer of the defendant, exceptions, case, and all orders and papers in any way involving the merits and necessarily affecting the judgment. (C. C. P., s. 253; Code, s. 434; Rev., s. 572; C. S., s. 612.)

Section Directory. — The provisions of this section as to the judgment roll should be complied with, but they are directory, and the clerk's failure to "attach together" the papers did not vitiate the judgment which was entered of record and regular in form. See *Brown v. Harding*, 171 N. C.

686, 89 S. E. 222 (1916), in spite of the holding in *Dewey v. Sugg*, 109 N. C. 328, 13 S. E. 923 (1891), to the effect that a judgment to constitute a lien must be docketed in the "prescribed manner."

Cited in *Williams v. Trammell*, 230 N. C. 575, 55 S. E. (2d) 81 (1949).

§ 1-233. Docketed and indexed; held as of first day of term.—Every judgment of the superior court, affecting the right to real property, or requiring

in whole or in part the payment of money, shall be entered by the clerk of said superior court on the judgment docket of the court. The entry must contain the names of the parties, and the relief granted, date of judgment, and the date, hour and minute of docketing; and the clerk shall keep a cross-index of the whole, with the dates and numbers thereof. In all cases affecting the title to real property the clerk shall enter upon the judgment docket the number and page of the minute docket where the judgment is recorded, and if the judgment does not contain particular description of the lands, but refers to a description contained in the pleadings, the clerk shall enter upon the minute docket, immediately following the judgment, the description so referred to.

All judgments rendered in any county by the superior court, during a term of the court, and docketed during the same term, or within ten days thereafter, are held and deemed to have been rendered and docketed on the first day of said term, for the purpose only of establishing equality of priority as among such judgments. (Supr. Ct. Rule VIII; C. C. P., s. 252; Code, s. 433; Rev., s. 573; 1909, c. 709; C. S., s. 613; 1929, c. 183; 1943, c. 301, s. 4½.)

Local Modification. — Durham: 1929, c. 88.

Editor's Note. — The 1929 amendment added to the second paragraph the words "for the purpose only of establishing equality of priority as among such judgments."

The 1943 amendment inserted in the second sentence the requirement that the entry contain the hour and minute of docketing.

For article on Names—Married Women—Change of Name by Legal Process—Notice, see 16 N. C. Law Rev. 187.

Strict Compliance Necessary.—The observance of this law is regarded as so important to subsequent purchasers and mortgagees that, wherever the system of docketing obtains, a very strict compliance with its provisions in every respect is required. Jones v. Currie, 190 N. C. 260, 129 S. E. 605 (1925).

Clerk Liable upon Failure to Index Judgment. — An action of tort will lie against the clerk upon his failure to index a judgment, such neglect resulting in damage to the plaintiff. Shackelford v. Staton, 117 N. C. 73, 23 S. E. 101 (1895).

Same — Duty of Judgment Creditor to See Judgment Properly Docketed. — It is the duty of a judgment creditor to see that his judgment is properly docketed. If the clerk neglects to docket the judgment, subsequent encumbrancers and claimants under the judgment debtor are not to be prejudiced thereby, and the remedy of the judgment creditor is against the clerk for loss suffered by reason of the failure to docket the judgment. Holman v. Miller, 103 N. C. 118, 9 S. E. 429 (1889).

Where Judgment Docketed in Foreign County.—Where the transcript of a judgment recovered in one county is sent to another for docketing, the transcript must

not only be docketed but must be entered on the cross-index, giving the names of all the judgment debtors and the name of at least one plaintiff. Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923 (1891); Jones v. Currie, 190 N. C. 260, 129 S. E. 605 (1925).

Contents of the Index and Purpose Thereof. — When there are several judgment debtors in the docketed judgment, the index should and must specify the name of each one, because the index as to one would not point to all or any of the others. The purpose is, that the index shall point to a judgment against the particular person inquired about if there be a judgment on the docket against him. A judgment not thus fully docketed does not serve the purpose of the statute, and is not docketed in contemplation of law. Dewey v. Sugg, 109 N. C. 328, 13 S. E. 923 (1891); Jones v. Currie, 190 N. C. 260, 129 S. E. 605 (1925).

Initials in Index Valid. — "J. Mizell" or "Jo. Mizell" is a sufficient cross-indexing for a judgment against "Josiah Mizell." Valentine v. Britton, 127 N. C. 57, 37 S. E. 74 (1900).

One Cross-Indexing Not Sufficient for Two Judgments. — One cross-indexing is insufficient for two judgments, though they appear on the same page and include the same parties, and only the first judgment on its page will constitute a lien. Valentine v. Britton, 127 N. C. 57, 37 S. E. 74 (1900).

Judgment Signed Out of Term. — The provisions of this section that judgments relate to the first day of the term, apply when the judgment was rendered and docketed during the term, or within ten days after adjournment thereof, and not to a judgment signed out of term by the consent of the parties, except where third persons are prejudiced; and the position may

not be maintained that a sale of lands to be made by commissioners appointed to sell property, etc., was not made within the time prescribed by the order, under the theory that the date of the order was to relate back to the commencement of the term, when it appears that by consent the order was signed after the term of court, and the sale occurred within the time prescribed from the actual date on which the judge signed it. *Contestee Chemical Co. v. Long*, 184 N. C. 398, 114 S. E. 465 (1922).

Consent Judgments.—The provisions of this section that judgments rendered during a term should relate back to the first day thereof, and that the liens of all judgments rendered on the same Monday shall

be of equal priority, do not apply to judgments by consent. *Hood v. Wilson*, 208 N. C. 120, 179 S. E. 425 (1935).

Judgment against Corporations.—A judgment against a corporation does not relate back, by implication of law, to the beginning of the term, so as to create a lien on the corporate property as against the vesting of the title in a receiver, under the statute, who had in the meantime been appointed. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8 (1917).

Cited in *Pentuff v. Park*, 195 N. C. 609, 143 S. E. 139 (1928); *Henry v. Sanders*, 212 N. C. 239, 193 S. E. 15 (1937); *Massachusetts Bonding, etc., Co. v. Knox*, 220 N. C. 725, 18 S. E. (2d) 436, 138 A. L. R. 1438 (1942) (dis. op.).

§ 1-234. **Where and how docketed; lien.**—Upon filing a judgment roll upon a judgment affecting the title of real property, or directing in whole or in part the payment of money, it shall be docketed on the judgment docket of the superior court of the county where the judgment roll was filed, and may be docketed on the judgment docket of the superior court of any other county upon the filing with the clerk thereof of a transcript of the original docket, and is a lien on the real property in the county where the same is docketed of every person against whom any such judgment is rendered, and which he has at the time of the docketing thereof in the county in which such real property is situated, or which he acquires at any time thereafter, for ten years from the date of the rendition of the judgment. But the time during which the party recovering or owning such judgment shall be, or shall have been, restrained from proceeding thereon by an order of injunction, or other order, or by the operation of any appeal, or by a statutory prohibition, does not constitute any part of the ten years aforesaid, as against the defendant in such judgment, or the party obtaining such orders or making such appeal, or any other person who is not a purchaser, creditor or mortgagee in good faith. (C. C. P., s. 254; Code, s. 435; Rev., s. 574; C. S., s. 614.)

I. In General.

II. Creation of the Lien and Priorities.

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Cross Reference.

As to docketed judgment for a fine constituting a lien, see § 15-185.

I. IN GENERAL.

Editor's Note.—See 11 N. C. Law Rev. 365, 367.

Applicable to Legal and Equitable Estates.—This section is sufficiently comprehensive to include equitable as well as

legal estates. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905). The principle is equally applicable when the sale to satisfy the judgment is made by an administrator. *Mannix v. Ihrie*, 76 N. C. 299 (1877).

Where a debtor executes a deed in trust to a trustee to secure certain debts therein mentioned, and after the registration of the deed a creditor obtains judgment and has the same docketed, the judgment, under the provisions of this section, is a lien upon the equitable estate of the debtor. *McKeithan v. Walker*, 66 N. C. 95 (1872).

A judgment from the time it is docketed has a lien on all the interest of whatever kind the defendant has in real estate, whether it be such as can be seized under execution or not. *Glenn Co. v. Shober*, 69 N. C. 154 (1873).

A lien is a right of property, and not a mere matter of procedure. So far as it relates to lands, it is a technical term, that means a charge upon the lands running

with them, and encumbering them in every change of ownership. *Ingles v. Bringhurst*, 1 Dall. (1 U. S.) 341, 1 L. Ed. 167 (1788).

Property converted from its original nature, as land into money, is not subject to the lien of a judgment, or to sale under execution issued thereon, although the statute gives a lien, under the judgment, on all the real property of the debtor in the county, which by construction of this court embraced both legal and equitable estates. *Clifton v. Owens*, 170 N. C. 607, 87 S. E. 502 (1916), citing *Dixon v. Dixon*, 81 N. C. 523 (1879).

Liability of Trustee. — A trustee having a surplus in his hands after the sale of land under a conveyance to secure money loaned thereunder, who is affected with notice by docketing of judgments against the trustor, or the one who otherwise is entitled to receive it, under the provisions of this section may not pay the same to the trustor without incurring liability; and in an action brought for that purpose the judgment creditors are necessary parties, and a final judgment therein entered without them is reversible error. *Barrett v. Barnes*, 186 N. C. 154, 119 S. E. 194 (1923).

Requirement That Clerk to Docket Judgment Mandatory. — A judge cannot, under this section, validly issue an order to the clerk not to docket a judgment pending the fulfillment of a conditional order directed to the parties. *Hopkins v. Bowers*, 111 N. C. 175, 16 S. E. 1 (1892). See also, § 1-233 and notes thereto.

Order of Resale of Realty Does Not Prolong Life of Lien.—Where the bid for real estate, offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment upon which the execution issued, was raised and resales were ordered successively under the provision of former § 45-28 by which the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of the lien of the judgment within the provisions and meaning of this section. *Cheshire v. Drake*, 223 N. C. 577, 27 S. E. (2d) 627 (1943). For comment on this decision, see 22 N. C. Law Rev. 146. For present provisions covering the subject matter of former § 45-28, see §§ 45-21.27 to 45-21.30.

Applied in *Dillard v. Walker*, 204 N. C. 67, 167 S. E. 632 (1933); *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936); *McCullum v. Smith*, 233 N. C. 10, 62 S. E. (2d) 483 (1950).

Cited in *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255 (1930); *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936); *Edmonds v. Wood*, 222 N. C. 118, 22 S. E. (2d) 237 (1942).

II. CREATION OF THE LIEN AND PRIORITIES.

A. Sufficiency.

1. Realty.

Docketing Fixes the Lien. — The docketed judgment fixes the lien and the debtor cannot escape it; if he sells thereafter the purchaser takes subject to the statutory lien given by this section. *Moore v. Jordan*, 117 N. C. 86, 23 S. E. 259 (1895); *Moore v. Jones*, 226 N. C. 149, 36 S. E. (2d) 920 (1946). The mere rendition of the judgment will not constitute a lien, *Alsop v. Mosely*, 104 N. C. 60, 10 S. E. 124 (1889); nor does the execution fix the lien. *Pasour v. Rhyne*, 82 N. C. 149 (1880).

A judgment for a fine, duly docketed, constitutes a lien on realty under § 15-185, and attaches immediately upon the docketing of the judgment under the provisions of this section. *Osborne v. Board of Education*, 207 N. C. 503, 177 S. E. 642 (1935).

In other words, the section specifies two requisites as conditions precedent to the fixing of the lien, namely (1) rendition and (2) docketing; when these two requirements are met the lien attaches as of the date of rendition.—Ed. Note.

Same — Subsequent Purchasers. — The docketing of the judgment having fixed the lien, the rights of the judgment creditor become fixed thereby, and the subsequent registration of a deed or mortgage to or on the same property cannot divest those rights. *Cowen v. Withrow*, 112 N. C. 736, 17 S. E. 575 (1893). See post, this note, "Priorities" II, B.

Same—Not Essential to Issuing an Execution.—Docketing is not a condition precedent to the enforcement of the judgment by final process. *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884 (1898). See also, *Holman v. Miller*, 103 N. C. 118, 9 S. E. 429 (1889), where it was said, "under the present system no lien is acquired upon land in the absence of an execution and levy, until the judgment has been docketed."

Strict Compliance with Requirement as to Docketing.—To constitute a lien on real estate, the judgment must be docketed in the office of the clerk of the superior court of the county where such property is sit-

uate. And, for a lien to be obtained, the requirement as to docketing must be strictly complied with. *Southern Dairies v. Banks*, 92 F. (2d) 282 (1937).

Docketing First in County of Rendition.

—A judgment rendered in one county can not be docketed in another without having been first docketed in the county where it was rendered. *McAden v. Banister*, 63 N. C. 479 (1869); *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936).

Transcript Sent to Foreign County.—In *Wilson v. Patton*, 87 N. C. 318 (1882), it was held that the transcript of a judgment sent from one county to another to be docketed, which sets out the date of its rendition, the names of the parties to the suit, the amount of the judgment and the costs of the action, is a sufficient docketing to create a lien on the defendant's land. *Lee v. Bishop*, 89 N. C. 256 (1883).

2. Personalty.

Levy Necessary to Constitute Lien on Personalty.—There is no lien upon personal property, except from the levying. *Selby v. Dixon*, 11 N. C. 424 (1826); *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894); *Summers Hdw. Co. v. Jones*, 222 N. C. 530, 23 S. E. (2d) 883 (1943).

B. Priorities.

Record as Notice.—A plaintiff will be charged with notice of judgment entered at a regular term of court as of the time of the entry. *Sluder v. Graham*, 118 N. C. 835, 23 S. E. 924 (1896).

Consent judgments, under this section, have priority in accordance with priority of docketing, since the provisions of § 1-233 are not applicable to consent judgments. *Hood v. Wilson*, 208 N. C. 120, 179 S. E. 425 (1935).

Between Judgments.—If a number of justice's judgments be docketed in the superior court, they will, under this section, be a lien upon the land of the defendant from the time when they were docketed, and will have a priority over a judgment obtained in court by another person against the same defendant at a subsequent time, and though an execution be issued on the latter and the sheriff levies it on the land and advertises it for sale, yet, if before the sale executions are issued on a part of the justice's docketed judgments, and are placed in the hands of the sheriff, the proceeds of the sale of the land must be first applied to the payment of all the justice's judgments. *Perry v. Morris*, 65 N. C. 221 (1871).

A prior assignee of a judgment for a

valuable consideration takes the title of his assignor unaffected by a subsequent assignment of the same judgment by the assignor to another for a valuable consideration without notice of the prior assignment, in the absence of fraud, even though the second assignee has his assignment first recorded on the judgment docket, there being no statute requiring an assignment of a judgment to be recorded. In *re Wallace*, 212 N. C. 490, 193 S. E. 819 (1937).

Between Docketed Judgment and Unrecorded Deed.—The lien of a regularly docketed judgment is superior to a claim under an unrecorded deed from the judgment debtor. *Eaton v. Doub*, 190 N. C. 14, 128 S. E. 494 (1925).

Where there is a lien by judgment under this section against the holder of an equitable title to lands who also holds a registered mortgage from his grantee under an unregistered deed to secure the balance of the purchase price, his deed registered after the lien of the judgment had taken effect, cannot render the lien under the mortgage superior to the judgment lien, and equity will remove the lien of the mortgage cloud upon the title of the purchaser at the execution sale holding the sheriff's deed. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905); *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850 (1921).

An adverse holder of land under § 1-40, pursuant to an unrecorded deed, has title superior to the lien of a judgment based on this section, but acquired and registered after the elapse of the 20-year period against the original grantor. *Johnson v. Fry*, 195 N. C. 832, 143 S. E. 857 (1928).

Between Judgment and Previous Conveyance.—A judgment is not a lien upon the lands of the judgment debtor that he had previously conveyed bona fide either by registered deed or mortgage upon which foreclosure has been made. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576 (1929).

Between Judgment and Subsequent Mortgage.—A docketed judgment has priority over a subsequently recorded mortgage. *Moore v. Jones*, 226 N. C. 149, 36 S. E. (2d) 920 (1946).

Where after the recordation of a judgment, the judgment debtor executes a mortgage on certain of his land, and the land is foreclosed under prior mortgages antedating the judgment, and the judgment debtor makes no claim to his homestead, the judgment creditor has a preference in the proceeds of the sale over the subsequent mortgage made. *Duplin County*

v. Harrell, 195 N. C. 445, 142 S. E. 481 (1928).

Between Lien and Subsequent Purchaser.—Upon the docketing of a judgment it becomes a lien on all the land to which the judgment debtor has title for a period of ten years from the time of its docketing, under this section, and the land is not relieved of the judgment lien by a subsequent transfer of title by the judgment debtor. *Moses v. Major*, 201 N. C. 613, 160 S. E. 890 (1931).

A judgment creditor or his assignee has a lien on the lands of the judgment debtor, and where the judgment is duly docketed, under this section, the lien exists against a subsequent purchaser from the judgment debtor, carrying with it the right to subject the property and improvements there-to to the satisfaction of the debt, but the judgment creditor or his assignee has no title or estate in the lands. *Byrd v. Pilot Fire Ins. Co.*, 201 N. C. 407, 160 S. E. 458 (1931).

When an heir acquires land or property to be treated as realty subsequent to docketing of several judgments against him, the judgment creditors are not entitled to priority in accordance with the date of the docketing of their respective judgments, but are entitled only to application of the property to the judgments pro rata. *Linker v. Linker*, 213 N. C. 351, 196 S. E. 329 (1938).

Execution Sale under Prior Judgment.—A judgment is not a lien upon the lands of the judgment debtor conveyed under execution sale of a prior docketed judgment. *Helsabeck v. Vass*, 196 N. C. 603, 146 S. E. 576 (1929).

Subject to Homestead.—A lien on the lands of the judgment debtor, is subject to the homestead interest as provided by Const. Art. X, sec. 2. *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1929).

Purchaser at Execution Sale.—Where the judgment creditor and a mortgagee under a prior registered mortgage claim the land from the same person, they are ordinarily estopped to deny the title of their common source, but where the deed from this common source, upon which the mortgagor's title depends, has been registered after the judgment lien has taken effect, this element of estoppel does not apply to the purchaser at the execution sale. *Mills v. Tabor*, 182 N. C. 722, 109 S. E. 850 (1921).

Sale under Junior Judgment.—The effect of a sale under a junior judgment is to pass the debtor's estate encumbered with the lien of an older docketed judgment; and the effect of a sale under both

is to vest the title in the purchaser, and transfer the liens, in the same order of priority to the proceeds of sale. *Cannon v. Parker*, 81 N. C. 320 (1879).

Same—Priorities Must Be Observed.—The sheriff must observe these priorities, of which he has notice upon the face of the execution, in paying out the money to the respective creditors. *Cannon v. Parker*, 81 N. C. 320 (1879).

Merger.—Where a creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. *Springs v. Pharr*, 131 N. C. 191, 42 S. E. 590 (1902).

As to Bona Fide Purchasers.—Where a judgment is entered during the term, the lien has no application against claimants who have in the meantime acquired bona fide title, and in such case the law will take notice of fractions of a day in favor of such a purchaser, and receivers of the debtor should be classed as a purchaser. *Odell Hdw. Co. v. Holt-Morgan Mills*, 173 N. C. 308, 92 S. E. 8 (1917).

Bona fide purchasers are also protected where there is a great delay in making motion to revive the lien, and execution being issued after the lapse of the ten-year period. See note of *Spicer v. Gambill*, post this note, analysis line, "Issuing Execution" IV.

Judgment Creditor Prior to Debtor's Homestead.—The lien of a judgment duly docketed in the county where the land lies is superior to that of a subsequently registered mortgage on land outside of the debtor's allotted homestead, and therefore, the proceeds of the sale of such land should be applied first to the payment of the judgment debt. *Gulley v. Thurston*, 112 N. C. 192, 17 S. E. 13 (1893). But see note of *Kirkwood v. Peden*, and also *Vanstory v. Thornton*, post this note, analysis line, "Property Subject to the Lien" III.

Interlocutory Judgment.—An interlocutory judgment, containing recitals made only for the purpose of directing a commissioner how to proceed in the sale of land, and the land was not sold, does not affect the rights of the parties. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905).

III. PROPERTY SUBJECT TO THE LIEN.

A. Property Located in County Where Judgment Docketed.

In General.—A docketed judgment is a lien only upon so much of the real property of the defendant as is situated in the county where the same is docketed. *King*

v. Portis, 77 N. C. 26 (1877), but it gives no peculiar lien upon any particular parcel of land. Bryan v. Dunn, 120 N. C. 36, 27 S. E. 37 (1897).

The owner of a docketed judgment has a lien on all the real estate of his debtor within his county. Moore v. Jones, 226 N. C. 149, 36 S. E. (2d) 920 (1946).

A judgment is a lien upon the lands of the judgment debtor that he may own in the county at the time the judgment was docketed. Helsabeck v. Vass, 196 N. C. 603, 146 S. E. 576 (1929).

The lien of a judgment is no more than that which is provided by the statute, and is effective only against "the real property in the county where the same is docketed of every person against whom any such judgment is rendered." Jackson v. Thompson, 214 N. C. 539, 200 S. E. 16 (1938).

Title to Standing Timber. — An estate created by a deed conveying standing timber, with a right to cut and remove the same within a specified time, is, while it exists, subject to the lien of a docketed judgment and to the ordinary methods of enforcing collection of the same as in other cases of realty. Fowle v. McLean, 168 N. C. 537, 84 S. E. 852 (1915).

Property converted from its original nature, see note of Clifton v. Owens, ante this note, analysis line, "In General" 1.

Homestead Not Subject to Judgment Lien.—The mere right of homestead is not such an estate or interest in lands as is subject to a lien by judgment. Kirkwood v. Peden, 173 N. C. 460, 92 S. E. 264 (1917).

Same—Reversionary Interest May Be Subjected.—The only reason for keeping a judgment in full force and effect during the existence of the homestead is to subject the reversionary interest to its payment when the homestead expires, as such interest cannot be sold under execution during the life of the homestead. Kirkwood v. Peden, 173 N. C. 460, 92 S. E. 264 (1917).

A docketed judgment is a lien on all the land of the debtor in the county where docketed from the date of the docketing, and the creditor may presently enforce the same on all the debtor's land outside of the homestead boundaries, but must await the termination of the homestead estate to subject the land to which it pertains, and no act of the debtor can change or impair the creditor's rights under such lien. Vanstory v. Thornton, 112 N. C. 196, 17 S. E. 566 (1893).

A judgment upon individual debt against holder of mere legal title held in trust for another has no lien upon the land so held.

Jackson v. Thompson, 214 N. C. 539, 200 S. E. 16 (1938).

Cited in Cheek v. Walden, 195 N. C. 752, 143 S. E. 465 (1928).

B. After-Acquired Property.

In General.—Under this section the lien of docketed judgments attaches to after-acquired lands in the same county at the moment that the title vests in the judgment debtor, and the proceeds of a sale under such judgments should be distributed pro rata without reference to the day when they were docketed. Moore v. Jordan, 117 N. C. 86, 23 S. E. 259 (1895).

The lien extends to and embraces only such estate as the judgment debtor has at the time of the docketing thereof, or thereafter acquires while the judgment subsists. Thompson v. Avery County, 216 N. C. 405, 5 S. E. (2d) 146 (1939). See also, Durham v. Pollard, 219 N. C. 750, 14 S. E. (2d) 818 (1941).

Judgment by Confession. — Though a judgment by confession is given out of the ordinary course of procedure, nevertheless, it at once, when docketed, becomes a lien upon the judgment debtor's real property. Sharp v. R. R., 106 N. C. 303, 319, 11 S. E. 530 (1890); Keel v. Bailey, 214 N. C. 159, 193 S. E. 654 (1938).

Judgments against Land Held in Remainder. — The docketing of judgments against a debtor who holds land in remainder, dependent upon a life estate in another, creates a lien upon such estate, which, not being susceptible of immediate occupancy, is not protected from sale under execution by the Constitution and laws relating to homestead exemptions. Stern Bros. v. Lee, 115 N. C. 426, 20 S. E. 736 (1894).

Successive Transfers of Different Tracts. — Where there is a judgment lien on land, part of which is sold by the debtor, the remaining portion will be first sold in satisfaction of the judgment before resorting to the land first sold, and the rule extends to a purchaser of the remaining land from the judgment debtor, but this equity is never enforced against the creditor when he will in any substantial way be prejudiced by it. Brown v. Harding, 170 N. C. 253, 86 S. E. 1010 (1915), rehearing denied 171 N. C. 686, 89 S. E. 222.

Attaches upon Conveyance to Judgment Debtor.—The lien of a judgment attaches when the land is conveyed to the judgment debtor, and is superior to any equity which his grantor could retain by a parol agreement or a subsequently recorded conveyance. Colonial Trust Co. v. Sterchie Bros., 169 N. C. 21, 85 S. E. 40 (1915).

C. Nature of Right Acquired.

No Estate Vested.—The lien created by docketing a judgment does not vest any estate in the property subject to it in the judgment creditor, but only secures to the creditor the right to have the property applied to the satisfaction of his judgment, and such lien extends only to such estate, legal or equitable, as may be sold or disposed of at the time it attaches. *Bruce v. Nicholson*, 109 N. C. 202, 13 S. E. 790 (1891).

Title to Property in Third Party.—A docketed judgment constitutes no lien upon real property purchased and paid for by the debtor, where title is taken in the name of some third person. *Dixon v. Dixon*, 81 N. C. 323 (1879).

Same—Remedy of Creditor.—In such case the creditor has a right to follow the fund in equity, but the institution of a suit for that purpose confers no lien, and can have no further effect than to give the creditor first bringing his suit a priority over other creditors, and to disable the holder of the property from defeating, by a conveyance, the object of the proceedings. *Dixon v. Dixon*, 81 N. C. 323 (1879).

Persons Entitled to Enforce.—In an action to enforce the lien of judgments against land formerly owned by the judgment debtor, it was no concern of the defendants that the person in whose name the judgments were taken was not the beneficial owner of the judgments, as defendants would be protected by payment to the plaintiff of record. *Brown v. Harding*, 170 N. C. 253, 86 S. E. 1010 (1915), rehearing denied, 171 N. C. 686, 89 S. E. 222.

Where Equitable Execution and Accounting Necessary.—Where there was a conflict as to the priorities of the secured creditors the plaintiff, whose docketed judgment constituted a lien on the resulting trust in a deed of trust, could not enforce his lien by the ordinary process of execution but had to resort to an action in the nature of an equitable execution where an account could be taken. *Trimble v. Hunter*, 104 N. C. 129, 10 S. E. 291 (1889).

Same—Reason for the Rule.—As it (the resulting trust) could not be levied on or sold by the common law to satisfy the execution, no lien arose from its issuing or what the sheriff calls its levy. For as the lien arises or is created as a means to the end, it would be in vain for the law to raise it when the end could not be attained. *McKeithan v. Walker*, 66 N. C. 95 (1872).

IV. ISSUING EXECUTION.

See the analysis line immediately following in this note.

Purpose.—The sole office of the execution is to enforce the lien by the sale of the land upon which it has attached. *Pasour v. Rhyne*, 82 N. C. 149 (1880).

Time Allowed.—Leave to issue execution upon a docketed judgment may be granted at any time within ten years from the docketing. *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535 (1890).

Same—Appeal.—The motion for leave to issue execution is made in apt time, though the ten years expired pending the appeal and though no undertaking is given; this is true because the time during which the judgment creditor was restrained by the operation of the appeal is not to be counted, as the appeal had the effect to prevent the issuing of execution within the time prescribed. *Adams v. Guy*, 106 N. C. 278, 11 S. E. 535 (1890).

Motion to Revive.—Where a judgment creditor delays issuing execution until within a short time before the expiration of the lien of his judgment and then gives notice of a motion to revive and for leave to issue execution, and the motion is heard and execution issued after ten years from the date of the judgment, a purchaser at the execution sale of land gets no title as against one who bona fide bought the land during the ten years. *Lilly v. West*, 97 N. C. 276, 1 S. E. 834 (1887); *Pipkin v. Adams*, 114 N. C. 201, 19 S. E. 105 (1894). The same principle applies where the execution is levied before the expiration of the lien but the sale does not take place until after the expiration of the lien. *Spicer v. Gambill*, 93 N. C. 378 (1885).

Failure to Docket Judgment.—If a party who obtains judgment below neglects to docket it in any county, then upon obtaining judgment in the Supreme Court, he will have no lien prior to the teste of his execution from that court. *Rhyne v. McKee*, 73 N. C. 259 (1875).

V. LOSS OF THE LIEN.

In General.—The lien of a judgment docketed under this section is lost by the lapse of ten years from the date of the docketing of the judgment; and this is so notwithstanding execution has been issued within the ten years. *Pasour v. Rhyne*, 82 N. C. 149 (1880); *Lyon v. Russ*, 84 N. C. 588 (1881).

The lien of a judgment, created upon real estate by the provisions of this section, is for a period of ten years from the date of the rendition of the judgment and such lien ceases to exist at the end of that

time, unless suspended in the manner set out in the statute. It is in the interest of public policy that this statute should be strictly construed. *Cheshire v. Drake*, 223 N. C. 577, 27 S. E. (2d) 627 (1943).

Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

The life of the lien of a judgment is ten years from the date of its rendition in the superior court, and an action to enforce the lien by condemning land of the judgment debtor to be sold is barred by the statute when sale of the land cannot be made and concluded within the ten-year period, even though the action is instituted within such period, when the running of the statute is not interrupted at any time or in any manner by order restraining and proceeding on the judgment. *Lupton v. Edmundson*, 220 N. C. 188, 16 S. E. (2d) 840 (1941).

Lien Is Lost if Sale Not Made in Ten Years.—This section and § 1-306 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948).

Deduction from Ten-Year Period.—The period during which a judgment debtor is in the bankrupt court and his property in custodia legis should be deducted from the ten-year period as provided in this section. *First-Citizens Bank, etc., Co. v. Parker*, 232 N. C. 512, 61 S. E. (2d) 441 (1950).

Appeal as Stopping Statute.—Where judgment was taken in 1926, and in 1931 defendant moved before the clerk to set the judgment aside, motion denied and appeal taken to the judge, and the clerk ordered that execution should not issue until the adjournment of the August, 1931, term of court, and the appeal to the judge

was never heard, the order of the clerk and the appeal to the judge did not have the effect of stopping the statute and the judgment was barred in 1939 by the ten-year statute of limitations. *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424 (1942).

When Mandate to Sell the Land Expires.—A judgment recovered in the superior court for the payment of money is a lien on land from the moment it is docketed, and executions issued to enforce collection are returnable to the next term of the court beginning not less than forty days after they are issued. With the return day the mandate expires and the power to sell land under the particular writ is thereafter withheld. *Jeffreys v. Hocutt*, 193 N. C. 332, 137 S. E. 177 (1927).

Cancellation of Judgment to Remove Cloud.—Where a deed of trust to secure certain bonds contains the provision that the bonds may be sold in part by the trustor with the consent of the trustee who is to receive and apply the purchase price on the bonds, and a judgment has been docketed against the trustor, after he has sold a part of said land under the agreement but without the joinder of the trustee and before the purchaser has registered his deed, the purchaser is entitled to have the judgment canceled as a cloud on his title since the purchase of the land was, in reality, through the trustee who received the money and not the trustor. *Boyd v. Bristol Typewriter Co.*, 190 N. C. 794, 130 S. E. 858 (1925).

In What Court Judgment Impeachable.—A justice's judgment docketed in the superior court is for the purpose of execution there, and that court has no power to set it aside, unless the cause be carried up by appeal or writ of recordari. A judgment can be vacated only by the court which rendered it. *Morton v. Rippey*, 84 N. C. 611 (1881).

Effect of Former § 45-28.—An execution sale held less than ten days before the expiration of ten years after the rendition of the judgment was held ineffective, since under former § 45-28, the sale under execution could "not be deemed to be closed under ten days," in order to afford opportunity for an increase in the bid, and thus the sale could not be consummated within the ten-year period. The contentions that the sheriff's deed related back to the day of the sale, and that delay on the part of the sheriff in executing the deed or making formal return could not adversely affect the rights of the purchaser, were inapposite. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948). For present

provisions covering the subject matter of **Cited in** *Scales v. Scales*, 218 N. C. 553, former § 45-28, see §§ 45-21.27 to 45-21.30. 11 S. E. (2d) 569 (1940).

§ 1-235. Of Supreme Court docketed in superior court; lien.—It is the duty of the clerk of the Supreme Court, on application of the party obtaining judgment in that court, directing in whole or in part the payment of money, or affecting the title to real estate, or on the like application of the attorney of record of said party, to certify under his hand and the seal of said court a transcript of the judgment, setting forth the title of the court, the names of the parties thereto, the relief granted, that the judgment was so rendered by said court, the amount and date of the judgment, what part thereof bears interest and from what time; and said clerk shall send such certificate and transcript to the clerk of the superior court of such counties as he is directed; and the clerk of the superior court receiving the certificate and transcript shall docket them in like manner as judgment rolls of the superior court are docketed. And when so docketed, the lien of said judgment is the same in all respects, subject to the same restrictions and qualifications, and the time shall be reckoned as is provided and prescribed in the preceding sections for judgments of the superior court, so far as the same are applicable. The party desiring the certificate and transcript provided for in this section may obtain them at any time after such judgment has been rendered, unless the Supreme Court otherwise directs. (1881, c. 75, ss. 1, 4; Code, s. 436; Rev., s. 575; C. S., s. 615.)

Editor's Note.—The foundation of the purpose of the enactment of this section is to be found in the great importance attached to the requirement that every judgment, to constitute a lien, must be docketed, the imperativeness of which has been dealt with in the preceding section. Hence by the very provisions of this section the substantial elements of a final judgment rendered by the Supreme Court must be transmitted to the various superior courts and when docketed (and not until then) in the proper county the judgment forms a lien upon the real estate of the debtor situated therein. See *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124 (1889).

Rendition Does Not Perfect Lien.—The simple rendition of a judgment in the Supreme Court will not constitute a lien upon the judgment debtor's land until "docketed" in the county where the land lies, as required by the statute. *Alsop v. Moseley*, 104 N. C. 60, 10 S. E. 124 (1889).

Issuing Execution Prior to Docketing.—See note of *Bernhardt v. Brown*, under § 1-234.

Judgment of Supreme Court Applied to Docketed Lower Court Judgment.—The defendant, by a decree in the Supreme Court, had recovered from the plaintiffs a sum of money; while the execution was in the hands of the sheriff the plaintiff recovered from the defendant, by judgments before a magistrate, a like amount for items in their account not allowed in the case in the Supreme Court. These latter judgments were docketed, and executions were taken out upon them and returned nulla bona; the plaintiffs then asked for an order to have the amount of the decree in favor of the defendant applied to their judgments and it was held that they were entitled to such relief. *Hogan v. Kirkland*, 64 N. C. 250 (1870).

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282 (1937).

§ 1-236. Fees for filing transcripts of judgments by clerks of superior courts.—The fee for filing, docketing and indexing transcripts of judgments in the offices of the several clerks of the superior court in North Carolina shall be the same fee charged for filing, docketing and indexing transcripts of judgments in the office of the clerk of the superior court of the county from which the transcript of judgment is sent to said county. (1933, c. 435, s. 1.)

§ 1-236.1. Transcripts of judgments certified by deputy clerks validated.—Each transcript of judgment from the original docket of the superior court of a county where the same was rendered and docketed, heretofore certified under the official seal of said court, by a deputy clerk thereof, in his own name as such deputy clerk, and docketed on the judgment docket of another county in the State, is hereby validated and declared of full force and effect in such county where docketed, from the date of docketing of the same, to the same extent and with the same effect as if said transcript of judgment had been certi-

fied in the name of the clerk of the superior court of said original county, and under his hand and official seal. (1943, c. 11.)

§ 1-237. Judgments of federal courts docketed; lien on property; recordation; conformity with federal law.—Judgments and decrees rendered in the district courts of the United States within this State may be docketed on the judgment dockets of the superior courts in the several counties of this State for the purpose of creating liens upon property in the county where docketed; and when a judgment or decree is registered, recorded, docketed and indexed in a county in like manner as is required of judgments and decrees of the courts of this State, it shall become a lien and shall have all the rights, force and effect of a judgment or decree of the superior court of said county. When a judgment roll of a district court is filed with the clerk of the superior court, the clerk shall docket it as judgments of the superior court are required to be docketed. It is the intent and purpose of this section to conform the State law to the requirements of the act of Congress entitled "An Act to Regulate the Liens on Judgments and Decrees of the Courts of the United States" being the act of August first, one thousand eight hundred and eighty-eight, chapter seven hundred and twenty-nine. (1889, c. 439; Rev., s. 576; C. S., s. 616; 1943, c. 543.)

Editor's Note.—Prior to the 1943 amendment this section also applied to judgments and decrees rendered in the federal circuit courts. The amendment made other changes in the wording of the section.

Judgment Rendered in District Court.—Judgment rendered by district and circuit courts, in order to be liens must be docketed as required by the state laws, and, since the United States may take advantage of any state or federal statute without being bound by its limitations, it may enforce the lien of the judgment in its favor though barred by the ten-year limitation contained in this statute. *United States v. Minor*, 235 F. 101 (1916).

Date of Docketing Fixes the Lien.—Under the act of Congress as to docketing judgments of federal courts, and the provisions of this section authorizing the docketing of judgments and decrees of the federal courts on the judgment dockets of the superior courts of this State for the purpose of creating liens, such judgments on a money demand are liens on real property only from the date of their docketing in the county where the land is situated. *Riley v. Carter*, 165 N. C. 334, 81 S. E. 414 (1914).

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282 (1937).

§ 1-238: Repealed by Session Laws 1943, c. 543.

§ 1-239. Paid to clerk; docket credited; transcript to other counties.—The party against whom a judgment for the payment of money is rendered, by any court of record, may pay the whole, or any part thereof, to the clerk of the court in which the same was rendered, at any time thereafter, although no execution has issued on such judgment; and this payment of money is good and available to the party making it, and the clerk shall enter the payment on the judgment docket of the court, and immediately forward a certificate thereof to the clerk of the superior court of each county to whom a transcript of said judgment has been sent, and the clerk of such superior court shall enter the same on the judgment docket of such court and file the original with the judgment roll in the action. Entries of payment or satisfaction on the judgment dockets in the office of the clerk of the superior court, by any person other than the clerk, shall be made in the presence of the clerk or his deputy, who shall witness the same, and when entries of full payment or satisfaction have been made, the clerk or his deputy shall enter upon the judgment index kept by him, opposite and on a line with the names of the parties to the judgment, the words "Paid" or "Satisfied." (1823, c. 1212, P. R.; R. C., c. 31, s. 127; Code, s. 438; Rev., s. 577; 1911, c. 76; C. S., s. 617.)

Payment Made to Clerk.—A trustee may properly pay money to the clerk as part payment in satisfaction of a judgment.

Sugg v. Bernard, 122 N. C. 155, 29 S. E. 221 (1898).

A judgment debtor under this section is

entitled to credit on the judgment for amounts paid by him on the judgment to the clerk of the superior court in whose office the judgment is docketed, although the clerk fails to enter payment on the judgment docket, the judgment debtor being under no duty to require the clerk to make entry of payment on the judgment docket and the clerk being in effect the statutory agent of the owner of the judgment in making such entries. *Dalton v. Strickland*, 208 N. C. 27, 179 S. E. 20 (1935).

Same.—Where Execution Is in the Hands of Sheriff.—A debtor has no right to pay the money to the clerk when the execution is in the hands of the sheriff. *Bynum v. Barefoot*, 75 N. C. 576 (1876).

Clerk Receiving Depreciated Currency.—Whenever it is sought to establish an authority in a clerk to bind a plaintiff by the receipt of depreciated currency in payment of a judgment, it must be shown either that the receipt was expressly authorized by the plaintiff or that the plaintiff has done acts from which such an authority may fairly be implied. *Purvis v.*

Jackson, 69 N. C. 474 (1873).

Misappropriation of Payment by Clerk.—Where a judgment debtor has paid the judgment entered against him in the office of the clerk of the superior court, and the clerk has misappropriated the payment, so that the debtor has again paid the judgment, the equitable doctrine as to whether he is subrogated to the right of the judgment creditor does not necessarily arise, and a right of action will lie against the surety on the clerk's bond for the direct misappropriation of the money. *Gilmore v. Walker*, 195 N. C. 460, 142 S. E. 579 (1928).

Liability for Loss.—The clerk of the superior court and the surety on his bond are liable for loss resulting to the owner of a judgment from the clerk's failure to perform his statutory duty to enter the judgment and payments thereon on the judgment docket or his failure to account to the owner for sums paid on the judgment by the judgment debtor, as provided by this section. *Dalton v. Strickland*, 208 N. C. 27, 179 S. E. 20 (1935).

§ 1-239.1. Records of cancellation, assignment, etc., of judgments recorded by photographic process.—In all cases where the governing authority of any county has caused the instruments or documents filed for record in the office of the clerk of the superior court of such county to be recorded by any system involving the use of microfilm or by the use of any microphotographic system or by any system of photographic recording, it shall be lawful for the clerk of the superior court to keep a record or docket book for the purpose of entering on same payment or payments, credit or satisfaction, assignments or releases in whole or in part of any judgment which has heretofore been recorded by any photographic process above mentioned. For this purpose, the form of such docket or record book shall be substantially as follows:

“..... Superior Court Cancellation, Assignment, Transfer or Release of Judgments, etc.

I (We) do hereby certify that that certain judgment docketed in Judgment Docket, at page, filed day of, 19.., Case No., wherein is (are) Plaintiff(s) and is (are) Defendant(s) has been fully satisfied, released and discharged together with all costs, and interest,

.....
Signed in the presence of
.....
Assistant-Deputy Clerk of
the Superior Court of
..... County

Any entries of payment, credits or satisfaction made on such record or docket book, in substantially the form above mentioned, shall be good and valid payments, credits or satisfactions in all respects as if the same had been duly entered on the original judgment docket before the recording of same by the photographic process or system above mentioned. The clerk of the superior court shall have

the authority to forward certificates to the clerk of the superior court of each county to whom a transcript of said judgment has been sent to the same extent and for all the purposes provided in G. S. 1-239, and all payments, credits or satisfactions entered in said docket book or record shall be valid to the same extent as if the same had been entered in the regular judgment docket in accordance with the provisions of G. S. 1-239. (1951, c. 774.)

§ 1-240. Payment by one of several; transfer to trustee for payor.—In all cases in the courts of this State wherein judgment has been, or may hereafter be, rendered against two or more persons or corporations, who are jointly and severally liable for its payment either as joint obligors or joint tort-feasors, and the same has not been paid by all the judgment debtors by each paying his proportionate part thereof, if one of the judgment debtors shall pay the judgment creditor, either before or after execution has been issued, the amount due on said judgment, and shall, at the time of paying the same, demand that said judgment be transferred to a trustee for his benefit, it shall be the duty of the judgment creditor or his attorney to transfer without recourse such judgment to a trustee for the benefit of the judgment debtor paying the same; and a transfer of such judgment as herein contemplated shall have the effect of preserving the lien of the judgment and of keeping the same in full force as against any judgment debtor who does not pay his proportionate part thereof to the extent of his liability thereunder in law and in equity, and in the event the judgment was obtained in an action arising out of a joint tort, and only one, or not all of the joint tort-feasors, were made parties defendant, those tort-feasors made parties defendant, and against whom judgment was obtained, may, in an action therefor, enforce contribution from the other joint tort-feasors; or at any time before judgment is obtained, the joint tort-feasors made parties defendant may, upon motion, have the other joint tort-feasors made parties defendant.

If the judgment debtors do not agree as to their proportionate liability, and it be alleged in such action by petition that any judgment debtor is insolvent or is a nonresident of the State and cannot be forced under the execution of the court to contribute to the payment of the judgment, the court shall, in the action in which the judgment was rendered, after notice to the defendants or such of them as may be within the jurisdiction of the court, submit proper issues to a jury to find the facts arising on such petition and any answer that may be filed thereto, and shall, upon such verdict and any admissions in the petition and answer, enter judgment declaring the proportionate part each judgment debtor shall pay.

Any judgment creditor who refuses to transfer a judgment in his favor to a trustee for the benefit of a judgment debtor who shall tender payment and demand in writing a transfer thereof to a trustee to preserve his rights in the same action, as contemplated by this section, shall not thereafter be entitled to an execution against the judgment debtor so tendering payment. (1919, c. 194, ss. 1, 2; C. S., s. 618; 1929, c. 68.)

Editor's Note.—The 1929 amendment changed the first paragraph by permitting contribution between joint tort-feasors, and the joinder of joint tort-feasors not made parties. The amendment, of course, did not apply to a suit commenced before its enactment. *Bargeon v. Transportation Co.*, 196 N. C. 776, 147 S. E. 299 (1929).

For a discussion of this section in connection with federal Rules of Civil Procedure, see 25 N. C. Law Rev. 245.

This section creates a new right, provides an exclusive remedy, and substantial compliance with its terms is necessary to make it available. *Hoft v. Mohn*, 215 N.

C. 397, 2 S. E. (2d) 23 (1939).

At common law no right of action for contribution existed between or among joint tort-feasors who were in *pari delicto*, thus the right is statutory, and its use necessarily depends upon the terms of this section. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736 (1943).

Intent and Purpose.—The intent and purpose of this section is to permit a defendant, who has been sued in a tort action, to bring into the action for purpose of enforcing contribution, any joint tort-feasor, against whom the plaintiff could have originally brought suit in the same

action. *Wilson v. Massagee*, 224 N. C. 705, 32 S. E. (2d) 335 (1944).

The language and intention of this section is to settle an entire controversy regarding conflicting joint tort claims in one action. *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434 (1939).

The purpose of the statute is to permit defendants in tort actions to litigate mutual contingent liabilities before they have accrued, so that all matters in controversy growing out of the same subject of action may be settled in one action, though the plaintiff in the action may be thus delayed in securing his remedy. *Evans v. Johnson*, 225 N. C. 238, 34 S. E. (2d) 73 (1945).

But it was not the purpose and it is not the effect of this section to create a cause of action in contribution between joint tort-feasors when the *lex loci delicti* gives none. *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126 (1943).

Right Must Be Enforced According to Form of Section.—The right to contribution comes from this section, and it is to be enforced according to the form of this section. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269 (1949).

What Must Be Alleged and Proved to Enforce Contribution.—Where a judgment has been obtained, arising out of a joint tort, and only one of the joint tort-feasors was a party and judgment against him alone, to enable such judgment debtor to recover, under this section, against the other joint tort-feasor, he must allege and prove, in an action *de novo*, the negligence of his alleged joint tort-feasor, the defendant, and his duty of contribution. *Charlotte v. Cole*, 223 N. C. 106, 25 S. E. (2d) 407 (1943).

Right Is Not One of Subrogation.—This section gives to one joint tort-feasor, who is sued, the right to bring in others jointly liable with him and to require them to contribute proportionately to the payment of any judgment which the plaintiff may recover, but this would not include the right to step into the plaintiff's shoes and prosecute any claim which he might have against them. The right sought to be enforced is one of contribution, and not one of subrogation. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269 (1949).

It Is Not Dependent on Plaintiff's Continued Right to Sue.—The right of one joint tort-feasor to enforce contribution against another is said to spring from the plaintiff's suit. This right of contribution,

however, projects itself beyond the plaintiff's suit, and is not dependent upon the plaintiff's continued right to sue both or all the joint tort-feasors. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736, 149 A. L. R. 1183 (1943). It is the joint tort and common liability to suit which gives rise to the right to "enforce contribution" under this section. *Tarkington v. Rock Hill Printing, etc., Co.*, 230 N. C. 354, 53 S. E. (2d) 269 (1949).

Enforcement of Right of Contribution after Payment of Judgment.—The right of contribution may be enforced after the liability to the injured party has been extinguished by payment of the judgment and its transfer to a trustee for the benefit of the paying judgment debtor. *Godfrey v. Tidewater Power Co.*, 223 N. C. 647, 27 S. E. (2d) 736 (1943).

Assignment to Third Party Necessary to Claim Subrogation.—A surety defendant in a judgment with the principal according to principles heretofore obtaining in North Carolina, without the aid of a statute, in order to preserve the judgment lien and enforce it for his reimbursement, is required on payment to have it assigned to some third person for his benefit, and, in case of collateral security, he is in such instances also entitled to the full equitable doctrine of subrogation; but if he pays the judgment debt on which he himself is bound, without having it assigned, as indicated, he then becomes the simple contract creditor of his principal. *Bank v. Sprinkle*, 180 N. C. 580, 104 S. E. 477 (1920). See *Stewart v. Parker*, 225 N. C. 551, 35 S. E. (2d) 615 (1945).

Subrogation Applicable between 'Co-Sureties.—A surety may preserve the lien of judgment against the principal and himself by paying the judgment creditor and having the judgment assigned to a third person for his own credit, and this also applies to a judgment against his co-sureties and himself in enforcing an equality of obligation between them. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

Discharge of Judgment by Compromise Payment.—Where one of several judgment debtors, jointly and severally liable, discharges the entire judgment under a compromise agreement with the judgment creditor by payment of a fraction of the amount of the judgment, he is entitled to an assignment of the judgment to a trustee for his benefit under this section, and is entitled to recover from each of his codefendants the proportionate part of such codefendant's liability in the amount of the compromise settlement, he

being entitled to contribution on the basis of the amount actually paid for the full discharge of the judgment even though such amount does not equal his proportionate liability on the original amount of the judgment. *Scales v. Scales*, 218 N. C. 553, 11 S. E. (2d) 569 (1940).

Judgment Should Be Transferred to Trustee Not the Debtor.—A bank holding a note hypothecated by the payee bank obtained judgment thereon against the payee bank and the makers. Thereafter the payee bank became insolvent and the Commissioner of Banks made a payment on the judgment out of the assets of the payee bank and obtained an assignment of the judgment, which it transferred to plaintiff, who brought suit thereon against the makers. Held: The Commissioner of Banks in the payment of the judgment and in taking the assignment represented the bank and such acts were taken in the same right and with the effect as though they had been taken by the bank, and therefore the Commissioner of Banks may not act as a trustee for the transfer of judgment under this section, and the payment of the judgment by the Commissioner of Banks extinguished same. *Hoft v. Mohn*, 215 N. C. 397, 2 S. E. (2d) 23 (1939).

What Constitutes a Refusal to Transfer.—Under a proper interpretation of the relevant parts of this section the refusal of the judgment creditor to transfer the judgment to some third person to preserve the lien thereof for the benefit of the surety, tendering payment of the same, means his final refusal to do so, and not when the status of the parties remain the same, and the judgment creditor subsequently offers and stands willing to assign the judgment as the statute requires. *Bank v. Sprinkle*, 180 N. C. 580, 104 S. E. 477 (1920).

The entry of transfer of judgment by the attorney of the judgment creditor upon the margin of the judgment as docketed in the office of the clerk of the superior court is prima facie evidence of transfer. *Harrington v. Buchanan*, 222 N. C. 698, 24 S. E. (2d) 534 (1943).

It is presumed that attorney acted within the scope of his authority. *Harrington v. Buchanan*, 222 N. C. 698, 24 S. E. (2d) 534 (1943).

Proportionate Liability of Sureties.—The liability of sureties among themselves is controlled by the equitable principle of equality arising out of a common risk, and in case of insolvency or nonresidence these rights are adjusted by reference to the number of sureties who are solvent or

who have property available to process within the jurisdiction of the court. *Fowle v. McLean*, 168 N. C. 537, 84 S. E. 852 (1915).

Surety Cannot Raise Question of Liability after Judgment.—By paying the whole judgment, one joint tort-feasor, under this section, can lose no right it has against the other tort-feasor or its surety. If the surety is a party to the judgment and bound thereby it cannot thereafter raise the question of its liability to the defendant, when it pays the judgment in full and requires the transfer of said judgment to a trustee by virtue of the provision of this section. *Hamilton v. Southern R. Co.*, 203 N. C. 468, 166 S. E. 392 (1932).

Contribution between Joint Tort-Feasors.—This section seems to abrogate the well-settled rule, that, subject to some exceptions (*Gregg v. Wilmington*, 155 N. C. 18, 70 S. E. 1070 (1911)), there can be no contribution between joint tort-feasors. *Lineberger v. Gastonia*, 196 N. C. 445, 146 S. E. 79 (1929), citing *Raulf v. Elizabeth City Light, etc., Co.*, 176 N. C. 691, 97 S. E. 236 (1918).

Right to contribution among joint tort-feasors exists solely by provision of this section. *Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634 (1936).

Plaintiff Cannot Be Compelled to Sue Joint Tort-Feasors.—In so far as plaintiff is concerned, when he has elected to sue only one of joint tort-feasors, the others are not necessary parties and plaintiff cannot be compelled to pursue them; nor can the original defendant avail himself of this section to compel plaintiff to join issue with a defendant he has elected not to sue. Original defendant cannot rely on the liability of the party brought in to the original plaintiff, but must recover, if at all, upon the liability of such party to him. *Charnock v. Taylor*, 223 N. C. 360, 26 S. E. (2d) 911, 148 A. L. R. 1126 (1943).

Original Defendant Cannot Bring in Injured Third Persons.—This section neither directly nor by implication authorizes the bringing in of persons who are apprehended to have been damaged or injured, at the convenience of the tort-feasor in determining the right to contribution in one trial. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

On Allegation That Plaintiff Was Joint Tort-Feasor.—This section provides that a tort-feasor sued by the injured person may bring in joint tort-feasors as parties defendant, but it does not authorize a party sued for negligent injury to join injured

third persons upon its allegation that plaintiff was a joint tort-feasor in causing the calamity resulting in injury to himself and such third parties, and thus force such injured third parties to prosecute their claims in plaintiff's action. *Fleming v. Carolina Power, etc., Co.*, 229 N. C. 397, 50 S. E. (2d) 45 (1948).

Presumption as to Authority of Attorney to Transfer Judgment.—Upon the transfer on the judgment docket of a judgment by an attorney of record, acting under authority expressly granted by this section, nothing appearing to indicate that the attorney received less than full value, there is a presumption that such attorney acted within the scope of his authority, and the burden is on the party seeking to set the transfer aside to prove that no such authority existed. *Harrington v. Buchanan*, 224 N. C. 123, 29 S. E. (2d) 344 (1944).

Section Does Not Apply to Insurers of Tort-Feasors.—An insurer of one joint tort-feasor paying the judgment recovered against both joint tort-feasors is not entitled to equitable subrogation as against the insurer of the other tort-feasor, there being no relation between the tort-feasors outside the provision of the statute upon which the doctrine of equitable subrogation can be based, and the insurers of the tort-feasors not coming within the provision of the statute in regard to contribution. *Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634 (1936).

Since the liability of insurance carriers of tort-feasors is contractual and not founded on tort, where no judgment had been recovered against such a carrier by any of the parties to an action, it was held that this section was inapplicable as by its express terms it applies only to joint tort-feasors and to joint judgment debtors. *Gaffney v. Lumbermen's Mut. Cas. Co.*, 209 N. C. 515, 184 S. E. 46 (1936); *Lumbermen's Mut. Cas. Co. v. United States Fidelity, etc., Co.*, 211 N. C. 13, 188 S. E. 634 (1936).

Defendants May File Cross Action to Join Others as Joint Tort-Feasors.—Defendants in an action to recover for negligent injury are entitled, under this section to have other defendants joined with them upon filing a cross action against such other defendants, alleging that such defendants were joint tort-feasors with them in causing the injury. *Mangum v. Southern Ry. Co.*, 210 N. C. 134, 185 S. E. 644 (1936).

When a defendant in a negligent injury action files answer denying negligence but

alleging that if it were negligent a third party was also guilty of negligence which concurred in causing the injury in suit, and demands affirmative relief against such third person, he is entitled to have such third person joined as a codefendant under this section. *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434 (1939); *Lackey v. Southern Ry. Co.*, 219 N. C. 195, 13 S. E. (2d) 234 (1941). See also, *Bost v. Metcalfe*, 219 N. C. 607, 14 S. E. (2d) 648 (1941).

This section means that in an action arising out of a joint tort wherein judgment may be rendered against two or more persons or corporations, who are jointly and severally liable, and not all who are so jointly and severally liable as joint tort-feasors have been made parties defendant, those who are sued may at any time before judgment, upon motion, have the other such joint tort-feasors brought in and made parties defendant in order to determine and enforce contribution. *Wilson v. Massagee*, 224 N. C. 705, 32 S. E. (2d) 335 (1944).

Apart from the Statute.—This section authorizes the joinder of a third party as a joint tort-feasor for the purpose of enforcing contribution, but before this provision was inserted in the statute in 1929 it was settled law that a third party could be brought in on allegation of primary liability. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822 (1951).

Upon equitable principles, apart from the provisions of this section, a person who is sued alone, and whose negligence is passive, is entitled to join and to set up by cross-action the liability of the person whose positive and active negligence produced the injury, in order that the primary and secondary liability as between the joint tort-feasors may be adjudged in the one action, notwithstanding that both are equally liable to the injured person. *Wright's Clothing Store v. Ellis Stone & Co.*, 233 N. C. 126, 63 S. E. (2d) 118 (1951).

Voluntary Nonsuit Not Permitted as to Joint Tort-Feasor against Whom Other Tort-Feasor Claims Relief.—Where plaintiff sued defendants as joint tort-feasors, and appealing defendant in its amended answer denied negligence but also alleged that if appealing defendant were negligent its negligence concurred with the negligence of its codefendant, and asked for such relief against its codefendant as it was entitled to under this section, it was error for the court, over appealing defendant's objection, to permit plaintiff to take a voluntary nonsuit as to the codefendant

before the close of plaintiff's evidence, since under the pleadings, appealing defendant requested affirmative relief against its codefendant and is entitled to hold the codefendant as a party under this section. *Smith v. Kappas*, 218 N. C. 758, 12 S. E. (2d) 693 (1941).

Although Judgment Not Transferred Surety May Sue on Contract.—Defendants were principals on a note and plaintiff was a surety. After judgment was obtained by the payee, plaintiff drew his check to one of the principals to be used in satisfying the judgment. Although upon the rendition of the judgment the note merged therein and the judgment became the only legal evidence of the indebtedness, the relative liability of defendants as principals and plaintiff as surety, as between themselves, remained the same as on the note, and plaintiff, even in the absence of an assignment of the judgment to a trustee for his benefit, became the contract creditor of defendants to the extent of the money advanced by him. *Saied v. Abeyounis*, 217 N. C. 644, 9 S. E. (2d) 399 (1940).

Section Inapplicable Where Defendant Alleges Sole Liability of Codefendant.—Where the defendant had another party joined as codefendant, and filed answer denying negligence on his part and alleging that the negligence of his codefendant was the sole proximate cause of the injury in suit, but demanding no relief against his codefendant, it was held that the demurrer of the party joined should have been sustained as neither the complaint nor the answer of the original defendant alleged any cause of action against him, this section permitting contribution among joint tort-feasors, being therefore inapplicable since the answer of the original defendant alleges sole liability on the part of his codefendant and not joint tort-feasorship. *Walker v. Loyall*, 210 N. C. 466, 187 S. E. 565 (1936).

When a defendant simply denies negligence on its part and alleges that the negligence of its codefendant was the sole proximate cause of the injury, and makes no demand for affirmative relief against its codefendant, such defendant is not in a position to complain of nonsuit granted upon motion of the codefendant, upon its contention that it was entitled to keep the codefendant in the case as a joint tort-feasor, from whom it would be entitled to contribution under this section. *Perry v. Sykes*, 215 N. C. 39, 200 S. E. 923 (1939).

Where Plaintiff's Complaint Demurrable.

—Plaintiff sued the receivers of a corporation and an individual as joint tort-feasors. The demurrer of the receivers on the ground that the complaint did not allege a cause of action against them was sustained, and plaintiff did not amend or appeal. Thereafter, the individual defendant filed a cross action for contribution against the receivers, alleging facts sufficient for their joinder under this section. It was held that the judgment sustaining the demurrer adjudicated only that the complaint was insufficient to state a cause of action against the receivers as joint tort-feasors, and does not estop the individual defendant from setting up the cross action against them as joint tort-feasors, since the individual defendant was not the "party aggrieved" by the determination of that issue of law between the plaintiff and the receivers, and had no right to appeal therefrom, and no power to force plaintiff to amend or appeal. *Canestrino v. Powell*, 231 N. C. 190, 56 S. E. (2d) 566 (1949).

Burden Is on Original Defendant to Prove Cross Action.—Where plaintiff does not demand any relief against a codefendant joined by the original defendant as a joint tort-feasor, the burden is on the original defendant to prove his cross action for contribution, and upon motion of the codefendant for nonsuit on the cross action the evidence must be considered in the light most favorable to the original defendant upon that cause. *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 534 (1948).

Joinder before Loss Suffered.—A retailer, sued by a customer for breach of implied warranty that a product, sold in the original package, is wholesome and fit for human consumption, is not required to wait until he has suffered loss before joining the wholesaler or distributor upon the theory that the wholesaler or distributor is primarily liable upon the warranty. *Davis v. Radford*, 233 N. C. 283, 63 S. E. (2d) 822 (1951).

Improper Joinder.—Where the driver of a car is under the control and direction of a passenger who is the employee driver's superior, any negligence of the driver is imputable to the passenger and bars any action by the passenger against him, and therefore in an action by the passenger against the owner of the other vehicle involved in the collision, the employee driver is improperly joined as an additional defendant on motion of the original defendant for the purpose of contribution as a joint tort-feasor. *Bass v. Ingold*, 232 N. C. 295, 60 S. E. (2d) 114 (1950).

Propriety of Joinder Determined by Pleadings of Original Defendant.—Where an additional defendant is brought in by the original defendant for the purpose of contribution under this section, the propriety of such joinder will be determined by the pleadings of the original defendant, unaffected by any pleadings filed by plaintiff. *Bass v. Ingold*, 232 N. C. 295, 60 S. E. (2d) 114 (1950).

Joint and Several Judgment in Favor of Plaintiff Held Error.—Where plaintiffs seek no affirmative relief against a codefendant joined by the original defendant for the purpose of enforcing contribution against it as a joint tort-feasor, it is error for the court to enter joint and several judgments in favor of plaintiffs against both defendants upon the jury's finding that both were guilty of actionable negligence, since the liability of the codefendant is solely to the original defendant on its claim for contribution. *Pascal v. Burke Transit Co.*, 229 N. C. 435, 50 S. E. (2d) 534 (1948).

Res Judicata.—The owner and driver of a car recovered judgment against the driver and owner of a truck for damages sustained in a collision upon verdict of the jury establishing, *inter alia*, that the plaintiff therein was not guilty of contributory negligence. Thereafter the passengers in the car sued the owner and driver of the truck for injuries sustained in the same collision. It was held that as between the parties thereto the prior judgment was *res judicata* on the question of whether the driver of the car was guilty of negligence contributing to the collision, and bars the right of the owner and driver of the truck from joining the driver of the car as a joint tort-feasor in the second action, § 1-240, notwithstanding that the plaintiffs in the second action were not parties thereto or bound by the judgment, and could have joined the driver of the car as a party defendant had they so elected.

Tarkington v. Rock Hill Printing, etc., Co., 230 N. C. 354, 53 S. E. (2d) 269 (1949).

Where plaintiffs seek no relief from party joined by original defendants for purpose of contribution under this section, the liability of such defendant to plaintiffs is not at issue on the trial, and judgment for the original defendants does not preclude plaintiffs from later suing the party so joined. *Powell v. Ingram*, 231 N. C. 427, 57 S. E. (2d) 315 (1950).

Interstate Commerce.—Where plaintiff sues a defendant under § 28-173, alleging that her intestate was killed by the negligence of the defendant, the defendant cannot join as a joint tort-feasor under this section, a railway company by which the plaintiff's intestate was employed in interstate commerce. *Wilson v. Massatee*, 224 N. C. 705, 32 S. E. (2d) 335 (1944).

Rehearing.—Plaintiff's petition to rehear was allowed for inadvertence in the original opinion in stating that before trial appealing defendant had filed amended answer asking affirmative relief against its codefendant under this section, precluding plaintiff from taking a voluntary nonsuit as against the codefendant, it appearing of record that appealing defendant did not tender amended answer and moved that it be permitted to file same and did not request that its codefendant be made a party as a joint tort-feasor until after verdict. *Smith v. Kappas*, 219 N. C. 850, 15 S. E. (2d) 375 (1941).

Cited in *Jones v. Rhea*, 198 N. C. 190, 151 S. E. 255 (1930); *Gaffney v. Phelps*, 207 N. C. 553, 178 S. E. 231 (1935); *Peterson v. McManus*, 208 N. C. 802, 182 S. E. 483 (1935); *Godfrey v. Tidewater Power Co.*, 224 N. C. 657, 32 S. E. (2d) 27 (1944); *McIntyre v. Monarch Elevator, etc., Co.*, 230 N. C. 539, 54 S. E. (2d) 45 (1949); *Rulane Gas Co. v. Montgomery Ward & Co.*, 231 N. C. 270, 56 S. E. (2d) 689 (1949); *Essick v. Lexington*, 232 N. C. 200, 60 S. E. (2d) 106 (1950).

§ 1-241. Clerk to pay money to party entitled.—The clerk, to whom money is paid as aforesaid, shall pay it to the party entitled to receive it, under the same rules and penalties as if the money had been paid into his office by virtue of an execution. (1823, c. 1212, s. 2, P. R.; R. C., c. 31, s. 128; Code, s. 439; Rev., s. 578; C. S., s. 619.)

§ 1-242. Credits upon judgments.—Where a payment has been made on a judgment docketed in the office of the clerk of the superior court, and no entry made on the judgment docket, or where any docketed judgment appealed from has been reversed or modified on appeal and no entry made on such docket, any person interested therein may move in the cause before the clerk, upon affidavit after notice to all persons interested, to have such credit, reversal or modification entered; and upon the hearing before the clerk he may hear affidavits, oral

testimony, depositions and any other competent evidence, and shall render his judgment, from which any party may appeal in the same manner as in appeals in special proceedings. On the trial of any issue of fact on the appeal either party may demand a jury trial, which shall be had upon the evidence before the clerk, which he shall reduce to writing. On a final judgment ordering any such credit, reversal or modification, a transcript thereof shall be sent by the clerk of the superior court to each county in which the original judgment has been docketed, and the clerk of such county shall enter the same on the judgment docket of his county opposite such judgment and file the transcript. No final process shall issue on any such judgment after affidavit filed in the cause until the motion for credit, reversal or modification has been finally disposed of. (1903, c. 558; Rev., s. 579; C. S., s. 620.)

Parol Agreement to Convey Land Not within Section.—Upon a motion to enter satisfaction of a judgment under this section, a defendant may not set up his parol executory agreement to convey lands to the plaintiff for that purpose, such is not in the purview of the statute, and not enforceable by him under the statute of frauds. *Brown v. Hobbs*, 154 N. C. 544, 70 S. E. 906 (1911).

Amount Paid Plaintiff on Covenant Not to Sue as Credit.—Where some of defendants, sued as joint tort-feasors, pay plain-

tiff a sum in consideration of a covenant not to sue, and thereafter the action is prosecuted against the other defendants, and judgment recovered against them, the defendants against whom judgment was entered are entitled to have the judgment credited with the amounts paid by the other defendants for the covenant not to sue upon the motion made prior to execution, the motion coming within the spirit if not the letter of this section. *Brown v. Norfolk Southern R. Co.*, 208 N. C. 423, 181 S. E. 279 (1935).

§ 1-243. For money due on judicial sale.—The Supreme and other courts ordering a judicial sale, or having possession of bonds taken on such sale, may, on motion, after ten days' notice thereof in writing, enter judgment as soon as the money becomes due against the debtors or any of them, unless for good cause shown the court directs some other mode of collection. (R. C., c. 31, s. 129; Code, s. 941; Rev., s. 1524; C. S., s. 621.)

Constitutionality.—This section is constitutional and does not contravene the right of trial by jury. *Ex parte Cotten*, 62 N. C. 79 (1867).

Motion Proper Method to Enforce Contract.—An independent action upon an obligation to secure the payment of money given on a purchase under a judicial sale will not be entertained if objection be made in apt time; the proper course is to enforce the contract by a motion in the cause in which the sale is decreed. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121 (1888), but this matter is within the control of the court and in proper instances the court may decree a resale of the land if the purchaser does not pay within a specified time—in this case, sixty days. *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182 (1914).

Same—When Independent Action Allowed.—If the objection is not made at the proper time the court may proceed with the independent action. Such objection will not be entertained when made for the first time in the Supreme Court. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121 (1888).

Failure of Purchaser to Comply with His

Bid.—If a purchaser at a judicial sale fails to comply with his bid, the court may either decree, first, that he specially perform his contract, or, second, that the land be resold and the purchaser released, or third, that without releasing the purchaser the land be resold; but in this case the purchaser must undertake, as a condition precedent to the order of sale, to pay all additional costs and to make good any deficiency in the price. *Hudson v. Coble*, 97 N. C. 260, 1 S. E. 688 (1887).

Ten Days' Notice Required.—Any court, which orders a judicial sale, has the power to make a decree for the money after ten days' notice thereof. *Ex parte Cotten*, 62 N. C. 79 (1867).

Waiver of Right to Jury Trial.—Although the defendant under this section is entitled to have the issue, where the debt sued on was contracted for the purchase of land, tried by a jury, yet, if after being duly summoned he fails to appear and answer, he waives that right. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683 (1889).

Sale by Administrator.—A sale of land for assets, made by an administrator, pursuant to a judgment in a probate court, in a proceeding instituted for that purpose,

is a judicial sale, and the provisions of this section are applicable thereto. *Mauney v. Pemberton*, 75 N. C. 219 (1876); *Chambers v. Penland*, 78 N. C. 53 (1878).

When Court May Reopen Case.—Where the commissioner for the private sale of lands for division has withheld from the knowledge of the court the actual price the purchaser has agreed to pay, and reported a lesser sum, which the court has confirmed by final judgment, it is an imposition on the court, and will not conclude it from reopening the case on the petition of the commissioner in the cause, after notice, and affording the proper relief. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242 (1922).

Petition by Commissioner.—A commissioner appointed for the sale of land in proceedings for partition, after confirma-

tion of sale to a private purchaser, filed a petition in the cause after notice alleging in effect that in addition to the purchase price he had reported, the purchaser had agreed to pay a larger sum to include his commission, etc., and had paid only the smaller sum, reported and confirmed, and refused to pay the balance as agreed after having received the deed from the clerk's office, where it had been deposited. It was held, upon demurrer, that the allegations of the petition must be considered as true, and it was reversible error for the trial judge to sustain the demurrer, and not require an answer to be filed to set the matters at issue for the purpose of proceeding to determine the controversy. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242 (1922).

§ 1-244. Applicable to justices' courts.—This article applies, wherever appropriate, to proceedings in courts of justices of the peace. (Code, s. 389; Rev., s. 562; C. S., s. 622.)

§ 1-245. Cancellation of judgments discharged through bankruptcy proceedings.—When a referee in bankruptcy furnishes the clerk of the superior court of any county in this State a written statement or certificate to the effect that a bankrupt has been discharged, indicating in said certificate that the plaintiff or judgment creditor in whose favor judgments against the defendant bankrupt are docketed in the office of the clerk of the superior court have received due notice as provided by law from the said referee, and that said judgments have been discharged, it shall be the duty of the clerk of the superior court to file said certificate and enter a notation thereof on the margin of said judgments.

This section shall apply to judgments of this kind already docketed as well as to future judgments of the same kind.

For the filing of said instrument or certificate and making new notations the clerk of the superior court shall be paid a fee of one dollar (\$1.00). (1937, c. 234, ss. 1-4.)

Editor's Note.—It appears that the effect of filing the certificate as provided by this section is to give notice of the inefficacy of the judgment to attach as a lien after

the bankruptcy; not to give notice that the judgment is no lien at all, for it may have become a lien before the bankruptcy. 15 N. C. Law Rev. 336.

§ 1-246. Assignment of judgment to be entered on judgment docket, signed and witnessed.—No assignment of judgment shall be valid at law to pass any property as against creditors or purchasers for a valuable consideration from the donor, bargainor, or assignor, but from the entry of such assignment on the margin of the judgment docket opposite the said judgment, signed by the owner of said judgment, or his attorney under power of attorney or his attorney of record, and witnessed by the clerk or the deputy clerk of the superior court of the county in which said judgment is docketed: Provided, that when an assignment of judgment is duly executed by the owner or owners of the judgment and recorded in the office of the clerk of the superior court of the county in which the judgment is docketed and a specific reference thereto is made on the margin of the judgment docket opposite the judgment to be assigned, it shall operate as a complete and valid transfer and assignment of the judgment. (1941, c. 61; 1945, c. 154.)

Editor's Note.—The 1945 amendment added the proviso.

For comment on this section, see 19 N. C. Law Rev. 462.

ARTICLE 24.

Confession of Judgment.

§ 1-247. **When and for what.**—A judgment by confession may be entered without action either in or out of term, either for money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this article.

A judgment by confession may be entered for alimony or for support of minor children, and when the same shall have been entered as provided by this article, such judgment shall be binding upon the defendant, and the failure of the defendant to make any payments, as required by such judgment, shall, upon proper cause shown to the court, subject him to such penalties as may be adjudged by the court as in any other case of contempt of its orders, subject to authority of the court to modify said judgment thereafter for proper cause shown as provided by law in case of adverse judgments in proceedings for such alimony or support. (C. C. P., s. 325; Code, s. 570; Rev., s. 580; C. S., s. 623; 1947, c. 95.)

Cross Reference.—See § 1-248 and notes thereto.

Editor's Note.—The 1947 amendment added the second paragraph. The apparent purpose of the amendment is expressly to authorize a simplified method for converting an agreement between the parties into a judgment enforceable by contempt. Under prior case law, such an agreement, if made a part of a consent judgment in the sense that the judgment itself orders the payments to be made, can give rise to contempt proceedings; but if the consent judgment merely approves the agreement, without expressly ordering the payments to be made, it is enforceable only as a contract. 25 N. C. Law Rev. 389.

It should be noted that the cases cited under this section were decided prior to the 1947 amendment.

This section and §§ 1-248, 1-249 are mere procedural statutes, regulating the practice of the courts, and can of course have no extraterritorial effect or be looked to as limiting the powers of corporations. *Monarch Refrigerating Co. v. Farmers' Peanut Co.*, 74 F. (2d) 790 (1935).

They are in derogation of common right, and must be strictly construed. *Gibbs v. Weston & Co.*, 221 N. C. 7, 18 S. E. (2d) 698 (1942).

Court Must Have Jurisdiction.—It is essential that the court have jurisdiction before a judgment on confession can be validly entered. *Slocumb v. Shingle Co.*, 110 N. C. 24, 14 S. E. 622 (1892).

Same—May Be Collaterally Impeached.—Judgment, void if for want of jurisdiction in the court, if such appears on the record, may be collaterally impeached in any court in which the question arises. *Hervey v. Edmunds*, 68 N. C. 243 (1873).

Manner of Attacking Judgment by Confession.—Judgment by confession, being a

final judgment, cannot be collaterally attacked for fraud, this must be done by an independent action properly constituted for that purpose. *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 11 S. E. 530 (1890); *Uzzle v. Vinson*, 111 N. C. 138, 16 S. E. 6 (1892).

For What Judgment May Be Confessed.

—A judgment by confession may be taken to cover a future debt. *Bank v. Higginbottom*, 9 Pet. (34 U. S.) 48, 9 L. Ed. 46 (1835).

So also a judgment may, it seems, be confessed for a specific sum claimed, subject to the right of the party confessing to reduce the amount, and in case of failure or omission to do so the whole amount will be collectible. *Gear v. Parish*, 5 How. (46 U. S.) 168, 12 L. Ed. 100 (1847).

Confession by Partner.—It would seem to be well settled that, even before dissolution, one partner cannot confess judgment so as to bind his copartners. *Hall v. Lanning*, 91 U. S. 160, 23 L. Ed. 271 (1875).

Confession by Guardian.—A judgment confessed by a guardian of one non compos mentis, under the provisions of this section, if the statement required be verified by the guardian in the absence of fraud, is not irregular. *McAden v. Hooker*, 74 N. C. 24 (1876).

In *White v. Albertson*, 14 N. C. 241 (1831), the process has been served on the guardian alone, and not on the infants also, as it should have been, and the guardian permitted judgment against the infants by nil dicit; yet it was held that the judgment was not irregular, although in that case it was said the court had acted unadvisedly in permitting the guardian whose interests were opposed to those of the ward to represent him in that case. The analogy between infants and lunatics

is so close as to justify the conclusion that a similar judgment against a lunatic would not be irregular. *McAden v. Hooker*, 74 N. C. 24 (1876).

A judgment confessed by executors on a debt created after the death of the testator and during the time of administration will bind them in their individual capacity, though they style themselves as executors in making such a confession. *Hall v. Craige*, 65 N. C. 51 (1871).

Confession May Be Made to State.—A person may confess a judgment, or recognition on record, to the State for a sum of money, as well as to an individual. Therefore, where A was convicted on an indictment and fined, and ordered into the custody of the sheriff, and B, in consideration that A should be discharged from custody, confessed a judgment to the State for the fine and costs, it was held that the judgment could not afterwards be set aside. *State v. Love*, 23 N. C. 264 (1840).

Confession by Corporation.—A corporation, nothing to the contrary appearing, may by the action of its proper officers confess judgments as a natural person, if the essential requirements of the statute are complied with. *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 11 S. E. 530 (1890).

Same—Authority Should Be Shown.—A corporation may confess judgment, without action, in or out of term, but the record should show that the officer or person who represented the corporation in the proceedings was duly authorized to act, and that he did act under the direction of his principal. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622 (1892).

Construction of Warrant of Attorney.—It seems to be an established principle that an authority given by warrant of attorney to confess a judgment against the maker of a note must be clear and explicit and strictly construed, and the court cannot supply any supposed omissions of the par-

ties. *National Exch. Bank v. Wiley*, 195 U. S. 257, 25 S. Ct. 70, 49 L. Ed. 184 (1904).

Effect of Confession.—It has been held that the confession of a judgment does indeed create a contract; but it is only on the side of the defendant, who thus acknowledges or assumes upon himself a debt, which may be made the ground of an action. *Livingston v. Moore*, 7 Pet. (32 U. S.) 469, 8 L. Ed. 751 (1833).

But on the side of the plaintiff, the necessity of resorting to certain means of enforcing that judgment, is not an obligation arising out of contract, but one imposed upon him by the laws of the country. *Livingston v. Moore*, 7 Pet. (32 U. S.) 469, 8 L. Ed. 751 (1833).

Lien from Date of Docketing.—A judgment by confession, like any other judgment, becomes a lien on the judgment debtor's real estate as of the date the judgment is docketed. *Keel v. Bailey*, 214 N. C. 159, 198 S. E. 654 (1938).

Parol Evidence Not Admissible.—Where a judgment is confessed by one against himself, and so entered of record, parol evidence is not admissible to show that it was intended to have been entered against another. *Davidson v. Alexander*, 84 N. C. 620 (1881).

Mistake as Ground for Relief.—If a judgment be confessed under a clear mistake, a court of law will set the judgment aside, if application be made, and the mistake shown, while the judgment is in its power. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963 (1879).

But, if the judgment is no longer in the power of a court of law, relief may be obtained in a court of chancery. *Walden v. Skinner*, 101 U. S. 577, 25 L. Ed. 963 (1879).

Applied in *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322 (1937).

§ 1-248. Debtor to make verified statement.—A statement in writing must be made, signed, and verified by the defendant, to the following effect:

1. It must state the amount for which judgment may be entered, and authorize the entry of judgment therefor.

2. If it is for money due, or to become due, it must state concisely the facts out of which it arose, and must show that the sum confessed is justly due, or to become due.

3. If it is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability, and must show that the sum confessed does not exceed the same. (C. C. P., s. 326; Code, s. 571; Rev., s. 581; C. S., s. 624.)

Editor's Note.—This section must be read in connection with the preceding one, as compliance with the provisions of the

one without the other is not sufficient. As was said in *Sharp v. Danville, etc.*, R. R. Co., 106 N. C. 308, 319, 11 S. E. 530 (1890),

"It is not sufficient simply to confess and enter judgment. It is essential that the confession and entry shall have the additional requisites further prescribed by the statute."

Section Strictly Construed.—Strict compliance with the provisions of this section is required, and if all the requirements are not met the judgment is void because of a want of jurisdiction in the court to render judgment, which is apparent on the face of the proceedings. *Smith v. Smith*, 117 N. C. 348, 23 S. E. 270 (1895).

It is essential to the validity of a judgment by confession that it be confessed and entered of record according to the provisions of this section. These are essential matters required by the section to confer jurisdiction on the court, and to insure validity of the judgment. *Farmers' Bank v. McCullers*, 201 N. C. 440, 160 S. E. 494 (1931).

Where the statutory requirements with respect to the form and contents of the statement have been fully complied with, as in the instant case, the court acquires jurisdiction, and a judgment by confession, as authorized by the debtor in the statement, is valid for all purposes. *Cline v. Cline*, 209 N. C. 531, 183 S. E. 904 (1936).

The verified statement is jurisdictional, both as to its filing and as to its contents. *Gibbs v. Weston & Co.*, 221 N. C. 7, 9, 18 S. E. (2d) 698 (1942).

Verified Statement of Facts Required.—A judgment confessed under this section must contain a verified statement of the facts and transactions out of which the indebtedness arose. *Davenport v. Leary*, 95 N. C. 203 (1886). And a mere statement that the debts are bona fide due, without embracing the account which was filed, is not a sufficient compliance. *Id.* See *Davidson v. Alexander*, 84 N. C. 621 (1881), and *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894), the latter case holding that the confession is sufficient when it is for "goods sold and delivered," although omitting the time of sale, quantity, price and value of the goods.

Debts Evidenced by Note or Bond.—A judgment confessed upon the statement that defendant is indebted to the plaintiff in a certain sum "arising from the acceptance of a draft," setting out a copy thereof, is irregular and void. *Davidson v. Alexander*, 84 N. C. 621 (1881).

A statement that the amount was due by a certain note described in the judgment, that said note became due on a day named, and that the consideration was cotton sold

and delivered—was a compliance with this section. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Where the affidavit stated that the amount was due on a bond under seal for borrowed money, due and payable 2 November, 1876, it was held that the statement was sufficient. *Uzzle & Co. v. Vinson*, 111 N. C. 138, 16 S. E. 6 (1892).

Same—This Requirement Mandatory.—The filing of the concise statement of the facts out of which the indebtedness arose, required of the party confessing judgment, is mandatory. *Davidson v. Alexander*, 84 N. C. 621 (1881).

Same—Reason for the Rule.—A confession of judgment being a proceeding in derogation of a common right, the statute requires, as a protection against the perpetration of fraud, that the consideration out of which the debt arose be stated, and an averment that the debt for which the judgment is confessed "is justly due." *Smith v. Smith*, 117 N. C. 348, 23 S. E. 270 (1895).

Confession of Judgment with Defeasance.—It is a well recognized practice to confess a judgment with a defeasance, and the courts will take notice of the condition, and will not permit an execution to issue in violation of it. *Hardy v. Reynolds*, 69 N. C. 5 (1873).

A stipulation in a confession of judgment that no execution shall issue thereon within a time specified is not such a reservation for the benefit of the debtor as impairs the rights of other creditors, and does not vitiate the judgment. *Merchants Nat. Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Where a judgment confessed by a wife in favor of her husband shows only that it was based upon a sum alleged to be due on account of money advanced by the husband from time to time to take care of obligations due at the banks by the wife, and fails to state the items constituting the claim, when advanced and to whom, and that the advancements were not gifts to the wife, the judgment is insufficient to meet the requirements of the statute, and is void. *Farmers' Bank v. McCullers*, 201 N. C. 440, 160 S. E. 494 (1931).

Showing That Debt Is Due Sufficient without Statement.—A confession of judgment which states the amount for which the judgment is confessed, and states that the same is due by a certain promissory note due and payable on a day named, and that the consideration for the same was an article sold and delivered, sufficiently conforms to the statute provided the statement is true, for then it follows that it is

shown that the amount "is justly due." *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Description of the Nature of the Indebtedness Sufficient.—The failure to file with the confession of judgment the note or other evidence of indebtedness does not invalidate the judgment, provided the confession contains a sufficient description of the nature of the indebtedness to enable a party to make inquiry and ascertain the truth of the matter. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Where Judgment Does Not Expressly Authorize Filing.—Although a confession of judgment does not contain words expressly authorizing the clerk to enter the same upon the records, yet, if the record shows that the confession was sworn to and filed and judgment thereupon entered, the filing is equivalent to an express authority for its entry and sufficiently conforms to the statute. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Mere filing and entry of a verified statement, although recorded on the judgment docket, and cross-indexed as judgments are, will not be effective as a judgment. *Gibbs v. Weston & Co.*, 221 N. C. 7, 18 S. E. (2d) 698 (1942).

The failure to comply with the mandatory terms of the statute and especially the want of rendition of judgment upon the statement and affidavit of the defendant is not a mere irregularity, but constitutes a fatal defect, rendering the proceeding of no effect as against creditors whose judgments were subsequently docketed. *Gibbs v. Weston & Co.*, 221 N. C. 7, 18 S. E. (2d) 698 (1942).

Judgment Is a Lien for the Amount

§ 1-249. **Judgment; execution; installment debt.**—The statement may be filed with the clerk of the superior court of the county in which the defendant resides, or if he does not reside in the State, of some county in which he has property. The clerk shall indorse upon it and enter on his judgment docket a judgment of the court for the amount confessed, with three dollars costs, together with disbursements. The statement and affidavit, with the judgment indorsed, thenceforth become the judgment roll. Executions may be issued and enforced thereon in the same manner as upon judgments in other cases in such courts. When the debt for which the judgment is recovered is not all due, or is payable in installments, and the installments are not all due, the execution may issue upon such judgment for the collection of such installments as have become due, and shall be in the usual form; but must have indorsed thereon, by the attorney or person issuing it, a direction to the sheriff to collect the amount due on such judgment, with interest and costs, which amount shall be stated, with interest thereon, and costs of said judgment. Notwithstanding the issue and collection of such execution, the judgment remains as security for the installments thereafter to become due; and whenever any further installment becomes due, execution may,

Named.—A judgment confessed to provide security against a contingent liability is authorized by the Code, and must be a lien for the full amount named till the actual loss is determined at a lesser sum. *Darden v. Blount*, 126 N. C. 247, 35 S. E. 479 (1900).

Judgment Containing Irregularities.—Ordinarily, a judgment by confession without action will not be set aside for mere irregularities, the party confessing the judgment being presumed to have waived them; but where the judgment is void for a cause appearing in the record, or the record omits some essential element, it will be set aside or quashed. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622 (1892).

Same—Judgments by Confession May Be Amended as Other Judgments.—Such irregularities in a confession of judgment as might be corrected by amendment in the case of ordinary judgments may be the subject of amendment in a confession of judgment. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Same — Irregularities Only May Be Cured by Amendment.—If the proceeding is so defective in form and substance that it is void upon its face, no amendment can be made to give it life; but if there are irregularities they may be cured by amendment. *Bank v. Newton Cotton Mills*, 115 N. C. 507, 20 S. E. 765 (1894).

Same—Who May Set Aside the Judgment.—A judgment may be set aside for irregularity only upon the application of a party thereto. *Uzzle & Co. v. Vinson*, 111 N. C. 138, 16 S. E. 6 (1892).

Applied in *Davis v. Cockman*, 211 N. C. 630, 191 S. E. 322 (1937).

in like manner, be issued for its collection and enforcement. (C. C. P., s. 327; Code, s. 572; Rev., s. 582; C. S., s. 625.)

Substantial Compliance Required.—The requirements of this section, like those contained in the two preceding sections, must be, at least, substantially complied with. *Sharp v. Danville, etc., R. R. Co., 106 N. C. 308, 11 S. E. 530 (1890).*

The rendition of judgment in a proceeding of this kind is a distinct office of the court, not to be confused with the ministerial acts of filing and docketing. *Gibbs v. Weston & Co., 221 N. C. 7, 18 S. E. (2d) 698 (1942).*

When and Where Judgment Entered.—The mere fact that the judgments were entered in the nighttime and in the law office of counsel, which was near to the

courthouse and convenient, did not render them void or irregular. *Sharp v. Danville, etc., R. R. Co., 106 N. C. 308, 11 S. E. 530 (1890).*

Failure to Endorse Judgment on Verified Statement Does Not Affect Validity.—The failure to endorse the judgment on the verified statement was an irregularity which does not affect the validity of the judgment, which the entry on the judgment docket made by the clerk, or under his immediate supervision, shows was rendered by the court. *Cline v. Cline, 209 N. C. 531, 183 S. E. 904 (1936).*

Applied in *Davis v. Cockman, 211 N. C. 630, 191 S. E. 322 (1937).*

ARTICLE 25.

Submission of Controversy without Action.

§ 1-250. **Submission, affidavit, and judgment.**—Parties to a question in difference which might be the subject of a civil action may, without action, agree upon a case containing the facts upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action had been brought. But it must appear by affidavit that the controversy is real, and the proceedings in good faith to determine the rights of the parties. The judge shall hear and determine the case, and render judgment thereon as if an action were pending. (C. C. P., s. 315; Code, s. 567; Rev., s. 803; C. S., s. 626.)

Editor's Note.—The prime (and practically the only) object of this section is to prevent expensive litigation. This being true, its provisions are quite limited in their operation. They are applicable only to a case where there are parties to a question which might be the subject of a civil action in which a judgment might be rendered for one party against the other.

The purpose of this section, is to enable parties to a question in difference, which might be the subject of a civil action, where they agree as to the facts involved, to submit the facts to the court, for its decision of the question in difference, and for its judgment in accordance therewith, without the expense and formalities required for a civil action. *Hicks v. Greene County, 200 N. C. 73, 156 S. E. 164 (1930).*

Where the parties submit to the court questions of law arising upon facts agreed, without showing that they have rights involved in the questions, upon which they would be entitled to judgment, in a civil action the court is without jurisdiction, under this section, and should decline to consider the questions submitted for its decision. *Hicks v. Greene County, 200 N. C. 73, 156 S. E. 164 (1930).*

The jurisdiction to render advisory opin-

ions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts, was not conferred by this section. *Wright v. McGee, 206 N. C. 52, 173 S. E. 31 (1934).*

Court Must Have Jurisdiction.—The submission of controversy without action under this section must be to a court of competent jurisdiction over the subject matter. And as the superior court has no jurisdiction over an action to recover a town tax of \$5 paid to an incorporated town under written protest, an action therefor in that court should be dismissed. *Lenoir Drug Co. v. Town, 160 N. C. 571, 76 S. E. 480 (1912).*

A special judge is without authority of law to hear and determine at chambers a controversy without action submitted under the provisions of this section, when the Governor has not specially appointed him under the provisions of statute to hold a term of court at that time, Constitution, Art. IV, § 11; and the proceedings of a special judge under such circumstances are a nullity, and on appeal the cause will be dismissed. *Greene v. Stadium, 197 N. C. 472, 149 S. E. 685 (1929).*

Not Applicable to Justice's Court.—This

section has no application to the court of a justice of the peace. *Wilmington v. Atkinson*, 88 N. C. 54 (1883).

The difference between the operation of the Declaratory Judgment Act and this section is that prior to the enactment of the Declaratory Judgment Act, the courts had no jurisdiction to render advisory opinions with respect to, or judgments declaring the rights and liabilities of parties to actions or proceedings on an agreed statement of facts. Such jurisdiction was not conferred by this section. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450 (1942).

Verification by Affidavit Essential.—It is essential that the submission be verified by an affidavit. *Hervey v. Edmunds*, 68 N. C. 243 (1873); *Millikan v. Fox*, 84 N. C. 108 (1881). And where there is a failure to file an affidavit to the effect that the controversy is real, and the proceedings are in good faith to determine the rights of the parties, the Supreme Court will refuse to hear the case, as this requirement, under the section, is an indispensable requisite to the exercise of jurisdiction in such a case. *Grant v. Newsom*, 81 N. C. 36 (1879). See also, *Wilmington v. Atkinson*, 88 N. C. 54 (1883); *Arnold v. Porter*, 119 N. C. 123, 25 S. E. 785 (1896); *Grandy v. Gulley*, 120 N. C. 176, 177, 26 S. E. 779 (1897).

Same—Exception.—While the Supreme Court has no jurisdiction of a case submitted without action, under this section, where it does not appear by affidavit that a controversy is real, yet, where all the parties interested in the construction of a will (including the executor, who is a claimant and is in possession of the property concerning which the question arises) agree, as petitioners, to submit the question to the decision of a judge of the superior court, it was held, that this court will take cognizance of the case as an application by the executor for a construction of the will, so as to enable him to dispose of the fund in his hands. *Ruffin v. Ruffin*, 112 N. C. 102, 16 S. E. 1021 (1893).

Interests Must Be Antagonistic. — For the courts to pass upon a controversy submitted under the provisions of this section the interest of the parties must be antagonistic, and the case will be dismissed if it appears that the parties are one in interest, or desire the same relief. *Burton v. Durham, etc., Realty Co.*, 188 N. C. 473, 125 S. E. 3 (1924).

Where it appears that an action is instituted solely to obtain the advice and opinion of the court as to the validity of a pro-

posed county bond issue upon the facts agreed, and that the interest of both parties is the same and there is no "question of difference" between them, the proceeding will be dismissed for want of jurisdiction. *Moore v. Caldwell County*, 207 N. C. 311, 176 S. E. 580 (1934).

An agreement as to the facts and for the court to rule the law, in a suit to quiet title to lands, differs from a controversy submitted without action under the provisions of this section. *Dowling v. So. Ry. Co.*, 194 N. C. 488, 140 S. E. 213 (1927).

Section Contemplates the Rendition of a Judgment.—The true construction of this section is that it does not confer upon certain parties who differ as to their rights to propound to the court on a case agreed interrogatories in respect thereto, but that the purpose is simply to dispense with the formalities of a summons, complaint and answer, and upon an agreed state of facts to submit the case to the court for decision, and thereupon the judge shall hear and determine the case and "render judgment thereon as if an action were pending." *McKethan v. Ray*, 71 N. C. 165 (1874); *Little v. Thorne*, 93 N. C. 69 (1885); *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9 (1895).

Same—Sufficiency of Facts Stated.—The statement of the facts agreed upon should contain sufficient averments to constitute a cause of action upon which the court could render judgment. *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9 (1895).

When a case is heard under this summary method authorized by the Code, the statement should embrace all the facts material to a final and complete determination, with nothing further to be done except to carry the judgment into effect. *Moore v. Hinnant*, 87 N. C. 506 (1882).

Same—Where Question of Great Public Concern Involved. — Where, under this section a controversy is submitted which involves matters of great public concern and which is supported by an affidavit that a real case exists, and that the controversy is submitted in good faith to determine the rights of the parties, the Supreme Court will, upon appeal, determine the question of law thus raised, it being stated with entire distinctness, although the statement of facts is not full enough to render a judgment commanding or prohibiting a thing to be done. *Farthing v. Carrington*, 116 N. C. 315, 22 S. E. 9 (1895).

Statement of Facts Should Include Only Pertinent Facts Agreed Upon. — In the submission of a controversy without action

the statement of facts agreed should include only pertinent facts upon which the parties are in agreement, and evidence from which other facts may be found has no place therein, and since the procedure is statutory, compliance with the provisions of the statute is necessary and the statute must be strictly construed. *Consolidated Realty Corp. v. Koon*, 216 N. C. 295, 4 S. E. (2d) 850 (1939).

Administration Suit Distinguished from Submission of Controversy. — Where, in proceedings to sell lands to make assets, defendants pleaded the statute of limitations as to certain indebtedness alleged in petitioner's bill of particulars and asked for an accounting, and the parties thereupon agreed that the matters in controversy should be heard by the judge without a jury upon an agreed statement of facts, and that the judge might find such additional facts as he may consider necessary to complete determination of the matters in controversy, the proceeding is converted by consent into an administration suit, and petitioner is precluded by the agreement from objecting to an order requiring her to be made a party in her individual capacity, and to account for certain money paid to her either individually or as the widow of the deceased, the agreement not constituting the proceeding a controversy without action in which the authority of the court is limited to the matters submitted. *Edney v. Mathews*, 218 N. C. 171, 10 S. E. (2d) 619 (1940).

Record on Appeal. — Upon appeal from judgment entered in a submission of controversy without action, the agreed facts with the required affidavits, are necessary parts of the record proper. *Consolidated Realty Corp. v. Koon*, 215 N. C. 459, 2 S. E. (2d) 360 (1939).

No Prayer for Judgment Necessary. — In an action submitted without controversy no prayer for judgment is necessary. *Williams v. Commissioners*, 132 N. C. 300, 43 S. E. 896 (1903).

Exhibits Containing Facts Not Attached. — The summary method provided by this section for the submission of an action upon a case agreed, contemplates that all the facts necessary to a determination of the questions submitted shall be fully stated in the case agreed; and where it appeared that some of the facts were recited in exhibits which were not attached, and that leave was given the parties to add other matters, the cause was remanded to be perfected. *Piedmont R. Co. v. Reidsville*, 101 N. C. 404, 8 S. E. 124 (1888).

Plaintiff Permitted to File Affidavit after

Case Docketed. — Where, when the case was docketed in the Supreme Court, no affidavit had been filed as required by this section, the plaintiff upon motion (the defendant being present and not objecting) was allowed to file the required affidavit. *Bank v. Trust Co.*, 119 N. C. 553, 26 S. E. 131 (1896).

Parties. — All persons having an interest in the controversy must be parties, to the end that they may be concluded by the judgment, and the controversy be finally adjudicated as in case of an action instituted in the same way. *McKethan v. Ray*, 71 N. C. 165 (1874).

Facts Must Show Equitable Dealings When Wife Is Party. — Where a controversy, properly constituted, is submitted without action under the provisions of this section, involving the question as to the necessity of the wife of a tenant in common to join in his deed voluntarily given to divide the lands between himself and the other tenants in common, on appeal the case will be remanded if it does not appear in the facts agreed that the division so made was a fair and equitable one. *Valentine v. Granite Corp.*, 193 N. C. 578, 137 S. E. 668 (1927).

Conflicting Claims to Money, in Sheriff's Hands. — Where a sheriff has money in his hands under executions in favor of different creditors, against the same defendant, and the creditors set up conflicting claims to the money, it is not such a case as may be submitted to a judge, without an action, under this section, by the adverse claimants. *Bates v. Lilly*, 65 N. C. 232 (1871).

Title to Office May Not Be Tried under Section. — A civil action in the nature of a writ of quo warranto is the proper mode of trying title to a public office; the submission of a controversy without action under this section for that purpose cannot be sustained. *Davis v. Moss*, 81 N. C. 303 (1879).

Where Controversy May Not Be Considered. — An action brought by the seller of a cotton-scale beam may not be maintained against the purchaser thereof in anticipation of the latter's claim for damages arising upon the breach of an implied warranty against defects that caused damages to the purchaser, and under this section upon demurrer the controversy may not be considered by the court as upon a case agreed. Equitable rights of bills of peace, quia timet, and to remove clouds on title to lands distinguished. *Jacobi Hdw. Co. v. Jones Cotton Co.*, 188 N. C. 442, 124 S. E. 756 (1924).

Jury Trial Not Contemplated by the

Section. — This section does not contemplate a trial by jury. *Moore v. Hinnant*, 96 N. C. 163 (1884). Whether or not the Supreme Court can remand the case and direct an issue of fact to be tried by a jury in the court below was left undecided, although inclination was shown that this might be done if the application therefor is made in apt time.

Case May Be Submitted after Issues Joined. — The parties may agree upon a state of facts and submit it to the judge for his decision, even after issues are joined. *Hervey v. Edmunds*, 68 N. C. 243 (1873).

Illustrative Cases.—It is impossible in a work of this nature to collect all the cases bearing upon this section, and to state the facts found and the question involved therein. A few of the leading cases are given to show that where the essential requirements have been complied with, the courts have not confined the application of the method prescribed by the provisions of this section to any particular classes of questions.—Ed. Note.

Same—Recovery of Specific Legacy.—A controversy, the purpose of which was to recover a specific legacy given by the terms of a will, and to determine the conditions on which it was to be received, was submitted to the court under this section. *University v. Gatling*, 81 N. C. 508 (1879).

Same — Homestead and Personal Property Exemption. — The question whether or not minor children, whose mother and father died, neither of whom having applied for a homestead or personal property exemption, were entitled to claim such exemptions, was decided under the method prescribed by the provisions of this section. *Welch v. Welch*, 78 N. C. 240 (1878).

Same—Bank Deposit Applied on Matured Note. — The legality of the application by the banks of the balance of a bankrupt depositor on a note already matured, was the question submitted without action in *Trust Co. v. Spencer*, 193 N. C. 745, 138 S. E. 124 (1927).

Same—Sheriff's Right to Commission.—The facts agreed upon in the case of *Board v. Commissioners*, 137 N. C. 63, 49 S. E. 47 (1904), presented for determination the question whether or not a sheriff is allowed to retain a commission out of the school taxes collected by him.

Same—Specific Performance.—The question whether the plaintiff, who had contracted to convey certain land, could compel the defendant to fulfill the contract, when some doubt as to whether he (the plaintiff) could convey a good and inde-

feasible title arose by force of certain terms used in a will under which the plaintiff acquired the land, was submitted in *Watts v. Griffin*, 137 N. C. 572, 50 S. E. 218 (1905).

Same—Land Claimed under Conflicting Grants. — Where the parties claimed the same land under conflicting grants, the question as to the true owner was submitted without action in *Janney v. Blackwell*, 138 N. C. 437, 50 S. E. 857 (1905).

Same — The recovery of advances of money to meet losses sustained by a broker, the advances being made at the request of his principal, was the purpose of the action in *Black & Co. v. Carr*, 80 N. C. 295 (1879).

Same—The determination of the owner of the legal title of a safe sold upon a conditional sales contract, followed by the bankruptcy of the purchaser, was the question in *Brem v. Lockhardt*, 93 N. C. 191 (1885).

Same—Duty of County Board of Health. —The superior court has jurisdiction of a controversy without action between the board of health of a county and the county commissioners in which the facts agreed present the question of the legal duties of the respective boards in regard to the appointment of a county health officer, which duties, according to how the controversy is determined, might be the subject of mandamus, notwithstanding that the provisions of the Declaratory Judgment Act, the next succeeding article, are not specifically referred to. *Board of Health v. Board of Com'rs*, 220 N. C. 140, 16 S. E. (2d) 677 (1941).

Same — Taxes. — The section is applicable in the determination of the question whether a party is obligated for taxes demanded of him. *Pullen v. Commissioners*, 68 N. C. 451 (1873).

Same—Purchase of Municipal Bonds.—The determination of the liability of the defendants, under an agreement to purchase certain municipal bonds, was the question involved in the case submitted in *Charlotte v. Shepard*, 120 N. C. 411, 27 S. E. 109 (1897).

Same—General Assignment.—The question submitted without action in *Winston v. Biggs*, 117 N. C. 206, 23 S. E. 316 (1895) was this: Is the assignee under a general assignment for the benefit of creditors required upon demand to pay a dividend out of funds in his hands for distribution upon the basis of the entire debt of one of the creditors secured in the deed, who has, and who had at the time of the execution of the assignment, a prior security upon a piece of

property also conveyed in the assignment, or is the trustee to pay such creditor a dividend only on the balance due after the creditor has exhausted his prior security and applied the same to his debt?

Part Due Bonds as Counterclaim.—The question presented without action in *Bourne v. Board of Financial Control*, 207 N. C. 170, 176 S. E. 306 (1934), was this: Can past due county bonds owned at the commencement of the action, be used as a counterclaim against a promissory note belonging to said county?

Parity of Street Assessment with Tax Liens.—The question presented for determination under this section and § 1-252 in the case of *Saluda v. Polk County*, 207 N. C. 180, 176 S. E. 298 (1934), was whether a street assessment constitutes a lien on a parity and of equal dignity with tax lien.

Applied in *Webb v. Port Comm.*, 205 N. C. 663, 172 S. E. 377 (1934), with reference to the constitutionality of certain private corporate acts; in *Beaufort County v. Mayo*, 207 N. C. 211, 176 S. E. 753 (1934), with reference to determining title to land; *Powell v. Hood*, 211 N. C. 137, 189 S. E. 483 (1937); *Park View Hospital Ass'n v. Peoples Bank, etc.*, 211 N. C. 244, 189 S. E. 766 (1937); *St. Louis Union Trust Co. v. Foster*, 211 N. C. 331, 190 S. E. 522 (1937); *High Point v. Clark*, 211 N. C. 607, 191 S. E. 318 (1937); *Hill v. Colie*, 214 N. C. 408, 199 S. E. 381 (1938); *Cartwright v. Jones*, 215 N. C. 108, 1 S. E. (2d) 359 (1939); *Blades v. Norfolk Southern Ry. Co.*, 224 N. C. 32, 29 S. E. (2d) 148 (1944), with reference to sufficiency of deed to convey title; *Prince v. Barnes*, 224 N. C. 702, 32 S. E. (2d) 224 (1944); *Schaeffer v. Haseltine*, 228 N. C. 484, 46 S. E. (2d) 463 (1948); *Neill v. Bach*, 231 N. C. 391, 57 S. E. (2d) 385 (1950); *Weathers v. Bell*, 232 N. C. 561, 61 S. E. (2d) 600 (1950); *Sedberry v. Parsons*, 232 N. C. 707, 62 S.

E. (2d) 88 (1950).

Cited in *Lowery v. Goldsboro Lumber Co.*, 197 N. C. 299, 148 S. E. 926 (1929); *Qualls v. Farmers', etc., Bank*, 197 N. C. 438, 149 S. E. 546 (1929); *New York Indemnity Co. v. Corporation Commission*, 197 N. C. 562, 150 S. E. 16 (1929); *De Laney v. Hart*, 198 N. C. 96, 150 S. E. 702 (1929); *Wachovia Bank & Trust Co. v. Black*, 198 N. C. 219, 151 S. E. 269 (1930); *Commerce Union Trust Co. v. Thorner*, 198 N. C. 241, 151 S. E. 263 (1930); *Zimmerman v. Board of Education*, 199 N. C. 259, 154 S. E. 397 (1930); *Posey v. Board of Education*, 199 N. C. 306, 154 S. E. 593 (1930); *Callahan v. Flack*, 205 N. C. 105, 170 S. E. 125 (1933); *Swain County v. Welch*, 208 N. C. 439, 181 S. E. 321 (1935); *North Carolina Mtg. Corp. v. Morgan*, 208 N. C. 743, 182 S. E. 450 (1935); *Tucker v. Almond*, 209 N. C. 333, 183 S. E. 407 (1936); *Benson v. Johnston County*, 209 N. C. 751, 185 S. E. 6 (1936); *Hartware Mut. Fire Ins. Co. v. Stinson*, 210 N. C. 69, 185 S. E. 449 (1936); *Mecklenburg County v. Sterchi Bros. Stores*, 210 N. C. 79, 185 S. E. 454 (1936); *Daly v. Pate*, 210 N. C. 222, 186 S. E. 348 (1936); *Lawrence v. Shaw*, 210 N. C. 352, 186 S. E. 504 (1936); *Braak v. Hobbs*, 210 N. C. 379, 186 S. E. 500 (1936); *Morrow v. Durham*, 210 N. C. 564, 187 S. E. 752 (1936); *Gurganus v. Bullock*, 210 N. C. 670, 188 S. E. 85 (1936); *General Realty Co. v. Lewis*, 212 N. C. 45, 192 S. E. 902 (1937); *Home Real Estate Loan, etc., Co. v. Parmele*, 214 N. C. 63, 197 S. E. 714 (1938); *Privott v. Graham*, 214 N. C. 199, 198 S. E. 635 (1938); *State Distributing Corp. v. Travelers Indemnity Co.*, 224 N. C. 370, 30 S. E. (2d) 277 (1944) (dis. op.); *Howland v. Stitzer*, 231 N. C. 528, 58 S. E. (2d) 104 (1950); *Pack v. Newman*, 232 N. C. 397, 61 S. E. (2d) 90 (1950).

§ 1-251. Judgment roll.—Judgment shall be entered on the judgment docket, as in other cases, but without cost for any proceedings prior to trial. The case, the submission, and a copy of the judgment, constitute the judgment roll. (C. C. P., s. 316; Code, s. 568; Rev., s. 804; C. S., s. 627.)

Judge May Sign Judgment in Vacation.—A judge of the superior court has a right, with consent of parties, to sign a judgment in vacation out of court, and to order the

same to be entered of record at the ensuing term. *Hervey v. Edmunds*, 68 N. C. 243 (1873); but this does not apply to criminal cases. *State v. Alphin*, 81 N. C. 567 (1879).

§ 1-252. Judgment enforced; appeal.—The judgment may be enforced in the same manner as if it had been rendered in an action, and is subject to appeal in like manner. (C. C. P., s. 317; Code, s. 569; Rev., s. 805; C. S., s. 628.)

No particular assignment of error is necessary, when the appeal is taken from a judgment on an agreed statement of facts. *Davenport v. Leary*, 95 N. C. 203 (1886).

Facts Showing No Cause of Action.—Where the facts agreed in a controversy without action show no cause of action, an appeal from a judgment thereon will be

dismissed in the Supreme Court, as where the plaintiff claims title under a deed, avers that her purchaser was prevented from accepting her deed by the claims of the defendants, without allegation of the facts and circumstances or setting forth suffi-

ciently the terms of the deeds, or making her purchaser and other necessary parties, parties to her action," thus presenting a moot question which the court will not decide. *Waters v. Boyd*, 179 N. C. 180, 102 S. E. 196 (1920).

ARTICLE 26.

Declaratory Judgments.

§ 1-253. Courts of record permitted to enter declaratory judgments of rights, status and other legal relations.—Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree. (1931, c. 102, s. 1.)

Editor's Note.—See 12 N. C. Law Rev. 57, for note on this section.

This valuable legislation is passed in substantially the form of the Uniform Act recommended by the National Conference of Commissioners on Uniform State Laws, the variations from that standard being to adjust it more effectively to local procedure. See the explanation and comments in 9 N. C. Law Rev. 20-24.

One has only to look at the state of the law in North Carolina as disclosed in the case of *Hicks v. Greene County*, 200 N. C. 73, 156 S. E. 164 (1930), by way of contrast to appreciate the improvement which the Declaratory Judgment Act brings to procedure in this State. 9 N. C. Law Rev. 352, 353.

This and subsequent sections applied in *Edgerton v. Hood*, 205 N. C. 816, 172 S. E. 481 (1934), to determine the rights and duties of the parties with respect to the administration of assets of the Rutherford Bank under the provisions of c. 344, Public-Local Laws, 1933.

In General. — This article does not extend to the submission of the theoretical problem or a mere abstraction, and it is no part of the function of the courts, in the exercise of the judicial power vested in them by the Constitution, to give advisory opinions, or to answer moot questions, or to maintain a legal bureau for those who may chance to be interested, for the time being, in the pursuit of some academic matter. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936), citing *Poore v. Poore*, 201 N. C. 791, 161 S. E. 532 (1931); *Carolina Power, etc., Co. v. Iseley*, 203 N. C. 811, 167 S. E. 56 (1933).

While proceedings under this article have been given a wide latitude, nevertheless they are not without limitation, and it

can hardly be said the court is expected to lend its general equity jurisdiction to such proceedings. *Brandis v. Trustees of Davidson College*, 227 N. C. 329, 41 S. E. (2d) 833 (1947).

This article affords a means of testing the validity of a statute requiring persons presenting themselves for registration to prove to the satisfaction of the registrar their ability to read or write any section of the Constitution (§ 163-28), plaintiffs and all the people of the State being vitally affected by the statute in controversy. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936).

But an *ex parte* proceeding to determine petitioner's racial status is not within its scope. *Allison v. Sharp*, 209 N. C. 477, 184 S. E. 27 (1936), citing *In re Eubanks*, 202 N. C. 357, 162 S. E. 769 (1932).

The purpose of this article is to provide a speedy remedy for the determination of questions of law, and although questions of fact necessary to the adjudication of the legal questions involved may be determined, the remedy is not available to present for determination issues of fact alone. *Prudential Ins. Co. v. Powell*, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

An action to determine whether salaries paid certain employees should be included in computing the contributions to be paid by an employer under the Employment Security Law involves solely an issue of fact and does not involve any right, status or legal relation, and the employer may not maintain proceedings under this article to determine the question. *Prudential Ins. Co. v. Powell*, 217 N. C. 495, 8 S. E. (2d) 619 (1940).

Necessity for a Controversy.—If it does not appear that any controversy exists between plaintiffs and defendants as to their

respective rights, status, or legal relations, the action will be dismissed as not coming within the provisions of this and the following sections. *Wright v. McGee*, 206 N. C. 52, 173 S. E. 31 (1934).

This article does not authorize courts to give advisory opinions or academic legal guidance, but actions for declaratory judgments will lie for an adjudication of rights, status or other legal relations only when there is an actual or existing controversy between the parties. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

The court acquires jurisdiction to render a declaratory judgment as to those matters concerning which it can be inferred from a liberal interpretation of the pleading that there is an actual or existing controversy between the parties. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

The broad terms of this article do not confer upon the court an unlimited jurisdiction; and the court will not entertain an ex parte proceeding or a proceeding which, while adversary in form, yet lacks the essentials of genuine controversy. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450 (1942).

It need not be alleged and shown by plaintiff that the question is one which might be the subject of a civil action at the time, or that plaintiff's rights have been invaded or violated, or that defendant has incurred liability to plaintiff prior to the action. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450 (1942).

A mere difference of opinion between the parties as to whether plaintiff has the right to purchase or condemn, or otherwise acquire the utility of the defendant, without a declaration in the complaint of plaintiff's intent to exercise its rights under the franchise contract, does not constitute a controversy. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450 (1942).

Same—Failure of Adverse Party to Demur. — A litigant seeking a declaratory judgment must set forth in his pleading all facts necessary to disclose the existence of an actual controversy between the parties, but the adverse party cannot confer jurisdiction on the court by failing to demur to an insufficient pleading. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

Only civil rights, status and relations may be determined under the Declaratory Judgment Act, and when an action instituted thereunder involves both civil and criminal matters, the courts have jurisdiction to determine only the civil matters.

Calcutt v. McGeachy, 213 N. C. 1, 195 S. E. 49 (1938).

Action to Determine Rights under Testamentary Trust.—An action to determine the rights of the parties under a charitable trust created by will, in which the trustees and all of the agencies who are beneficiaries of the trust are made parties, is justiciable under this article. *Johnson v. Wagner*, 219 N. C. 235, 13 S. E. (2d) 419 (1941).

Litigant May Not Receive Advice as to Procedure in a Pending Case from Another Judge.—This act does not confer upon one judge the authority to advise a litigant upon a matter of procedure in another trial before another judge. *Redmond v. Farthing*, 217 N. C. 678, 9 S. E. (2d) 405 (1940).

Sales of Interests of Infants in Land.—The court may not order that the interests of infant defendants in certain realty be sold in the absence of allegation or evidence that such sale would benefit them. Whether the inherent power of a court of equity to authorize such sales in proper instances may be exercised in proceedings under the Declaratory Judgment Act, *quære?* *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

Marketability of Land.—The Declaratory Judgment Act does not empower courts to give advisory opinions as to the marketability of land merely to enable owners to allay the fears of prospective purchasers. *Lide v. Mears*, 231 N. C. 111, 56 S. E. (2d) 404 (1949).

Question of Insurer's Liability.—Insurer who issued liability policy insuring defendant's truck for "business-pleasure" use could invoke the provisions of Uniform Declaratory Judgment Act to determine whether the truck was being used at time of accident within exception clause of policy. *Lumber Mut. Cas. Ins. Co. v. Wells*, 225 N. C. 547, 35 S. E. (2d) 631 (1945).

Action to Determine Right to Easement.—An action to obtain a judicial declaration of plaintiffs' right to an easement appurtenant and by necessity over the lands of defendants is authorized by this article, and the superior court has jurisdiction, it not being a special proceeding to establish a cartway which must be instituted before the clerk. *Carver v. Leatherwood*, 230 N. C. 96, 52 S. E. (2d) 1 (1949).

Applied in *Farnell v. Dongan*, 207 N. C. 611, 178 S. E. 77 (1935), with reference to rights in the property of deceased; *Carr v. Jimmerson*, 210 N. C. 570, 187 S. E. 800 (1936); *Ficklen Tobacco Co. v. Maxwell*, 214 N. C. 367, 199 S. E. 405 (1938); *Branch*

Banking, etc., Co. v. Toney, 215 N. C. 206, 1 S. E. (2d) 538 (1939); Hilton Lbr. Co. v. Estate Corp., 215 N. C. 649, 2 S. E. (2d) 869 (1939). Burcham v. Burcham, 219 N. C. 357, 13 S. E. (2d) 615 (1941); Moore v. Sampson County, 220 N. C. 232, 17 S. E. (2d) 22 (1941); Oxford Orphanage v. Kittrell, 223 N. C. 427, 27 S. E. (2d) 133 (1943); Williams v. Rand, 223 N. C. 734, 28 S. E. (2d) 247 (1943); Patterson v. Brandon, 226 N. C. 89, 36 S. E. (2d) 717, 163 A. L. R. 1150 (1946); Buffaloe v. Barnes, 226 N. C. 313, 38 S. E. (2d) 222 (1946); First Security Trust Co. v. Hen-

derson, 226 N. C. 649, 39 S. E. (2d) 804 (1946); In re Battle, 227 N. C. 672, 44 S. E. (2d) 212 (1947); Williams v. Johnson, 228 N. C. 732, 47 S. E. (2d) 24 (1948); Ward v. Black, 229 N. C. 221, 49 S. E. (2d) 413 (1948); First Nat. Bank v. Brawley, 231 N. C. 687, 58 S. E. (2d) 706 (1950); Elmore v. Austin, 232 N. C. 13, 59 S. E. (2d) 205 (1950); Williamson v. Williamson, 232 N. C. 54, 59 S. E. (2d) 214 (1950). Cited in In re Reynolds, 206 N. C. 276, 173 S. E. 789 (1934); Corl v. Corl, 209 N. C. 7, 182 S. E. 725 (1935); Peyton v. Smith, 213 N. C. 155, 195 S. E. 379 (1938).

§ 1-254. Courts given power of construction of all instruments.—Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by a statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise, and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof. (1931, c. 102, s. 2.)

Wills.—A paper writing in the handwriting of deceased, found among his valuable papers after his death, and bearing upon its face the animus testandi, will be declared his will as a matter of law. Rountree v. Rountree, 213 N. C. 252, 195 S. E. 784 (1938).

In action by executor under Declaratory Judgment Act for construction of will and to determine validity of assignment of interest in legacy, motion to dismiss for want of jurisdiction denied where the controversy over the validity of assign-

ment was originally brought into court by executor, as it is entitled to have matter determined in present proceeding. First Security Trust Co. v. Henderson, 226 N. C. 649, 39 S. E. (2d) 804 (1946).

An action to modify or reform the provisions of a judgment may not be maintained under the Declaratory Judgment Act. Howland v. Stitzer, 231 N. C. 528, 58 S. E. (2d) 104 (1950).

Cited in First Security Trust Co. v. Henderson, 225 N. C. 567, 35 S. E. (2d) 694 (1945).

§ 1-255. Who may apply for a declaration.—Any person interested as or through an executor, administrator, trustee, guardian or other fiduciary, creditor, devisee, legatee, heir, next of kin, or cestui que trust, in the administration of a trust, or of the estate of a decedent, an infant, lunatic, or insolvent, may have a declaration of rights or legal relations in respect thereto: (a) To ascertain any class of creditors, devisees, legatees, heirs, next of kin or others; or (b) To direct the executors, administrators, or trustees to do or abstain from doing any particular act in their fiduciary capacity; or (c) To determine any question arising in the administration of the estate or trust, including questions of construction of wills and other writings. (1931, c. 102, s. 3.)

Advice as to Taxes.—An executor and trustee may institute an action in the superior court to obtain the advice of the court as to whether inheritance taxes should be paid from the corpus of the estate or deducted from annuities provided for in the will, and such action may be maintained under this section. Wachovia Bank, etc., Co. v. Lambeth, 213 N. C. 576, 197 S. E. 179, 117 A. L. R. 117 (1938).

Invocation of General Equitable Powers.—A proceeding may not be maintained under this and other sections of this article by trustees under a will to invoke the general equitable powers of the court to

authorize them to sell, mortgage or lease a part of the trust property for benefit and preservation of the trust, since such remedy goes far beyond a mere declaration of plaintiffs' rights or a mere obtaining of direction to plaintiffs to do or refrain from doing any act in their fiduciary capacity. Brandis v. Trustees of Davidson College, 227 N. C. 329, 41 S. E. (2d) 833 (1947). For comment upon the decision in this case, see 26 N. C. Law Rev. 69.

Applied in Rierison v. Hanson, 211 N. C. 203, 189 S. E. 502 (1937); Citizens Nat. Bank v. Corl, 225 N. C. 96, 33 S. E. (2d) 613 (1945).

§ 1-256. Enumeration of declarations not exclusive.—The enumeration in sections 1-254 and 1-255 does not limit or restrict the exercise of the general powers conferred in section 1-253 in any proceedings where declaratory relief is sought, in which a judgment or decree will terminate the controversy or remove an uncertainty. (1931, c. 102, s. 4.)

The purpose of this section is to grant "declaratory relief" and remove uncertainties when properly presented. *Brandis v. Trustees of Davidson College*, 227 N. C. 329, 41 S. E. (2d) 833 (1947).

This section enlarges the specific categories mentioned elsewhere in the statute. *Tryon v. Duke Power Co.*, 222 N. C. 200, 22 S. E. (2d) 450 (1942).

§ 1-257. Discretion of court.—The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. (1931, c. 102, s. 5.)

§ 1-258. Review.—All orders, judgments and decrees under this article may be reviewed as other orders, judgments and decrees. (1931, c. 102, s. 6.)

§ 1-259. Supplemental relief.—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith. (1931, c. 102, s. 7.)

§ 1-260. Parties.—When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceedings. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be entitled to be heard. (1931, c. 102, s. 8.)

§ 1-261. Jury trial.—When a proceeding under this article involves the determination of an issue of fact, such issue may be determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending. (1931, c. 102, s. 9.)

Cross Reference.—As to how issues are tried, see §§ 1-172 et seq.

Question of Insurer's Liability.—Where insurer alleged exclusion from liability on policy and insured alleged coverage, and coverage was conceded unless use of vehicle was within exception clause in policy,

the issue of exclusion was an issue of fact which should have been determined by jury and rendering judgment on pleadings was error. *Lumber Mut. Cas. Ins. Co. v. Wells*, 225 N. C. 547, 35 S. E. (2d) 631 (1945).

§ 1-262. Hearing before judge where no issues of fact raised or jury trial waived; what judge may hear.—Proceedings under this article shall stand for trial at a term of court, as in other civil actions. If no issues of fact are raised, or if such issues are raised and the parties waive a jury trial, by agreement of the parties the proceedings may be heard before any judge of the superior court. If in such case the parties do not agree upon a judge for the hearing, then upon motion of the plaintiff the proceeding may be heard by the resident judge of the district, or the judge holding the courts of the district, or by any judge holding a term of the superior court within the district. Such motion shall be in writing, with ten days' notice to the defendant, and the judge so designated shall fix a time and place for the hearing and notify the parties. Upon notice

given, the clerk of the superior court in which the action is pending shall forward the papers in the proceeding to the judge designated. The hearing by the judge shall be governed by the practice for hearing in other civil actions before a judge without a jury. The term "superior court judge" used in this section shall include emergency and special judges of the superior court. (1931, c. 102, s. 10.)

Cross References.—As to trial generally, trial and findings of fact by judge, see §§ see §§ 1-170 et seq. As to waiver of jury 1-184, 1-185.

§ 1-263. **Costs.**—In any proceeding under this article the court may make such award of costs as may seem equitable and just. (1931, c. 102, s. 11.)

§ 1-264. **Liberal construction and administration.**—This article is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations, and it is to be liberally construed and administered. (1931, c. 102, s. 12.)

§ 1-265. **Word "person" construed.**—The word "person" wherever used in this article, shall be construed to mean any person, partnership, joint stock company, unincorporated association, or society, or municipal corporation or other corporation of any character whatsoever. (1931, c. 102, s. 13.)

§ 1-266. **Uniformity of interpretation.**—This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it, and to harmonize, as far as possible, with federal laws and regulations on the subject of declaratory judgments and decrees. (1931, c. 102, s. 15.)

§ 1-267. **Short title.**—This article may be cited as the Uniform Declaratory Judgment Act. (1931, c. 102, s. 16.)

SUBCHAPTER IX. APPEAL.

ARTICLE 27.

Appeal.

§ 1-268. **Writs of error abolished.**—Writs of error in civil actions are abolished, and the only mode of reviewing a judgment, or order, in a civil action, is that prescribed by this chapter. (C. C. P., s. 296; Code, s. 544; Rev., s. 583; C. S., s. 629.)

Editor's Note.—Prior to the adoption of the Code of Civil Procedure writs of error were allowed in proper cases. But in *Smith v. Cheek*, 50 N. C. 213 (1857), it was held that the Supreme Court had no power to issue a writ of error. Section 296 of the Code of Civil Procedure [G. S.,

§ 1-263] abolished writs of error and substituted appeals therefor. *Lynn v. Lowe*, 88 N. C. 478 (1883); *White v. Morris*, 107 N. C. 93, 12 S. E. 80 (1890).

Cited in *King v. Wilmington, etc., Ry.*, 112 N. C. 318, 16 S. E. 929 (1893).

§ 1-269. **Certiorari, recordari, and supersedeas.**—Writs of certiorari, recordari, and supersedeas are authorized as heretofore in use. The writs of certiorari and recordari, when used as substitutes for an appeal, may issue when ordered upon the applicant filing a written undertaking for the costs only; but the supersedeas, to suspend execution, shall not issue until an undertaking is filed or a deposit made to secure the judgment sought to be vacated, as in cases of appeal where execution is stayed. (1874-5, c. 109; Code, s. 545; Rev., s. 584; C. S., s. 630.)

I. Editor's Note.

II. Certiorari.

A. Editor's Note.

B. General Consideration.

C. Illustrative Cases.

D. Requirements of Application.

E. Time of Application.

F. Issuance of Writ from Superior Court.

III. Recordari.

A. Editor's Note.

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C. Requirements for Writ.

D. When Granted.

E. When Denied.

IV. Supersedeas.

Cross References.

As to writs of certiorari and supersedeas, when and how applied for and notice, see Rule 34 of Rules of Practice in the Supreme Court. As to cash deposit in lieu of bond, see § 109-32.

I. EDITOR'S NOTE.

The original Code of Civil Procedure of 1868, abolished writs of error and substituted appeals, but did not provide for writs of certiorari and recordari, as was pointed out by the Supreme Court in *Marsh v. Williams*, 63 N. C. 371 (1869).

Whenever a substantial wrong has been done in judicial proceedings, giving a litigant legal right to redress, and no appeal has been provided by law, or the appeal that has been provided proves inadequate, the Supreme Court to all courts of the State and the superior courts to all subordinate courts, over which they exercise appellate power, may issue one or more of these writs and thereby see that the error is corrected and justice administered. *State v. Tripp*, 168 N. C. 150, 83 S. E. 630 (1914).

II. CERTIORARI.

A. Editor's Note.

For regulations of the Supreme Court in regard to the writ of certiorari see Supreme Court Rule 34. It is very important that appellant's petition should comply with these regulations as the writ will be dismissed for his failure to do so. Where petitioner failed to give the notice required by Supreme Court Rule 34 the writ will not issue. *Keerans v. Keerans*, 109 N. C. 101, 13 S. E. 895 (1891); *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225 (1894). However notice may be waived. *Anonymous*, 2 N. C. 405 (1796).

The writ of certiorari is an extraordinary remedial writ and lies for two purposes: First, as a writ of false judgment to correct errors of law and, second, as a substitute for an appeal. In either case it can issue only to the court where the judgment is. Therefore when the cause has been transferred by appeal the writ must be dismissed. *Williams v. Williams*, 71 N. C. 427 (1874). Its object is to prevent an improper deprivation of appeal.

Where a cause is removed from one superior court to another, the latter has the right to issue a writ of certiorari to the

former, directing a more perfect transcript to be certified; for the right to issue writs of certiorari is not founded on the circumstance that the court from which the writ issues is superior to that to which it is directed; but upon the principle that all courts have the right to issue any writ necessary to the exercise of their powers. *State v. Reid*, 18 N. C. 377 (1835).

Where appellant has lost his right to appeal by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted without reference to the merits of the cause. *McConnell v. Caldwell*, 51 N. C. 469 (1859).

Where a statute authorizing a proceeding makes no provision for a review, certiorari may be maintained for that purpose. *Board of Comm'rs v. Smith*, 110 N. C. 417, 14 S. E. 972 (1892).

Where no appeal to the superior court from an inferior court is prescribed by the statute creating such court, and where an appeal would otherwise lie, a certiorari in lieu of appeal will issue from the superior court. *McPherson Drug Co. v. Norfolk, etc., R. Co.*, 173 N. C. 87, 91 S. E. 606 (1917).

It is the only method by which the Supreme Court can review the judgment in habeas corpus proceedings in matters not involving the custody of children. In *re Holley*, 154 N. C. 163, 69 S. E. 872 (1910). Certiorari may issue from the superior courts as well as the Supreme Court. *Rhyne v. Lipscombe*, 122 N. C. 650, 29 S. E. 57 (1898).

B. General Consideration.

Substitute for Appeal.—A writ of certiorari to bring up the record in a case is the proper substitute for an appeal. *State v. McGimsey*, 80 N. C. 377 (1879).

If an appeal is unavoidably lost, certiorari may be granted as a substitute. *Anonymous*, 2 N. C. 302 (1796); *Norwood v. Pratt*, 124 N. C. 745, 32 S. E. 979 (1899).

Certiorari is the appropriate process to review the proceedings of inferior courts and of bodies and officers exercising judicial or quasi-judicial functions in cases where no appeal is provided by law. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589 (1950).

"As no appeal lay, a certiorari as a substitute therefor cannot be granted." *State v. Todd*, 224 N. C. 776, 32 S. E. (2d) 313 (1944), quoting *Guilford County v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861 (1891).

Discretion of Supreme Court.—The

granting or refusing of a petition for a certiorari, is a matter within the discretion of the Supreme Court. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751 (1924); *Peoples Bank, etc., Co. v. Parks*, 191 N. C. 263, 131 S. E. 637 (1926); *Waller v. Dudley*, 193 N. C. 354, 137 S. E. 149 (1927).

When Certiorari a Matter of Right.—Certiorari will be granted, as a matter of right, where it appears that appellant has been deprived of his appeal by the conduct of the opposing party. *State v. Bill*, 35 N. C. 373 (1852); *Wiley v. Lineberry*, 88 N. C. 68 (1883); *State v. Bennett*, 93 N. C. 503 (1885). Even though the conduct was unintentional. *Walton v. Pearson*, 83 N. C. 309 (1880).

If a party prays an appeal, and the court refuses to allow it, the certiorari is granted as "a matter of course." *Bledsoe v. Snow*, 48 N. C. 100 (1855).

Cannot Be Dispensed with.—Certiorari is a discretionary writ, and counsel may not dispense with it by agreement. *In re McCade*, 183 N. C. 242, 111 S. E. 3 (1922); *State v. Hooker*, 183 N. C. 763, 111 S. E. 351 (1922).

Persons Entitled.—To entitle one to a writ of certiorari he must have some interest in the proceeding sought to be reviewed, and sustain injury thereby. *Petty v. Jones*, 23 N. C. 408 (1841). See *Otey v. Rogers*, 26 N. C. 534 (1844); *Shober v. Wheeler*, 119 N. C. 471, 26 S. E. 26 (1896).

When Another Remedy Available.—Certiorari is not a proper remedy where another adequate remedy is available. *Petty v. Jones*, 23 N. C. 408 (1841); *Watson v. Shields*, 67 N. C. 235 (1872).

Finality of Determination.—Where the judgment against a party is retained for further orders, the judgment is interlocutory and certiorari will not be granted. *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355 (1911).

Applicant Must Negative Laches.—He who seeks a certiorari must negative laches. *Mitchell v. Baker*, 129 N. C. 63, 39 S. E. 633 (1901); *Cox v. Kinston Carolina, etc., R. Co.*, 177 N. C. 227, 98 S. E. 704 (1919); *Peoples Bank, etc., Co. v. Parks*, 191 N. C. 263, 131 S. E. 637 (1926).

Negligent Delay.—One who negligently allows the time for bringing his appeal to expire without seeking such remedy is not entitled to the remedy by certiorari. *Suiter v. Brittle*, 92 N. C. 53 (1885); *In re Brittain*, 93 N. C. 587 (1885).

Necessity of Filing Record.—The appellant must aptly file a record proper in the case appealed from as a prerequisite for the Supreme Court to grant his motion

for a certiorari to bring up the case for review. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916); *Brock v. Ellis*, 193 N. C. 540, 137 S. E. 585 (1927).

Necessity of Security.—Since certiorari is but a substitute for an appeal, it can only be allowed on the same security, and justification thereof, as in cases of appeal. *Chastain v. Chastain*, 87 N. C. 283 (1882).

But the Supreme Court has the power, in a proper case, to allow the writ to issue without such undertaking. *Brittain v. Mull*, 93 N. C. 490 (1885). The contrary is apparently held in *Weber v. Taylor*, 66 N. C. 412 (1872), but this was in reality not a "proper case."

Certiorari Denied When Appeal Waived.—A writ of certiorari will not issue where the right of appeal has been waived. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751 (1924).

Imposition of Terms on Applicant.—When granted the appellant may be laid under terms not to avail himself of a technical advantage. *Collins v. Nall*, 14 N. C. 224 (1831).

Only Errors Apparent of Record.—Under a writ of certiorari, the object of which is only to bring up the record of an inferior court, only such errors or defects as appear on the face of such record can be considered. *Hartsfield v. Jones*, 49 N. C. 309 (1857); *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

When a criminal action has been brought from an inferior court to the superior court by means of a writ of certiorari, the superior court acts only as a court of review, and in all ordinary instances must act on the facts as they appear of record * * * and can only revise the proceedings as to regularity or on questions of law or legal inference. *State v. King*, 222 N. C. 137, 22 S. E. (2d) 241 (1942).

Case on Appeal Not Settled.—When for any sufficient cause the case on appeal is not settled in time to have the case docketed at the term of the Supreme Court to which the appeal should be brought, the appellant should in apt time file a transcript of the record proper and move for a certiorari. *McNeil v. Virginia-Carolina R. Co.*, 173 N. C. 729, 92 S. E. 484 (1917); *Tripp v. Somersett*, 182 N. C. 767, 108 S. E. 633 (1921). See *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680 (1910).

In such a case if appellant does not apply for certiorari at the first term next after the trial, he is not entitled to certiorari at the next term. *Joyner v. Hines*, 108 N. C. 413, 12 S. E. 901 (1891); *Haynes v. Coward*, 116 N. C. 840, 21 S. E. 690 (1895).

Issuance of Successive Writs.—Although a certiorari has once been issued from the Supreme Court, upon a suggestion of a defect of the record, and has been returned, yet the court may, a second time or oftener direct writs of certiorari to issue if it sees reason to think the transcript defective. *State v. Munroe*, 30 N. C. 258 (1848).

But where the return of a certiorari, substituted for an appeal, shows an imperfect record, and no statement of the case, a new writ of certiorari will not be granted. *Skinner v. Badham*, 80 N. C. 14 (1879).

Effect of Certiorari.—Where a defendant has lost his appeal, but is granted a writ of certiorari in lieu thereof, the granting of the writ has the effect of an appeal as to stay of execution, and if the offense be bailable, he is entitled to bail. *State v. Walters*, 97 N. C. 489, 2 S. E. 539 (1887). See *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324 (1898).

Docketing as a Condition Precedent for Certiorari.—All of the transcript that can be obtained must be docketed at the first term and certiorari asked to complete the transcript. *Pittman v. Kimberly*, 92 N. C. 562 (1885); *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196 (1906); *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680 (1910).

Same—Waiver.—Requirement of Supreme Court that on application for certiorari for case on appeal transcript of record proper must be docketed cannot be waived by appellee. *Murphy v. Carolina Elect. Co.*, 174 N. C. 782, 93 S. E. 456 (1917).

Same — When Transcript Cannot Be Docketed.—Where the papers constituting the record proper have been misplaced without any laches of an appellant, the proper practice is to file the case on appeal settled by the trial judge, and ask for certiorari for the record proper. *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196 (1906). See also *Burrell v. Hughes*, 120 N. C. 277, 26 S. E. 782 (1897); *Parker v. Southern R. Co.*, 121 N. C. 501, 28 S. E. 347 (1897); *McMillan v. McMillan*, 122 N. C. 410, 29 S. E. 361 (1898).

When certiorari is addressed to boards of assessment or boards of assessment and equalization, where that practice is permitted, it is generally held that the power of review, as in other instances of its use under the common law, does not extend to questions of valuation, but only to jurisdictional or procedural irregularities or errors of law. *Belk's Dept. Store v. Guil-*

ford County, 222 N. C. 441, 23 S. E. (2d) 897 (1943), and cases cited therein.

Applied in *Hamilton v. Southern R. Co.*, 203 N. C. 468, 166 S. E. 392 (1932).

Cited in *In re Guerin*, 206 N. C. 824, 175 S. E. 181 (1934).

C. Illustrative Cases.

Failure to Serve Case on Appeal.—A petition for a writ of certiorari to bring up the case on appeal will not be granted where the appeal was lost by failure to serve the case on appeal. *Zell Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650 (1897).

Waiver of Statutory Requirements.—When there is an alleged waiver of the statutory requirements in settling case on appeal, a certiorari will issue if the allegations of petitioner's affidavit are not denied. *Holmes v. Holmes*, 84 N. C. 833 (1881).

Delay of Judge.—Where the delay in prosecuting the appeal is owing to no fault of the appellant, but to the delay of the judge, certiorari, in lieu of an appeal may be granted. *Sparks v. Sparks*, 92 N. C. 359 (1885); *Haynes v. Coward*, 116 N. C. 840, 21 S. E. 690 (1895).

Retirement of Judge before Preparing Case.—Where the trial judge goes out of office before preparing a case on appeal, held, that certiorari is proper as a substitute for appeal, if the parties can agree on a statement of the case. *Shelton v. Shelton*, 89 N. C. 185 (1883). But where the trial judge has died certiorari will not lie. *Taylor v. Simmons*, 116 N. C. 70, 20 S. E. 961 (1895).

Loss Caused by Mistake of Clerk.—After a party has prayed an appeal and offered his sureties, if he be defeated of the appeal by the neglect, omission or delay of the clerk, he shall have his cause carried up by a certiorari. *Chambers v. Smith*, 2 N. C. 366 (1796); *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362 (1890).

But not where the clerk fails to send up the transcript. *Pittman v. Kimberly*, 92 N. C. 562 (1885).

Neglect of Counsel.—Where the appellant's counsel told him that he would do everything necessary towards perfecting his appeal, but the counsel failed to file a proper appeal bond it was held, no ground for a certiorari. *Winborne v. Byrd*, 92 N. C. 7 (1885).

Sickness of Appellant.—Sickness of appellant is a sufficient excuse for failure to perfect an appeal so as to entitle him to certiorari as a substitute therefor. *Hewerton v. Henderson*, 86 N. C. 718 (1882).

Sickness of Applicant's Attorney.—The sickness of an attorney is a sufficient excuse

for want of diligence in perfecting an appeal, and certiorari will lie. *Mott v. Ramsay*, 90 N. C. 372 (1884).

However the sickness of one of two attorneys is not sufficient although the other is absent from the county. *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 80 (1895).

Error of counsel, whereby a party fails to appeal from a final judgment, is not ground for the certiorari, except under very exceptional circumstances. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445 (1905); *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355 (1911).

Failure to File Appeal Bond.—The fact that the appeal was not perfected because of the failure of appellant's counsel to file a proper appeal bond is not ground for certiorari in lieu of appeal. *Winborne v. Byrd*, 92 N. C. 7 (1885); *Churchill v. Brooklyn Life Ins. Co.*, 92 N. C. 485 (1885). Nor for failure to file appeal bond in time. *Bowen v. Fox*, 99 N. C. 127, 5 S. E. 437 (1888). Nor when justification of sureties is omitted. *Turner v. Powell*, 93 N. C. 341 (1885).

For a contra case, see *Manning v. Sawyer*, 8 N. C. 37 (1820), where it was held that where the appellant has failed to bring up the appeal bond along with the transcript, and swears that neither he nor the clerk knew it was his duty to do so, and that he did not intend to abandon his appeal, he shall have a certiorari to bring it up. This case decided at an early day seems to be the only one where a certiorari was allowed because an appeal was lost through the applicant's ignorance as to the requirements of the appeal bond.

Inability to Give Bond.—A certiorari will not be granted where the petitioner is unable to give bond for his appeal, unless it be shown that the judge below refused to make an order allowing the appeal in forma pauperis. *Lindsay v. Moore*, 83 N. C. 444 (1880).

Failure to Pay Clerk's Fees.—Certiorari will not be granted where it appears that the petitioner lost his appeal owing to his failure to comply with a demand for the payment of clerk's fees for making out the transcript. *Smith v. Lynn*, 84 N. C. 837 (1881); *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225 (1894). Even though the clerk's fees were exorbitant. *Brown v. House*, 119 N. C. 622, 26 S. E. 160 (1896).

Omission of Assignment of Errors.—If by accident or inadvertence, without appellant's negligence, an assignment of errors is omitted from the record on appeal appellant may apply to the Supreme Court for certiorari to have such assignments

sent up, *McDowell v. Kent Co.*, 153 N. C. 555, 69 S. E. 626 (1910), and for incorporation of exceptions. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76 (1904).

The action of a county board of education in removing a school committeeman from his office may be reviewed in the superior court by certiorari. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589 (1950).

When judgment has been entered in the recorder's court upon defendant's plea of guilty certiorari will not lie from the superior court to the recorder's court. *State v. Barber*, 232 N. C. 577, 61 S. E. (2d) 714 (1950).

Stenographer's Notes.—The mistake of appellant's counsel in sending up the stenographer's notes on appeal, instead of a properly settled case, does not entitle appellant to a certiorari. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

D. Requirements of Application.

Editor's Note.—Under the analysis line "General Consideration," II, B, ante, this note, will be found many cases pertaining to, though not expressly referring to, the application. These cases considering the subject generally should be consulted with reference to the requisites of the application.

Affidavit Required.—The writ of certiorari or recordari to review the judgment of a lower court will be issued only on a proper showing of merits, on affidavit filed. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981 (1916).

Affidavit Must Show Merits.—An application for a writ of certiorari must show a prima facie case of merits. *March v. Thomas*, 63 N. C. 249 (1869); *Short v. Sparrow*, 96 N. C. 348, 2 S. E. 233 (1887). For affidavit held sufficient see *Bayer v. Raleigh, etc., R. Co.*, 125 N. C. 17, 34 S. E. 100 (1899).

When Merit in Appeal Need Not Be Shown.—Where defendant is not able, at the time, to procure sufficient sureties for an appeal, he is entitled to a certiorari, without showing any merits in fact, where the case discloses that there were questions of law which he had a right to have decided by the superior court. *Britt v. Patterson*, 31 N. C. 197 (1848).

Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a certiorari will be granted, without reference to the merits. *Collins v. Nall*, 14 N. C. 224 (1831); *McConnell v. Caldwell*, 51 N. C. 469 (1859).

Loss of Papers.—Where an application for certiorari states that the papers asked to be sent up were lost, but does not aver that steps have been taken to supply them, the writ will not issue. *Sanders v. Thompson*, 114 N. C. 282, 19 S. E. 225 (1894).

Failure to Show Reason for Neglect.—Where a petition for a writ of certiorari did not allege that the adverse party prevented defendants from taking an appeal, and it did not appear that an appeal was ever taken, and no reason was assigned for the neglect, it was held that the writ would not issue. *Cox v. Pruett*, 109 N. C. 487, 13 S. E. 917 (1891).

Case Inaccurately Made.—When it is suggested that the case on appeal is inaccurately made out, the Supreme Court will award a certiorari, in order that the judge, if he sees proper, may make correction. *State v. Gay*, 94 N. C. 821 (1886).

Must Show Judge Will Make Corrections.—Where it is sought to have the case as settled by the judge corrected by a certiorari, the petitioner should set out his grounds for believing that the judge would make the corrections if given an opportunity, and not merely that he believes that probably the judge would do so. *Porter v. Western, etc., R. Co.*, 97 N. C. 63, 2 S. E. 580 (1887); *Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205 (1893).

Ability and Willingness to Correct.—The Supreme Court will not, by certiorari, direct the trial court to make changes in the case on appeal where the letter of the trial judge states his opinion that the record is fair and correct; the relief being granted only when the judge by letter indicates that he is willing to make the corrections desired. *Slocumb v. Construction Co.*, 142 N. C. 349, 53 S. E. 196 (1906).

Omitted Matter Must Be Relevant.—A certiorari will be denied where it does not appear that the matter omitted from the case settled is relevant to the exceptions presented on appeal. *City Nat. Bank v. Bridgers*, 114 N. C. 107, 19 S. E. 276 (1894); *Clark v. Soco-Petee Mach. Works*, 150 N. C. 88, 63 S. E. 153 (1903).

Mistake Must Be Apparent.—Certiorari to correct a mistake stated on appeal will not be granted unless it is probable that the judge below would make the desired correction, or unless it is apparent that there was a mistake. *Currie v. Clark*, 90 N. C. 17 (1884); *Cheek v. Watson*, 90 N. C. 302 (1884); *Ware v. Nisbet*, 92 N. C. 202 (1885); *Allen v. McLendon*, 113 N. C. 319, 18 S. E. 205 (1893).

Mere Allegation of Fraud Is Insufficient.—In *Hunsucker v. Winborne*, 223 N. C.

650, 27 S. E. (2d) 817 (1943), it was held that conceding the complaint to be a petition for writ of certiorari to review the ruling of the Municipal Board of Control in respect to the sufficiency of the signatures to a petition to change the name of a town, it fails to make proper showing of merit, upon which alone certiorari will issue, since the mere allegation in a pleading that an act was induced by fraud is insufficient.

Failure to Pray That Writ of Certiorari Be Issued.—Where a verified petition of a district school committeeman alleges that the county board of education made an order purporting to remove petitioner from his office without notice and an opportunity to be heard, and contains a general prayer for relief in addition to specific prayers, it will not be held inadequate as a petition for certiorari because of its failure to specifically pray that the writ be issued. *Russ v. Board of Education*, 232 N. C. 128, 59 S. E. (2d) 589 (1950).

E. Time of Application.

When Applied for.—Generally, the writ of certiorari, as a substitute for an appeal, must be applied for at the term of the Supreme Court to which the appeal ought to have been taken, or if no appeal lay, then before or to the term of court next after the judgment complained of was entered in the superior court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown. *State v. Johnson*, 93 N. C. 559 (1885); *State v. Sloan*, 97 N. C. 499, 2 S. E. 666 (1887).

Application Must Be Timely.—An application for certiorari to supply omissions in the appellate record must be presented to the appellate court with proper diligence, and the result of any laches by the applicant will fall upon him. *Todd v. Mackie*, 160 N. C. 352, 76 S. E. 245 (1912).

Agreement to Waive Time.—To the rule that appeal will be dismissed on motion of the appellee if not perfected according to law, there are the following exceptions: First, where the record shows a written agreement of counsel waiving the lapse of time; and secondly, where the alleged agreement is oral and disputed, and such waiver can be shown by the affidavit of the appellee, rejecting that of the appellant. In either case certiorari is the proper substitute. *Walton v. Pearson*, 82 N. C. 464 (1880).

Tacit Agreement to Waive Delay.—Where there is an undenied tacit agreement to waive delay certiorari will issue. *Holmes v. Holmes*, 84 N. C. 833 (1881); *Willis v. Atlantic, etc., R. Co.*, 119 N. C. 718, 25 S. E. 790 (1896).

Denial of Oral Agreement.—A certiorari will not be granted, where an alleged oral agreement between counsel to await the decision of a certain other case is denied. *Hutchinson v. Rumpfelt*, 83 N. C. 441 (1880); *Short v. Sparrow*, 96 N. C. 348, 2 S. E. 233 (1887); *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362 (1890).

Time for Requesting Certiorari.—An appellant who has ground for a certiorari as a substitute for appeal must move for it before the cause is reached for argument. *State v. Harris*, 114 N. C. 830, 19 S. E. 154 (1894); *State v. Marsh*, 134 N. C. 184, 47 S. E. 6 (1903). As to when allowed after argument, see *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330 (1890).

F. Issuance of Writ from Superior Court.

Review of Hearing on Lunacy Writ.—Where a writ of lunacy was issued by a county court, and the party found non compos, and a guardian appointed, in the absence of the said party, and without notice, it was held, that the petitioner was entitled to a certiorari, to have the case taken into a superior court. *Dowell v. Jacks*, 53 N. C. 387 (1861).

Action on Bond.—Where the principal obligor in a bond was called, and, failing to appear, judgment was rendered against his surety, it was held that the fact that the principal was sick, and unable to attend at the term for which he was bound, did not entitle the surety to a certiorari to have the case removed into the superior court. *Buis v. Arnold*, 53 N. C. 233 (1860).

Failure to Plead and Appeal.—Where a defendant fails to enter a plea and to take an appeal, he is not entitled to a certiorari to bring the case into the superior court. *Rule v. Council*, 48 N. C. 33 (1855).

Deprived of Defense by Fraud of Opposite Party.—Where a party is deprived, by the fraud of his opponent, of the opportunity of making a defense in the county court, which can be made in the superior court as well as in the county court, his proper remedy is by a writ of certiorari. *Lunceford v. McPherson*, 48 N. C. 174 (1855).

But a mere suggestion of fraud is insufficient. *McLaughlin v. McLaughlin*, 47 N. C. 319 (1855). See also *Haddock v. Stocks*, 167 N. C. 70, 83 S. E. 9 (1914).

III. RECORDARI.

A. Editor's Note.

"The writ of recordari under the former practice, and retained in the new, is used for two purposes: the one in order to have a new trial of the case upon its merits, and this is a substitute for an appeal from a

judgment rendered before a justice; the other, for a reversal of an erroneous judgment, performing in this respect the office of a writ of false judgment." *King v. Wilmington, etc., R. Co.*, 112 N. C. 318, 16 S. E. 929 (1893).

The adoption of this section of the Code (Acts 1874-75 c. 109) seems to retain this practice. *King v. Wilmington, etc., R. Co.*, supra, cites many cases in which the writ of recordari has been used as a writ of false judgment since the adoption of this section by the legislature. It has been said that the writ of recordari is used only in North Carolina, writs of error and certiorari being substituted for it elsewhere. *State v. Griffith*, 117 N. C. 709, 23 S. E. 164 (1895).

B. General Consideration.

Scope of Recordari.—If a party has merits and desires a new trial in the superior court, upon a matter heard before a justice of the peace, he must, by a proper application, obtain a writ of recordari as a substitute for an appeal. *Ledbetter v. Osborne*, 66 N. C. 379 (1872). It is in the nature of an extension of the power of appeal. *Webb v. Durham*, 29 N. C. 130 (1846).

Writ of False Judgment or Substitute for Appeal.—The writ of recordari may be used, either as a substitute for an appeal from a justice's judgment to have a new trial on the merits, or as a writ of false judgment. *Caldwell v. Beatty*, 69 N. C. 365 (1873); *Morton v. Rippy*, 84 N. C. 611 (1881); *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co.*, 150 N. C. 519, 64 S. E. 366 (1909).

The writ of recordari is authorized by this section and recognized by the decisions of this court, both as a substitute for an appeal from a judgment of a justice of the peace, in order to have a new trial on the merits, and as a writ of "false judgment," to obtain a reversal of an erroneous judgment. *King v. Wilmington, etc., R. Co.*, 112 N. C. 318, 16 S. E. 929 (1893).

The writ of recordari may be used as a writ of false judgment. *Parker v. Gilreath*, 28 N. C. 221 (1845); *Kearney v. Jeffreys*, 30 N. C. 96 (1847); *Bailey v. Bryan*, 48 N. C. 357 (1856).

Lies to Inferior Tribunal Whose Proceedings Are Not Recorded.—The writ of recordari lies to an inferior tribunal, whose proceedings are not recorded. *Hartsfield v. Jones*, 49 N. C. 309 (1857).

Jurisdiction of Superior Courts.—The writs of certiorari and recordari are to be applied for in orderly procedure to the superior courts of general jurisdiction vested

by the State Constitution and statutes with appellate and supervisory powers over the judicial action of all the inferior courts of the State. *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981 (1916).

Failure to Docket Appeal. — When an appeal from a justice's court has not been docketed within the time prescribed by § 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978 (1911); *Abell v. Thornton Light, etc., Co.*, 159 N. C. 348, 74 S. E. 881 (1912); *Powell & Co. v. Rogers*, 180 N. C. 657, 104 S. E. 70 (1920).

Right to Object to Petition for Recordari Not Waived. — An appellee who does not docket an appeal from justice court not docketed in time by appellant and move for affirmance, does not waive the right to object to appellant's petition to bring up the appeal by recordari. *Pickens v. Whitten*, 182 N. C. 779, 109 S. E. 836 (1921).

Dismissal for Failure to Docket.—A recordari granted defendant by the superior court as substitute for an appeal from a justice not being docketed at that or the succeeding term, plaintiff may at a subsequent term docket the case, and have it dismissed. *Johnson v. Reformers*, 135 N. C. 385, 47 S. E. 463 (1904).

Review of Judge's Decision.—The decision of the judge upon a petition for recordari as a substitute for an appeal, after proper notice to the adverse party, is final and can only be reviewed by appeal, or upon an application to vacate it for mistake, surprise or excusable negligence. *Barnes v. Easton*, 98 N. C. 116, 3 S. E. 744 (1887). See also, *Stewart v. Craven*, 205 N. C. 439, 171 S. E. 609 (1933).

Where, upon application to the superior court for a writ of recordari, the judge finds as facts, upon evidence, that the appellant has been guilty of laches in not giving the legal notice of appeal and refuses to grant the writ, his judgment will not be disturbed in the Supreme Court; praying for the appeal and the payment of the fees in the justice's court by the appellant are not sufficient to entitle him to the order as a matter of right. *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616 (1914).

No appeal lies from the refusal of the court below to grant a motion to dismiss a petition for a writ of recordari. An appeal lies from the order of the court either granting or refusing to grant such writ. *Perry v. Whitaker*, 77 N. C. 102 (1877).

C. Requirements for Writ.

Issued at Term Following Trial.—The writ of certiorari or recordari to review the judgment of a lower court will be issued only at the next term of the supervising court following trial in the lower court. *Boing v. Raleigh, etc., R. Co.*, 88 N. C. 62 (1883); *Taylor v. Johnson*, 171 N. C. 84, 87 S. E. 981 (1916).

At Earliest Possible Time.—The writ of recordari or of certiorari, as a substitute for an appeal, should be applied for without any unreasonable delay, and any delay, after the earliest moment in the party's power to make the application must be satisfactorily accounted for. *Todd v. MacKie*, 160 N. C. 352, 76 S. E. 245 (1912).

See *Koonce v. Pelletier*, 82 N. C. 237 (1880), in which it was held that, under the circumstances, a delay of three months in applying for the writ was not unreasonable.

Necessity of Affidavit or Petition. — A recordari, granted upon the application of the plaintiff, without notice to the defendant, and without any petition or affidavit setting forth the grounds upon which it should be issued, is irregular, and will be dismissed upon the hearing. *Wilcox v. Stephenson*, 71 N. C. 409 (1874).

Averment as to Payment of Costs.—Before an application for a writ of recordari can be entertained, the petitioner must aver that he has paid or offered to pay the justice's fees. *Steadman v. Jones*, 65 N. C. 388 (1871).

Excuse for Laches and Meritorious Grounds. — Recordari will not be issued unless party applying shows (1) excuse for laches and (2) meritorious grounds. *Pritchard v. Sanderson*, 92 N. C. 41 (1885).

Application Must Negative Laches.—An applicant for recordari must show that he has not been guilty of laches. *Marler-Dalton-Gilmer Co. v. Wadesboro Clothing, etc., Co.*, 150 N. C. 519, 64 S. E. 366 (1909). See also, *March v. Thomas*, 63 N. C. 249 (1869); *Pritchard v. Sanderson*, 92 N. C. 41 (1885); *In re Brittain*, 93 N. C. 587 (1885).

Sufficient Ground for Recordari Must Be Shown.—It was incumbent on one failing to docket his appeal from justice court in the time required by law to show sufficient ground for a recordari in lieu of the appeal. *Baltimore Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922 (1920).

Applicant Must Show Merits.—An applicant for a writ of recordari must show merit. *Marler-Dalton-Gilmer Co. v. Wades-*

boro Clothing, etc., Co., 150 N. C. 519, 64 S. E. 366 (1909).

Failure to Show Meritorious Defense.—

It is error to issue a writ of recordari to a justice's court, requiring him to send up the cause for trial de novo after entry of default judgment against defendant, and loss of right to appeal, where there is no showing of a meritorious defense. *Hunter v. Atlantic Coast Line R. Co.*, 161 N. C. 503, 77 S. E. 678 (1913).

Effect of Failure to Assign Errors.—

Where no error is assigned, or none appears, the proper course is to dismiss the recordari, and award a procedendo. *Leatherwood v. Moody*, 25 N. C. 129 (1842); *Sossamer v. Hinson*, 72 N. C. 578 (1875).

Supersedeas Should Accompany.—An order for a recordari should be accompanied with an order for a supersedeas, and suspension of execution until the hearing. *Steadman v. Jones*, 65 N. C. 388 (1871).

D. When Granted.

Loss of Appeal without Fault of Applicant.—A recordari is a substitute for an appeal, where the party has lost his right to appeal otherwise than by his own default. *Marsh v. Cohen*, 68 N. C. 283 (1873); *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836 (1921).

Party Denied Right of Appeal.—If a party has been aggrieved in a trial before a justice of the peace and has been denied the right of appeal, he may obtain relief by a writ of recordari. *Ledbetter v. Osborne*, 66 N. C. 379 (1872); *Birdsey v. Harris*, 68 N. C. 92 (1873).

Refusal of Appeal on Frivolous Ground.—If an appeal be refused by a magistrate on frivolous ground, the remedy is by a writ of recordari. *Bailey v. Bryan*, 48 N. C. 357, 67 Am. Dec. 246 (1856).

Appeal Lost by Excusable Neglect.—Where a party has lost his appeal by excusable neglect he may have relief by a writ of recordari as a substitute for an appeal. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439 (1885).

Loss by Technical Default.—Where a party has lost his appeal by a technical default the superior court judge can have it brought up by recordari. *Suttle v. Green*, 78 N. C. 76 (1878).

Loss of Appeal by Misfortune.—The writ of recordari is not resorted to as a rule except in cases in which the party aggrieved has by his misfortune lost the opportunity of taking the ordinary statutory appeal. *State v. Griffis*, 117 N. C. 709, 23 S. E. 164 (1895). See also, *Boing v. Ra-*

leigh, etc., R. Co., 88 N. C. 62 (1883); *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78 (1893).

Erroneous Supposition as to Agreement.

—A writ of recordari is properly granted, where the defendant had merits, and lost his right to appeal without fault, having erroneously supposed that relief had been arranged with the plaintiff's attorney. *Carmer v. Evers*, 80 N. C. 56 (1879).

Notice of Appeal Not Returned.—On appeal from a justice of the peace to the superior court, where justice did not make a return of the notice of appeal during the next term, it was appellant's duty, where superior court judge was absent from such next term, to file motion for a recordari during such next term to preserve his right to have the case tried at the next succeeding term of the superior court. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919).

E. When Denied.

When Appeal Available.—Where a party has a remedy by appeal which he willfully or negligently fails to exercise he is not entitled to a writ of recordari. *State v. Griffis*, 117 N. C. 709, 23 S. E. 164 (1895); *Peltz v. Bailey*, 157 N. C. 168, 72 S. E. 978 (1911).

Duty to See That Appeal Is Filed in Time.—It is not enough that parties to a suit should engage counsel and leave the matter of taking an appeal entirely in his charge, as they should, in addition to this, give to the matter that amount of attention which a man of ordinary prudence usually gives to his important business, and should to that extent see that the appeal was filed in time. *Baltimore Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922 (1920).

Not Deprived of Appeal by Fraud, Accident or Mistake.—Where a party is not deprived of his appeal by any fraud, accident, surprise, or denial by the court, he is not entitled to the aid of a writ of recordari. *Satchwell v. Rispass*, 32 N. C. 365 (1849); *Hare v. Parham*, 49 N. C. 412 (1857).

When Appellant Has Not Perfected Appeal.—A motion for recordari made in the superior court several terms after the judgment has been entered in the justice's court for failure to send up the transcript, should be denied when the appellant has not paid the fees required or taken proper steps to perfect the appeal. *Helsabec v. Grubbs*, 171 N. C. 337, 88 S. E. 473 (1916).

Appeal Lost through Negligence of Applicant's Attorney.—A party is not entitled to a writ of recordari as a substitute for an

appeal from a justice's court which was lost by delay through the negligence of his attorney. *Boing v. Raleigh, etc., R. Co.*, 88 N. C. 62 (1883).

Illness of One Member of Law Firm.—As every member of a law firm is charged with knowledge of all the business of the firm, the illness of one member of a law firm which prevented him from attending a trial in justice court, and thus caused defendant to suffer a default judgment and lose its right of appeal, is not a showing of excusable neglect which will warrant the issuance of a writ of recordari. *Hunter v. Atlantic Coast Line R. Co.*, 163 N. C. 281, 79 S. E. 610 (1913).

IV. SUPERSEDEAS.

Editor's Note. — See Supreme Court Rule 34 as to requirements of application for this writ.

An appeal duly taken and regularly prosecuted of itself operates as a stay of all proceedings in the trial court. Section 1-294. *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585 (1914).

For supersedeas bond, see §§ 1-289 et seq., and notes.

Definition and Scope of Writ.—"Supersedeas" is a writ issuing from an appellate court to preserve the status quo pending exercise of that court's jurisdiction, and issues only to hold the matter in abeyance pending review, and is granted only by court ordering removal of cause, and is regulated by statute. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954 (1918).

A writ of supersedeas may issue to vacate the order of the lower court. *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931 (1911); *McArthur v. Timber Co.*, 164 N. C. 383, 80 S. E. 403 (1913); *Page v. Page*, 166 N. C. 90, 80 S. E. 1060 (1914); *In re Blake*, 184 N. C. 278, 114 S. E. 294 (1922); *Clegg v. Clegg*, 186 N. C. 28, 118 S. E. 824 (1923); 5 N. C. Law Rev. 26.

Authority of Court or Judge.—The superior court can not supersede the process of an inferior court, unless the writ of supersedeas be auxiliary to the appellate jurisdiction of the former. *Bank v. Stanley*, 13 N. C. 476 (1830).

A supersedeas is ancillary to a writ of error, and the former may be granted by the same judge who has granted the latter. *Seaboard Air Line R. v. Horton*, 176 N. C. 115, 96 S. E. 954 (1918).

The Supreme Court of North Carolina has no power to grant a supersedeas pend-

ing a petition to the United States Supreme Court for certiorari. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954 (1918).

When Granted—Case of Necessity.—A writ of supersedeas is only granted in case of necessity. *McArthur v. Commonwealth Land, etc., Co.*, 164 N. C. 383, 80 S. E. 403 (1913).

Where the rights of a party can be fully protected in other proceedings which he seeks to restrain, a writ of supersedeas will not be granted. *McArthur v. Commonwealth Land, etc., Co.*, 164 N. C. 383, 80 S. E. 403 (1913).

Appeal from Nonappealable Order. — Where an appeal is taken in a matter wherein no appeal lies, the court below need not stay proceedings, but may disregard the attempted appeal. *Dunn v. Marks*, 141 N. C. 232, 53 S. E. 845 (1906).

Review of Clerk's Decision. — A supersedeas is the proper remedy to stay proceedings in a cause, pending the review of a decision of the clerk in regard to the sufficiency or insufficiency of an undertaking for an appeal. *Saulsbury v. Cohen*, 68 N. C. 289 (1873).

Injunction.—An appeal from an order granting an injunction does not stay the operation of the injunction pending the appeal. *Green v. Griffin*, 95 N. C. 50 (1886); *Fleming v. Patterson*, 99 N. C. 404, 6 S. E. 396 (1888).

An appeal from an order dismissing a temporary injunction could not have the effect of continuing the injunction. *Reyburn v. Sawyer*, 128 N. C. 8, 37 S. E. 954 (1901).

It is not proper to allow a supersedeas for the purpose of continuing an injunction pending an appeal from an order dissolving it. *James v. Markham*, 125 N. C. 145, 34 S. E. 241 (1899).

Supersedeas upon Judgment.—An appeal from an order granting a supersedeas upon a judgment leaves the judgment creditor at liberty to enforce his judgment. *Bank v. Jones*, 17 N. C. 284 (1832).

Custody of Child. — Where, in divorce proceedings, the trial court granted custody of a child to a mother and the husband appealed, and the mother sued out habeas corpus for the custody of the child pending the appeal, the Supreme Court might supersede the order as to custody pending the appeal, by virtue of Const. art. 4, § 8, authorizing it to issue remedial writs. *Page v. Page*, 166 N. C. 90, 81 S. E. 1060 (1914).

§ 1-270. Appeal to Supreme Court; security on appeal; stay.—Cases shall be taken to the Supreme Court by appeal, as provided by law. All provisions

in this article as to the security to be given upon appeals and as to the stay of proceedings apply to appeals taken to the Supreme Court. (C. C. P., s. 312; Code, ss. 561, 946; Rev., ss. 595, 1540; C. S., s. 631.)

§ 1-271. Who may appeal.—Any party aggrieved may appeal in the cases prescribed in this chapter. (C. C. P., s. 298; Code, s. 547; Rev., s. 585; C. S., s. 632.)

Cross Reference. — For cases in which an appeal lies, see annotations under § 1-277.

Some Party Must Be "Aggrieved."—No appeal lies from a judgment until somebody is hurt or "aggrieved" by it. *Yadkin County v. High Point*, 219 N. C. 94, 13 S. E. (2d) 71 (1941).

And Only the "Aggrieved" May Appeal.—Only the party aggrieved may appeal from the superior court to the Supreme Court. *Watkins v. Grier*, 224 N. C. 334, 30 S. E. (2d) 219 (1944).

Where no error is found on plaintiff's appeal from a judgment in defendant's favor, defendant's appeal on the ground that the entire proceeding was void will be dismissed, since only the party aggrieved may appeal. *In re Westover Canal*, 230 N. C. 91, 52 S. E. (2d) 225 (1949).

"Party Aggrieved" Defined.—A defendant in a negligent injury action may appeal from the denial of his motion to have a third person joined as a defendant upon allegation that such third person was a joint tort-feasor, since the denial of the motion directly affects a substantial right, and a "party aggrieved" is one whose right has been directly and injuriously affected by the action of the court. *Freeman v. Thompson*, 216 N. C. 484, 5 S. E. (2d) 434 (1939).

Interest in Subject Matter.—A commissioner appointed to make a deed is not a "party to the action," and, having no personal interest in the subject of it can not appeal from an order of the court requiring him to correct his deed, and his attempted appeal will be dismissed. *Summerlin v. Morrissey*, 168 N. C. 409, 84 S. E. 689 (1915).

A creditor on rejection of his claim by the referee was such a "party aggrieved" as had a right of appeal under this section. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867 (1921).

Appeals for Purposes of Delay. — One who challenges neither the proceeding nor the judgment below and appeals only for purposes of delay, is not the "party aggrieved" within the meaning of this section. *Stephenson v. Watson*, 226 N. C. 742, 40 S. E. (2d) 351 (1946).

Parties Whose Only Interest Is Payment of Moneys Secured by Trust Deed.—In an action to restrain a trustee from

selling lands under a trust deed, till the termination of plaintiff's interest in the premises, parties whose only interest in the suit is the payment of the moneys secured to them by the trust deed can not appeal from a judgment declaring a parol trust in the equity of redemption in favor of plaintiff. *Faison v. Hardy*, 118 N. C. 142, 23 S. E. 959 (1896).

Receivers of a corporation can not appeal from a judgment of instructions because the instructions are, as between two classes of stockholders, prejudicial to one of such classes. *Strauss v. Carolina Interstate, etc., Loan Ass'n*, 117 N. C. 308, 23 S. E. 450 (1895), affirmed in 118 N. C. 556, 24 S. E. 116.

Parties of Record.—One not a party or privy to the record can not appeal. *Siler v. Blake*, 20 N. C. 90 (1838).

Administrators.—Where in proceedings by the administrator to sell lands of the estate to pay debts, the judge has ordered claimants to file original evidence of their indebtedness and then referred the matter, the proceedings assume the character of a creditor's bill in which a creditor whose claim has been disallowed, may appeal to the Supreme Court as a party aggrieved. *Irvin v. Harris*, 182 N. C. 647, 109 S. E. 867 (1921).

Propounders in Caveat Proceeding.—In a caveat proceeding where the jury found against propounder, and the trial court set aside the verdict as being against the weight of the evidence and ordered a new trial, it was held that the propounders were not the "parties aggrieved" by the order setting aside the verdict and could not appeal. *In re Hargrove*, 207 N. C. 280, 176 S. E. 752 (1934).

A defendant, who asks for no affirmative relief, is not the "party aggrieved" by a judgment of nonsuit within the meaning of this section and cannot appeal. *Guy v. Aetna Life Ins. Co.*, 206 N. C. 118, 172 S. E. 885 (1934).

But if defendants are not appealing from a nonsuit in their favor, but from a judgment upon the verdict which adversely affects their interest, they have the right to appeal under this section. *Hargett v. Lee*, 206 N. C. 536, 174 S. E. 498 (1934).

Application to Be Made a Party Denied.—If an application to be made a party de-

defendant is denied, the applicant is a "party aggrieved" for all the purposes of an appeal, under this section. *Rollins v. Rollins*, 76 N. C. 264 (1877).

Person Denied Right to Intervene.—

One whose claim to intervene in a suit has been rejected by the court can not appeal from the judgment rendered in the suit. *Phelps v. Long*, 31 N. C. 226 (1848); *Evans v. Governor's, etc., Min. Co.*, 50 N. C. 332 (1858); *Rollins v. Rollins*, 76 N. C. 264 (1877).

Interveners for Purpose of Appeal.—

Where a judgment for costs is rendered in a claim and delivery proceeding against a person who is not a party thereto, and who does not appear on the record as a party, such person may appeal on a special appearance made for that purpose. *Loven v. Parson*, 127 N. C. 301, 37 S. E. 271 (1900).

Party Not Served with Process.—One not a party can not appeal and the entry of a special appearance for one not served with process, though named as a defendant, does not authorize counsel so appearing to appeal from a default judgment against his client. *Houston v. Lumber Co.*, 136 N. C. 328, 48 S. E. 738 (1904).

Submission of Controversy.—Parties to an equity suit, who agree that the judge should find the facts, are precluded from asking the Supreme Court, on appeal, to review the finding. *Runnion v. Ramsay*, 93 N. C. 410 (1885).

Joinder.—All parties against whom a joint judgment or decree is rendered must join in an appeal. *Mastin v. Porter*, 32 N. C. 1 (1848); *Kelly v. Muse*, 33 N. C. 182 (1850).

Appeal from Joint Verdict and Judgment.—One defendant can not sustain an appeal from a joint judgment against two or more, when all had joined in the pleadings, and the trial was joint. *Hicks v. Gilliam*, 15 N. C. 217 (1833).

Where there is a joint judgment against two defendants in the court below, and one only appeals, the appeal will be dismissed on motion, no matter what steps have been taken in the cause after the filing of the appeal. *Smith v. Cunningham*, 30 N. C. 460 (1848).

Judgment against One of Two Parties.

—Where an action is brought in the county court against two defendants, who plead severally, and a verdict and judgment are rendered in favor of one and against the

other, the latter may alone appeal from the judgment rendered against him. *Stephens v. Batchelor*, 23 N. C. 60 (1840).

In assumpsit against two, if the jury find against one and in favor of the other, the former may appeal alone to the Supreme Court. *Sharpe v. Jones*, 7 N. C. 306 (1819).

Appeal by Garnishee and Delinquent

Taxpayer.—Where a proceeding to garnishee funds in a bank account belonging to a delinquent taxpayer, under § 105-242, is dismissed for want of jurisdiction, neither the garnishee nor the alleged delinquent taxpayer is the "party aggrieved," within the meaning of this section and neither may prosecute an appeal. *Gill v. McLean*, 227 N. C. 201, 41 S. E. (2d) 514 (1947).

Where defendant was granted new trial in superior court on two of his exceptions, he could not have the rulings upon his other exceptions reviewed unless reversible error appeared on plaintiff's appeal, as defendant was not the "party aggrieved" within the meaning of this section. *Starnes v. Tyson*, 226 N. C. 395, 38 S. E. (2d) 211 (1946).

Appeal by Justices of County.—Where, in a proceeding against the justices of a county, in their official capacity as justices of the county court, a judgment is rendered against them, they may appeal, although a minority of the justices refuse to join in the appeal. *Kelly v. Justices*, 24 N. C. 430 (1842).

Appeal by Statutory Receiver.—Objection that the statutory receiver has no right of appeal without the approval of the court is untenable when it appears that the superior court judge gave at least implied authority for appeal by approving the agreement of the parties as to what should constitute the case on appeal after notice of appeal by the receiver. *In re Central Bank, etc., Co.*, 206 N. C. 251, 173 S. E. 340 (1934).

Applied in *Canestrino v. Powell*, 231 N. C. 190, 56 S. E. (2d) 566 (1949).

Stated in *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

Cited in *Simmons v. Andrews*, 106 N. C. 201, 10 S. E. 1052 (1890); *In re Adams*, 218 N. C. 379, 11 S. E. (2d) 163 (1940); *Yancey v. North Carolina State Highway, etc., Comm.*, 221 N. C. 185, 19 S. E. (2d) 489 (1942).

§ 1-272. Appeal from clerk to judge.—Appeals lie to the judge of the superior court having jurisdiction, either in term time or vacation, from judgments of the clerk of the superior court in all matters of law or legal inference. In case of such transfer or appeal neither party need give an undertaking for costs; and

the clerk shall transmit, on the transfer or appeal, to the superior court, or to the judge thereof, the pleadings, or other papers, on which the issues of fact or of law arise. An appeal must be taken within ten days after the entry of the order or judgment of the clerk upon due notice in writing to be served on the appellee and a copy of which shall be filed with the clerk of the superior court. But an appeal can only be taken by a party aggrieved, who appeared and moved for, or opposed, the order or judgment appealed from, or who, being entitled to be heard thereon, had no opportunity of being heard, which fact may be shown by affidavit or other proof. (C. C. P., ss. 109, 492; Code, ss. 116, 252, 253; Rev., ss. 586, 610, 611; C. S., s. 633; 1927, c. 15.)

Cross References. — As to powers of clerks, see § 2-16. As to powers of the judge on appeal, see § 1-276.

Editor's Note.—No notice was required by this section prior to 1927. At that time by Public Laws 1927, ch. 15 the portion relating to "due notice in writing" was added.

By this section any party may appeal from any decision of the clerk of the superior court, on an issue of law or legal inference, to the judge, without undertaking; but an appeal can only be taken by a party aggrieved, who appeared and moved for or opposed the order or judgment appealed from. *National Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

This section and §§ 1-274 and 1-275, regulating appeals from the clerk to the judge, are applicable to appeals from orders and judgments made or rendered by the clerk in the exercise of jurisdiction conferred upon him by statute prior to chapter 92, Public Laws 1921, E. S. These sections do not apply to orders and judgments made or entered by the clerk as authorized by the latter statute. *Caldwell v. Caldwell*, 189 N. C. 805, 128 S. E. 329 (1925).

Section Does Not Apply Where Judge and Clerk Have Concurrent Jurisdiction.—This section and §§ 1-273 and 1-274, regulating appeals from the clerk of the superior court to the judge, have no application in regard to appeals from orders and decrees in proceedings over which the judge of the superior court has concurrent jurisdiction. *Moody v. Howell*, 229 N. C. 198, 49 S. E. (2d) 233 (1948).

Review of Ruling Where Clerk Had Original Jurisdiction.—In order to entitle the judge of the superior court to review a ruling of the clerk in a matter in which the latter has original jurisdiction the procedure prescribed by this section must be followed. *Muse v. Edwards*, 223 N. C. 153, 25 S. E. (2d) 460 (1943).

Clerk Acts for Court.—The exercise of judicial powers by the "clerk of the court" is the exercise of them by the "court" through the clerk; and the action of the

clerk stands as that of the court, if not excepted to and reversed or modified on appeal. *Brittain v. Mull*, 91 N. C. 498 (1884).

The clerk is not a "lower court" to the superior court with respect to appeals. While he has original jurisdiction in some matters and in the decision thereof may be considered a separate tribunal, nevertheless, all his power is delegated by virtue of his office as clerk of the superior court. *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83 (1934).

Action of Clerk Not Conclusive.—The action of the clerk is not final and conclusive. In a proper case, on appeal it is the duty of the court to review the findings of fact by the clerk and correct his errors of law. He is no more than the servant of the court, and subject to its supervision. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731 (1891).

Applies to Special Proceedings.—This section applies in special proceedings as well as in civil actions generally. *Welfare v. Welfare*, 108 N. C. 272, 12 S. E. 1025 (1891).

Order to Sell Land for Debt.—This section applies to an appeal from an order of the clerk to sell lands of decedent to pay debts. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772 (1920).

Docketing Tax Not Applicable.—Where an appeal is taken from an order of the clerk of the superior court to the judge thereof under this section, the judge has jurisdiction by mandate of § 1-276, and no "docketing" in a technical sense is involved, and § 105-93 requiring a tax of two dollars for "docketing" an appeal from a lower court in the superior court does not apply. *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83 (1934).

Sufficiency of Bonds.—The power to revise and control the action of a clerk of the superior court in passing upon the sufficiency or insufficiency of bonds to be taken by him, necessarily exists with the judge, whose minister and agent he is; and the proper mode of bringing the question before the judge is by an appeal from the

ruling of the clerk. *Marsh & Co. v. Cohen*, 68 N. C. 283 (1873).

Setting Aside Commissioner's Report.—An order of the clerk, setting aside the report of commissioners making partition of land, and directing a redivision, is appealable to the judge, and if no error in law is committed, the decision of the judge cannot be reversed. *McMillan v. McMillan*, 123 N. C. 577, 31 S. E. 729 (1898).

Removal of Executors.—An appeal will lie to the judge in proceedings for the removal of executors and administrators. *Edwards v. Cobb*, 95 N. C. 4 (1886).

Order Concerning Judgment Debtor.—An appeal lies from an order of the clerk requiring a judgment debtor to appear and answer concerning his property, where the affidavit for the order is objected to on the ground of its insufficiency. *Farmers Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

Refusal to Issue Execution.—Where a clerk of the superior court refuses to issue an execution against the person of a judgment debtor, an appeal therefrom may properly be taken to the resident judge of the district. *Huntley v. Hasty*, 132 N. C. 279, 43 S. E. 844 (1903).

Proceedings Supplemental to Execution.—Where in proceedings supplemental to execution had before the clerk, he held that the affidavit was sufficient and made the order demanded, an appeal lay at once to the judge as a matter of right, and the clerk could not allow or disallow it. *Farmers Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

§ 1-273. **Clerk to transfer issues of fact to civil issue docket.**—If issues of law and of fact, or of fact only, are raised before the clerk, he shall transfer the case to the civil issue docket for trial of the issues at the next ensuing term of the superior court. (C. C. P., s. 115; Code, s. 256; Rev., s. 588; C. S., s. 634.)

Cross References.—As to issues of fact, see §§ 1-173, 1-174. As to definitions of issues, see §§ 1-196, 1-197, 1-198. As to form and preparation of issues, see § 1-200. As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

Rule Stated.—Where issues of fact are joined before the clerk in the exercise of his special jurisdictional powers as a distinct tribunal, the issues must be transferred to the superior court—another jurisdiction—to be tried. *Brittain v. Mull*, 91 N. C. 498 (1884).

Special Proceedings.—When an issue of fact is joined in a special proceeding, or issues of both fact and law, it is the duty of the clerk to place the proceeding on the docket of the trial term, for trial. *Jones*

On appeal from the assessment of damages for lands taken by the State Highway Commission the clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. Where the clerk has failed to transmit the record the trial judge within his supervisory power may order that this be done. *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350 (1927).

Jurisdiction of Clerk.—Where an equitable proceeding brought before the clerk, who has no equity powers, is pending on appeal in a court having equity jurisdiction, the Supreme Court will permit the latter to retain control of the case, and make all necessary orders as though the case were regularly pending. *Smith v. Gudger*, 133 N. C. 627, 45 S. E. 955 (1903).

An appeal from a void order of the clerk of the superior court cannot be dismissed as frivolous. In re *Sale of Land of Sharpe*, 230 N. C. 412, 53 S. E. (2d) 302 (1949).

Laches.—An appeal from the clerk to the judge should be dismissed on the ground of inexcusable laches. *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107 (1918).

Cited in *Daniel v. Bellamy*, 91 N. C. 78 (1884); *Edwards v. Cobb*, 95 N. C. 4 (1886); *Chowan & Southern Ry. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328 (1890); *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535 (1890); *Holly Shelter Ry. Co. v. Newton*, 133 N. C. 136, 45 S. E. 549 (1903).

v. Desern, 94 N. C. 32 (1886).

Partition Proceedings.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk, upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. *Beckwith et al. ex parte*, 124 N. C. 111, 32 S. E. 393 (1899).

Section Governs Appeals from Judgment of Clerk in Dower Proceedings.—In dower proceedings issues of law and of fact were raised on the pleadings which had been filed before the clerk. At the hearing of the proceeding by the clerk, the parties waived a trial by jury of the issues of fact, and filed with the clerk a statement on facts agreed. On these facts the clerk

rendered a judgment adverse to the plaintiff. The plaintiff excepted to the judgment, and appealed to the superior court in term time. It was held that this section and not § 1-274, was applicable to plaintiff's appeal from the judgment of the clerk of the superior court, and there was error in the order of the judge dismissing plaintiff's appeal on his finding that plaintiff had failed to perfect her appeal, as required by § 1-274. *McLawhorn v. Smith*, 211 N. C. 513, 191 S. E. 35 (1937).

Right May Be Waived.—In special proceedings, pending before clerks, the parties have the right to insist that any issue

of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury, and where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts they waive the right of trial by jury, even if it be conceded that the statute gives them the right to demand it. *Chowan & Southern R. Co. v. Parker*, 105 N. C. 246, 11 S. E. 328 (1890).

Cited in *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768 (1896); *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350 (1927).

§ 1-274. Duty of clerk on appeal.—On such appeal the clerk, within three days thereafter, shall prepare and sign a statement of the case, of his decision and of the appeal, and exhibit such statement to the parties or their attorneys on request. If the statement is satisfactory, the parties or their attorneys must sign it. If either party objects to the statement as partial or erroneous, he may put his objections in writing, and the clerk shall attach the writing to his statement, and within two days thereafter he shall send such statement, together with the objections, and copies of all necessary papers, by mail or otherwise, to the judge residing in the district, or in his absence to the judge holding the courts of the district, for his decision. (C. C. P., s. 110; Code, s. 254; Rev., s. 612; C. S., s. 635.)

Cross Reference.—See annotations to §§ 1-272, 1-273.

As to procedure where judge and clerk have concurrent jurisdiction, see note to § 1-272.

Absolute Duty of Clerk.—The clerk is required by this section to transmit the entire record to the court upon notice of appeal duly given, leaving nothing for the appellant to do in respect thereto, and there is no analogy therein to an appeal from the justice of the peace. *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350 (1927).

But see *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107 (1918), where it was held that the neglect of the clerk in sending up the appeal would not excuse gross laches of the appellant.

What Statement Should Contain.—This statement should embrace the material facts, copies of necessary paper writings, or such papers themselves so that the judge may review the decision of the clerk appealed from upon its full merits. *Brooks v. Austin*, 94 N. C. 222 (1886).

Partition Proceedings.—Under proceedings for the partition of lands, when an appeal is taken from the decision of the clerk, upon issues of law or legal inference, it is his duty to prepare and make a statement of the case and send it to the judge. *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770 (1908).

When Clerk Does Not Act for Court.—

In appeals from the clerk, in that class of cases of which he has jurisdiction, not as and for the court as in special proceedings, but in his capacity as clerk, such as the auditing the accounts of executors and administrators, it is not necessary that he should prepare and transmit to the judge any statement of the case on appeal. *Ex parte Spencer*, 95 N. C. 271 (1886).

Court May Order Statement.—The clerk has no authority to allow or disallow an appeal; and on his refusal to prepare a statement of the case as required by this section, the court in term, or a judge at chambers, may direct him to do so by simple order. *Nat. Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

Where the clerk has failed to transmit the record to the court on appeal, upon notice of appeal given in proceedings under the provisions of this section, the trial judge within his supervisory power may order that this be done. *Sneed v. State Highway Com.*, 194 N. C. 46, 138 S. E. 350 (1927).

No Appeal from Order to Send Up Transcript.—No appeal lies to the Supreme Court from an order of the superior court directing the clerk to send up to the next term a transcript of proceedings supplemental to execution had before him. *National Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

When Statement Not Required.—It is not necessary to make out a statement of

the case on appeal when the record proper shows the grounds of appeal. *Cape Fear, etc., R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638 (1903).

Clerk Should Give Reasons.—Where the clerk refuses to allow an amendment affecting the substance of an affidavit in attachment proceedings he may, and should, state his reason for such refusal, even after appeal to the court in term. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889).

After Retirement of Clerk.—Where a clerk has gone out of office, it is not proper to order him to file with the court, in writing, the evidence offered and admissions made in a proceeding pending before him while he was clerk. *Ex parte Spencer*, 95 N. C. 271 (1886).

Rendering Decision Out of District.—In *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673 (1925), the court said, "We do not think that the judge residing in the district or, in his absence, the judge holding the courts for the district, can hear the questions and render a decision out of the district."

Irregular for Judge to Order Docket of

§ 1-275. Duty of judge on appeal.—It is the duty of the judge on receiving a statement of appeal from the clerk, or the copy of the record of an issue of law, to decide the questions presented within ten days. But if he has been informed in writing, by the attorney of either party, that he desires to be heard on the questions, the judge shall fix a time and place for the hearing, and give the attorneys of both parties reasonable notice. He must transmit his decision in writing, endorsed on or attached to the record, to the clerk of the court, who shall immediately acknowledge its receipt, and within three days after such receipt notify the attorneys of the parties of the decision and, on request and the payment of his legal fees, give them a copy thereof, and the parties receiving such notice may proceed thereafter according to law. (C. C. P., s. 113; Code, s. 255; Rev., s. 613; C. S., s. 636.)

Full Jurisdiction of Case.—Under this section an appeal in partition action from order of the clerk overruling demurrer carried the entire case into the superior court, and vested it with full jurisdiction of the cause. *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113 (1913).

When Issues of Fact Tried.—When issues of fact are tried the court remands the same and the pleadings or papers with the findings of the jury upon them, and the clerk will then proceed with the matter according to law. This provision has reference to issues of fact. *Brittain v. Mull*, 91 N. C. 498 (1884).

Appeal May Be Heard Outside County.—Appeals from the clerk of the superior court and special proceedings to the judge residing or presiding in the district may be heard and judgment rendered outside of

Issues.—It is irregular for the judge in making his decision to order the clerk to place the proceeding on the docket of the regular term for trial—it being the duty of the clerk to do this without such order when an issue of fact is joined. *Jones v. Desern*, 94 N. C. 32 (1886).

Waiver.—Where an appeal from an order of the clerk is noted at the time and is heard without objection at the term of the superior court beginning two days thereafter, but upon failure of the judge to decide the appeal before leaving the district, is placed on the calendar and reached the second term following, at which time without objection the parties appear and argue the matter before the presiding judge, any irregularity in procedure is waived, and defendant's contention that the appeal from the clerk should have been dismissed for failure to comply with this section, is untenable. *Cody v. Hovey*, 219 N. C. 369, 14 S. E. (2d) 30 (1941).

Applied in *Windsor v. McVay*, 206 N. C. 730, 175 S. E. 83 (1934).

Cited in *Lovinier v. Pearce*, 70 N. C. 168 (1874).

the county where the proceeding is pending, and within the district. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897).

Appeals from the clerk may be heard at chambers at any place in the district. *Monroe v. Lewald*, 107 N. C. 655, 12 S. E. 287 (1890).

When Notice Not Reasonable.—Where notice of appeal from action by the clerk is served on the day before the hearing, the notice is not reasonable within this section. *Byrd v. Nivens*, 189 N. C. 621, 127 S. E. 673 (1925).

Pending Appeal from Clerk.—A motion for a receiver to take possession of a debtor's property, in supplemental proceedings, may be made before a judge, pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

Presumption as to Proceedings.—Where nothing in the record indicates that a judge, who rendered a judgment on an appeal from the clerk of the superior court, was requested in writing to fix a time for the hearing and to give the parties notice, it will be presumed that the proceeding was rightly and regularly conducted. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897).

May Hear Any Evidence.—Upon an appeal from an order of the clerk to the judge, the latter may hear any evidence that would have been competent before the former, although in fact not introduced. *McAden v. Banister*, 63 N. C. 479 (1869).

Special Proceedings for Partition.—The controversy involved in a special proceeding for the partition of land, as to whether there shall be an actual partition or a sale for the purpose, is not an issue of fact which should be sent to a jury, but a question of fact to be decided by the clerk, or by the judge on appeal. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897).

Proceedings to Sell Lands.—A proceeding to sell lands to make assets to pay debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772 (1920).

Appeal from Clerk's Decision upon Com-

§ 1-276. Judge determines entire controversy; may recommit.—Whenever a civil action or special proceeding begun before the clerk of a superior court is for any ground whatever sent to the superior court before the judge, the judge has jurisdiction; and it is his duty, upon the request of either party, to proceed to hear and determine all matters in controversy in such action, unless it appears to him that justice would be more cheaply and speedily administered by sending the action back to be proceeded in before the clerk, in which case he may do so. (1887, c. 276; Rev., s. 614; C. S., s. 637.)

Cross Reference.—See note under § 1-152.

Editor's Note.—By passing this section in 1887, Acts 1887, ch. 276, the legislature considerably widened the power of judges on appeal. This section was enacted to remedy the inconvenience caused by the decision in *Brittain v. Mull*, 91 N. C. 498 (1884). In that case it was held that when the appeal was taken from the clerk the judge should hear the appeal and decide the questions of law present, and then remand the matter, including his decision, to the clerk.

Because of its beneficial results this section has always received a liberal interpre-

missioners' Report.—In an ex parte proceeding for partition, an appeal by some of the parties from the decision of the clerk upon the report of commissioners, alleging inequality and unfairness in the allotment—involves questions of fact, properly determinable by the judge, under this section. Ex parte *Beckwith*, 124 N. C. 111, 32 S. E. 393 (1899).

Proceedings Dismissed by Clerk.—Where clerk of superior court, for want of jurisdiction, dismisses a proceeding for the appointment of a trustee, on appeal the judge of the superior court may make such appointment. *Roseman v. Roseman*, 127 N. C. 494, 37 S. E. 518 (1900).

Issue of Law Joined in Special Proceedings.—When an issue of law is joined in a special proceeding it is the duty of the judge to decide the question thus presented, and to transmit his decision in writing to the clerk, who will then proceed with the special proceeding according to law. *Jones v. Desern*, 94 N. C. 32 (1886).

When Clerk Does Not Act for Court.—In appeals in cases in which the clerk does not act for the court, it is the duty of the judges to determine the questions of fact and law raised, and, for this purpose, if the evidence accompanying the papers is not satisfactory, he can require the production of other evidence. The judge can decide the questions of fact in such cases himself, or if he see fit, he can submit issues for his better information to the jury. Ex parte *Spencer*, 95 N. C. 271 (1886).

tation. Williams v. Dunn, 158 N. C. 399, 74 S. E. 99 (1912).

It was not contemplated by the legislature that by the provisions of this section a party who should be coram non iudice before the clerk could take advantage of his own mistake or purposely make it in order to obviate a well grounded objection to the jurisdiction, and secure by indirection what he could not obtain directly. *Nash v. Sutton*, 109 N. C. 550, 14 S. E. 77 (1891).

Judge May Determine Entire Controversy.—Under this section, the judge now has final jurisdiction to determine the

whole matter in controversy. *Lictie v. Chappell*, 111 N. C. 347, 16 S. E. 171 (1892); *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188 (1897); *Oldham v. Rieger*, 145 N. C. 254, 58 S. E. 1091 (1907); *Hall v. Artis*, 186 N. C. 105, 118 S. E. 901 (1923).

The clerk is but a part of the superior court, and when a proceeding before the clerk in any manner is brought before the judge, the superior court's jurisdiction is not derivative, but it has jurisdiction to hear and determine all matters in controversy in the proceeding. *Perry v. Bas-senger*, 219 N. C. 838, 15 S. E. (2d) 365 (1941). See also, *Ex parte Wilson*, 222 N. C. 99, 22 S. E. (2d) 262 (1942).

After a motion is made before the clerk, the judge is not required to remand the cause to the clerk for the determination of the motion made before him. *Wynne v. Conrad*, 220 N. C. 355, 17 S. E. (2d) 514 (1941).

Where the clerk of the superior court exceeds his authority or is without jurisdiction to make the decree, if the cause comes within the general jurisdiction of the superior court and invokes the proper exercise of its power, by virtue of this section the judge upon appeal may proceed to consider and determine the matter as if originally before him. *McDaniel v. Leggett*, 224 N. C. 806, 32 S. E. (2d) 602 (1945).

Court May Remand.—The court has the right in its discretion to remand the cause to the clerk for further proceedings. *York v. McCall*, 160 N. C. 276, 76 S. E. 84 (1912).

Appointment of Administrator.—On appeal from the order of a clerk appointing an administrator the superior court may reverse the order but the case should then be remanded. *In re Styers*, 202 N. C. 715, 164 S. E. 123 (1932).

Upon appeal from an order of the clerk removing certain executors and administrators, c. t. a., and appointing others in their place, by virtue of this section, the superior court judge may, in the exercise of his discretionary powers, retain the cause, reverse the order of the clerk and appoint other administrators or a receiver to administer the estate subject to the orders of the court, the entire matter being before the superior court on appeal. *Wright v. Ball*, 200 N. C. 620, 158 S. E. 192 (1931).

When Judge Cannot Merely Remand.—Where special partition proceedings were begun before the clerk, and he transferred the case to the judge in term, the judge was required to dispose of it on the merits,

and had no power to merely reverse the clerk's action and remand the case to him, though there may have been irregularities in the proceedings before the clerk. *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770 (1908).

Judge May Make Amendments.—The judge has power to make amendments to give jurisdiction. *Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102 (1895); *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508 (1903). He may strike out an answer that is irrelevant. *Commissioners v. Piercy*, 72 N. C. 181 (1875).

Judge May Add Issues.—The number and form of issues is in the discretion of the court, and if every phase of the contention could have been and was presented under the issues submitted they will be sustained on appeal; and when the judge accordingly adds other issues tending to elucidate the case after it has been submitted, in addition to the usual issue, it is not error, but in the line of his duty. *In re Herring*, 152 N. C. 258, 67 S. E. 570 (1910).

Judge May Set Aside Order.—The superior court acquired jurisdiction of the entire controversy upon appeal from the clerk, and has the power to hear and determine all matters involved therein, and may set aside a previous order of the clerk and substitute therefor an order of its own without finding that the clerk had abused his discretion or committed error of law in signing the order, the clerk being but a part of the superior court. *Bynum v. Fidelity Bank*, 219 N. C. 109, 12 S. E. (2d) 898 (1941).

Judge May Set Aside Judgment.—The judge has power to set aside a judgment for newly discovered testimony and to permit an amendment in the complaint. *Faison v. Williams*, 121 N. C. 152, 28 S. E. 188 (1897).

Clerk without Equity Jurisdiction.—The clerk of the superior court, having no equity jurisdiction, cannot issue a writ of assistance to enforce its order in proceedings to partition lands among tenants in common, nor can jurisdiction be conferred on the superior court on appeal, the latter having no concurrent or original jurisdiction. *Southern State Bank v. Leverette*, 187 N. C. 743, 123 S. E. 68 (1924).

Proceedings Improperly Brought before Clerk.—When a case properly cognizable in the superior court, but which is erroneously brought before a clerk, gets in the superior court on any ground the judge has jurisdiction to retain and hear the

cause as if originally instituted in the superior court. *Robeson v. Hodges*, 105 N. C. 49, 11 S. E. 263 (1890); *Hall v. Artis*, 186 N. C. 105, 118 S. E. 901 (1923). See also *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508 (1917); *Spence v. Granger*, 207 N. C. 19, 175 S. E. 824 (1934).

Where the clerk of the superior court erroneously hears a proceeding over which he does not have jurisdiction, an appeal to the superior court confers jurisdiction upon it to hear and determine the whole matter. *Bradshaw v. Warren*, 216 N. C. 354, 4 S. E. (2d) 883 (1939).

Establishment of Private Cartway.—See *Dailey v. Bay*, 215 N. C. 652, 3 S. E. (2d) 14 (1939).

Agreement That Judge Shall Hear Appeal.—Where the parties agree that the judge shall hear an appeal in term, he acquires jurisdiction of the whole case, and should finally dispose of it on its merits, without remanding it to the clerk. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889).

Such agreement cures all irregularities. *Foreman v. Hough*, 98 N. C. 386, 3 S. E. 912 (1887).

Judge Must Hear Controversy although Clerk without Jurisdiction.—Where a motion to quash an execution and sale of real estate was submitted to the clerk of the superior court who granted the relief, and an appeal was taken to the judge of the court, it was improper for the judge to refuse to hear the controversy on the ground that the clerk was without jurisdiction to entertain the motion. *Williams v. Dunn*, 158 N. C. 399, 74 S. E. 99 (1912).

Clerk Erroneously Transfers Issues.—Where the clerk of the superior court has erroneously at once transferred the proceedings in condemnation to the superior court on issue joined between the parties, and an appeal therefrom has been taken to the superior court, the judge thereof acquires jurisdiction for the hearing and determination of the controversy under the provisions of this section, and may order other proper or necessary parties to be made for the further determination of the cause. *Selma v. Nobles*, 183 N. C. 322, 111 S. E. 543 (1922).

The superior court acquires jurisdiction of any special proceeding sent to it on any ground whatever from the clerk, with discretionary power in the superior court to remand, and a motion in the superior court to dismiss for want of jurisdiction on the ground that the proceeding was erroneously transferred to the civil issue docket, is untenable. *Plemmons v. Cutshall*, 230

N. C. 595, 55 S. E. (2d) 74 (1949).

Appeal from Action of Clerk in Probate Proceedings.—Upon appeal to the superior court from action of the clerk taken in the exercise of his probate jurisdiction, the jurisdiction of the superior court is derivative, and this section does not apply. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

Thus where a clerk is without jurisdiction to make an order in probate proceedings, by reason of the filing of a caveat and the transfer of the cause to the civil issue docket, the error is not cured by the order of the resident judge of the superior court who heard the motion on appeal and affirmed the order of the clerk. In *re Will of Hine*, 228 N. C. 405, 45 S. E. (2d) 526 (1947).

The jurisdiction of the superior court on appeal from an order of the clerk in removing an administrator and appointing a successor is solely derivative. In *re Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223 (1950).

Question of Price of Land.—The discretion vested in the superior court judge on appeal from the clerk, by this section, cannot confer jurisdiction on the judge to pass upon the reasonableness of the price of land sold under the power of sale in a mortgage, wherein the clerk has no authority to further pass thereon in the absence of an increased bid. In *re Mortgage Sale of Ware Property*, 187 N. C. 693, 122 S. E. 660 (1924).

Where a commissioner, appointed to hold a foreclosure sale, advertises and sells the property in conformity with the order, but reports that the last and highest bid is less than the value of the property and recommends a resale, and the clerk orders a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, has jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. *Harriss v. Hughes*, 220 N. C. 473, 17 S. E. (2d) 679 (1941).

Proceedings to Sell Land.—A proceeding to sell lands to make assets to pay the debts of the deceased is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and to be heard and decided by him on the same or such additional evidence as may aid him to a correct conclusion of the matter. *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897); *Perry v. Perry*, 179 N. C.

445, 102 S. E. 772 (1920). See *Harrington v. Hatton*, 129 N. C. 146, 39 S. E. 780 (1901).

In a suit for partition of land the jurisdiction acquired by appeal includes the right of the court to accept a private bid through its commissioner. When the bid is accepted, whether it was made at public or private sale, the court has jurisdiction over the purchaser for the purpose of enforcing compliance with it. *Wooten v. Cunningham*, 171 N. C. 123, 88 S. E. 1 (1916).

Proceedings to Subject Lands to Dower.

— An ex parte proceeding by a widow to subject land in the hands of heirs to the payment of dower charges thereon cannot be had before the clerk and on appeal may be dismissed by the judge for want of jurisdiction. In *re Hybart's Estate*, 129 N. C. 130, 39 S. E. 779 (1901).

Drainage Assessment Proceedings.

— Under this section giving the superior court jurisdiction to hear and determine all matters in controversy upon appeal from the clerk in special proceedings, and § 156-29, providing that appeals from the clerk in drainage assessment proceedings should be the same as in special proceedings, an appeal may be taken from an order of the clerk to the superior court. *Spence v. Granger*, 207 N. C. 19, 175 S. E. 824 (1934).

Motion to Retax Bill of Costs.—When a motion to retax a bill of costs in a case which originated before the clerk but was appealed to the superior court is made at the next term after judgment is entered, it is error for the judge to hold that he has no power to entertain it. In *re Smith*, 105 N. C. 167, 10 S. E. 982 (1890).

Appeal from Order Requiring Surviving Partners to File Bond and Inventory.

— Upon the failure or refusal of surviving partners to file the bond required by § 59-74 or the inventory required by § 59-76 the clerk of the superior court may not properly issue an order requiring the filing of bond and inventory, but upon appeal from such orders the superior court acquires jurisdiction of the entire proceeding and the appeal is erroneously dismissed in the superior court on the ground of want of

jurisdiction. In *re Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223 (1950).

Appointment of Receiver for Partnership.

— While the clerk of the superior court has no jurisdiction to appoint a receiver for a partnership under § 59-77 when the surviving partners have failed or refused to file the inventory required by § 59-76, the superior court on appeal from an order of the clerk in the proceeding does acquire jurisdiction to appoint such receiver. In *re Estate of Johnson*, 232 N. C. 59, 59 S. E. (2d) 223 (1950).

Answer Filed Too Late Permitted to Remain of Record.

— Upon appeal from the denial by the clerk of a motion to set aside a default judgment on the ground that at the time of its rendition a duly filed answer appeared of record, the superior court acquires jurisdiction of the entire cause and has the power to permit the answer to remain of record, even though it was filed after time for answering had expired. *Bailey v. Davis*, 231 N. C. 86, 55 S. E. (2d) 919 (1949).

Conflicting Rulings.— Where the superior court ruled that a clerk had no authority under § 28-111 to appoint a referee to hear claim against the estate of a deceased, a further ruling that the referee's report was binding on other grounds is a nullity notwithstanding the broad jurisdiction of the superior court under this section. In *re Shutt*, 214 N. C. 684, 200 S. E. 372 (1939).

Applied in *Wynne v. Conrad*, 220 N. C. 355, 17 S. E. (2d) 514 (1941); *Garner v. Phillips*, 229 N. C. 160, 47 S. E. (2d) 845 (1948).

Quoted in *Sharpe v. Sharpe*, 210 N. C. 92, 185 S. E. 634 (1936).

Cited in *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908 (1891); *Fowler v. Fowler*, 131 N. C. 169, 42 S. E. 563 (1902); *Settle v. Settle*, 141 N. C. 553, 54 S. E. 445 (1906); *Carolina Power & Light Co. v. Reeves*, 198 N. C. 404, 151 S. E. 871 (1930); *Buncombe County v. Arbogast*, 205 N. C. 745, 172 S. E. 354 (1934); *Vann v. Coleman*, 206 N. C. 451, 174 S. E. 301 (1934); In *re Reynold's Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

§ 1-277. Appeal from superior court judge.—An appeal may be taken from every judicial order or determination of a judge of a superior court, upon or involving a matter of law or legal inference, whether made in or out of term, which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be

taken; or discontinues the action, or grants or refuses a new trial. (1818, c. 962, s. 4, P. R.; C. C. P., s. 299; Code, s. 548; Rev., s. 587; C. S., s. 638.)

I. Editor's Note.

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Cross References.

As to appellate jurisdiction of Supreme Court, see § 7-10; Constitution, Art. IV, § 8. As to who may appeal, see § 1-271. As to power of Supreme Court on appeal, see §§ 1-297, 7-11. As to appeals in criminal cases, see §§ 15-179 et seq., and annotations.

I. EDITOR'S NOTE.

Editor's Note.—The appellant should be very careful to conform with the rules of the Supreme Court regarding appeals. The penalty for failure to comply with these rules is the dismissal of the appeal. Exceptions which are not brought forth among the assignments of error, are deemed abandoned under Supreme Court Rule 21.

At common law there was no appeal from the decision of any court, and a decision could only be reviewed by a writ of error or writ of false judgment. By our law appeals are used as a substitute for those writs. Previous to the adoption of the Code of Civil Procedure an appeal was allowed by the court and the preparation and perfection of it was the act of the court. But the Code of Civil Procedure made a notable change in that particular. Appeals were no longer prayed for but were taken. As said in *Campbell v. Allison*, 63 N. C. 568 (1869), "The judge below has nothing to do with the granting of an appeal; it is the act of the appellant alone."

Under the provisions of our State Constitution, Art. IV, § 8, the Supreme Court

is confined on appeal to alleged errors of law or legal inference arising in the conduct of the trial in the superior court. See *Robinson v. Ivy & Co.*, 193 N. C. 805, 138 S. E. 173 (1927).

Although under this section the right of appeal is very broad, the Supreme Court is inclined to think that much inconvenience and delay are occasioned by the practice of appealing from orders, at every stage of the case, on objections which the party aggrieved could avail himself of after issue, as well as at the first steps in the proceedings.

Certiorari is the proper substitute for an appeal where the appellant has failed to perfect his appeal through no fault or negligence of his own. See § 1-269 and notes thereunder.

II. APPEAL IN GENERAL.

A. General Consideration.

Purpose of Appeal.—"The purpose of an appeal is to submit to the decision of a superior court a cause which has been tried in an inferior tribunal. Its object is to review the whole case and secure a just judgment upon the merits." *Rush v. Halcyon Steamboat Co.*, 67 N. C. 47 (1872).

Method of Correcting Errors.—Where an adjudication is based on the erroneous application of legal principles the proper remedy to correct the error is by a proceeding in appeal. *Stafford v. Gallops*, 123 N. C. 19, 31 S. E. 265 (1898); *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935 (1903); *Rawls v. Mayo*, 163 N. C. 177, 79 S. E. 298 (1913).

Jurisdiction Properly Acquired.—As appellate jurisdiction is derived from that previously acquired in the court from which the cause is removed, the record must show the possession of that jurisdiction, and that the cause was then properly constituted. *Gordon v. Sanderson*, 83 N. C. 1 (1880).

Jurisdiction Not Conferred by Consent.—Jurisdiction of an appeal can not be given by consent of parties. *Rodman v. Davis*, 53 N. C. 134 (1860); *Cary Co. v. Allegood*, 121 N. C. 54, 28 S. E. 61 (1897).

Appeal as a Matter of Right.—An appeal is not a matter of absolute right; but appellant must comply with the statutes and rules of court as to the time and manner of taking and perfecting it. *Caudle v. Morris*, 158 N. C. 594, 74 S. E. 98 (1912); *Byrd v. Southerland*, 186 N. C. 384, 119 S. E. 2 (1923).

An appellant's right of appeal to the Supreme Court is dependent upon his observance of the rules regulating appeals. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916); *Kerr v. Drake*, 182 N. C. 764, 108 S. E. 393 (1921); *State v. Butner*, 185 N. C. 731, 117 S. E. 163 (1923).

Neither the parties in litigation nor their attorneys have authority, by agreement among themselves, to disregard the rules regulating appeals and where the appellant has failed to comply with these rules the appeal will be dismissed. *Rose v. Rocky Mount*, 184 N. C. 609, 113 S. E. 506 (1922).

Failure to Transmit Record.—An appellant who merely prays an appeal in open court, and files a bond with the clerk, without settling and transmitting the record, does not "take" an appeal, within the meaning of this section. *Wilson v. Seagle*, 84 N. C. 110 (1881).

Both Parties Interested on Same Side of Case.—The Supreme Court will dismiss an appeal from a judgment in an action brought to obtain a construction of such act where it is apparent that both parties are interested on the same side of the case. *Kistler v. Southern R. Co.*, 170 N. C. 666, 79 S. E. 676 (1914).

Party Not Appealing.—A party not appealing or assigning any errors is not in position to complain of a ruling. *Hannah v. Hyatt*, 170 N. C. 634, 87 S. E. 517 (1916).

Separate Appeals in Related Causes.—Where causes of action which could not be merged were tried together merely for convenience, and were not united or consolidated by order of the court into one action, there should be separate appeals. *Williams v. Carolina, etc., R. Co.*, 144 N. C. 498, 57 S. E. 216 (1907).

Stated in *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375 (1950).

Cited in *State v. Williams*, 209 N. C. 57, 182 S. E. 711 (1935); *In re Estate of Suskin*, 214 N. C. 218, 198 S. E. 661 (1938).

B. From What Decisions, Orders, etc., Appeal Lies.

For particular orders, decisions, etc., see post this note, "Appeal as to Particular Subjects," III.

Judicial Order or Determination.—The right of appeal conferred by this section is from a judicial order or determination and not from the extrajudicial decision of private persons to whom the parties have agreed to submit their dispute. *In re Reynold's Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

Cause Directly Affected.—An appeal lies

from an order or determination in an action which affects the right litigated—the cause of action in controversy therein—in respects and ways specified; but it does not lie from an order or determination that is merely incidental, and not affecting directly the cause of action litigated. *Bynum v. Comm'rs*, 101 N. C. 412, 8 S. E. 136 (1888).

An order directing reference to ascertain certain alleged expenditures by guardian is not appealable, it not affecting any substantial rights. *Sutton v. Schonwald*, 80 N. C. 20 (1879).

It was formerly held that every order of a court of equity by which the rights of the parties may be affected may be reviewed in the Supreme Court. *Graham v. Skinner*, 57 N. C. 94 (1858).

Final Judgment.—Except where statute otherwise expressly provides, appeal to Supreme Court lies only from final judgment or one in its nature final. *Gilbert v. Waccamaw Shingle Co.*, 167 N. C. 286, 83 S. E. 337 (1914); *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535 (1922); *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950). See *Thomas v. Carteret*, 180 N. C. 109, 104 S. E. 75 (1920).

As a general rule, an appeal will not lie until there is a final disposition of the whole case. *State v. Keeter*, 80 N. C. 472 (1879); *Moore v. Hinnant*, 87 N. C. 505 (1882); *Norfolk, etc., R. Co. v. Warren*, 92 N. C. 620 (1885); *Hailey v. Gray*, 93 N. C. 195 (1885); *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925 (1949).

All issues should be determined, and a final judgment rendered, before an appeal to the Supreme Court should be permitted. *Yates v. Dixie Fire Ins. Co.*, 176 N. C. 401, 97 S. E. 209 (1918).

Any decision, order, or decree of the circuit court, which puts an end to the proceedings between the parties to a cause in that court, is final, and may be reviewed upon appeal. *Ex parte Spencer*, 95 N. C. 271 (1886); *Bain v. Bain*, 106 N. C. 239, 11 S. E. 327 (1890). For further consideration of what constitutes a final judgment, see § 1-208 and the notes thereto.

Same—Premature Appeal.—See post, this note, "What Supreme Court Will Consider," II, C.

Interlocutory Orders.—In order to present the subject of appeals in a logical manner as a whole, interlocutory orders are discussed here. It must be noted, however, that these orders are specifically provided for, in appeals after judgment, by § 1-278. As to what constitutes an inter-

locutory order, see § 1-208 and the notes thereto.—Ed. Note.

An appeal lies from an interlocutory order when it puts an end to the action, or where it may destroy or impair a substantial right of the complaining party to delay his appeal. *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908 (1891); *Warren v. Stancill*, 117 N. C. 112, 23 S. E. 216 (1895). See *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925 (1949).

Appeals to the Supreme Court will be entertained from interlocutory orders or decrees that put an end to the action or seriously imperil some substantial right of the appellant. *Martin v. Flippin*, 101 N. C. 452, 8 S. E. 345 (1888).

By special act the legislature may provide that no appeal lies from an interlocutory order in a specific proceeding. *Norfolk & Southern R. Co. v. Warren*, 92 N. C. 620 (1885).

An appeal from an interlocutory order brings up only such order, and no order in the main case can be made. *Perry v. Tupper*, 71 N. C. 380 (1874).

Where a party appeals from an interlocutory order, and proceeds to trial, without waiting for a decision upon the matter appealed from, the appeal will be dismissed with costs. *Love v. Johnston*, 34 N. C. 367 (1851).

Defendant's appeal from an order continuing its motion to dismiss is premature, since the order disposes of no substantial right. *Sanderson v. Aetna Life Ins. Co.*, 218 N. C. 270, 10 S. E. (2d) 802 (1940).

An appeal from an interlocutory order will be dismissed as fragmentary and premature unless the order affects some substantial right and will work injury to appellant if not corrected before appeal from the final judgment. *Cole v. Farmers Bank, etc., Co.*, 221 N. C. 249, 20 S. E. (2d) 54 (1942); *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925 (1949); *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

Judgments of Superior Court Final as to Matters of Fact.—The superior court is the court of final jurisdiction and has power to completely determine a controversy properly before it, and its judgment is final as to all matters of fact established in accordance with procedure and is subject to appeal and review only on matters of law. *State v. Carolina Scenic Coach Co.*, 218 N. C. 233, 10 S. E. (2d) 824 (1940).

Appeal from Order Allowing Amendment to Pleadings.—Where an order of court allowing amendments to pleadings does not affect a substantial right, an ap-

peal therefrom is fragmentary and premature, and the appeal will be dismissed. *Nissen Company v. Nissen*, 198 N. C. 808, 153 S. E. 450 (1930).

Motions to Strike Allegations from Pleadings and Motions.—While the Supreme Court may entertain an appeal from an order denying a motion to strike allegations from the pleadings, since the pleadings are read to the jury and chart the course of the trial and determine in large measure the competency of the evidence, and therefore denial of the motion may impair or imperil substantial rights, this reasoning does not apply to motions to strike allegations from a motion before the court, since no substantial right is likely to be impaired or seriously imperiled by the denial of the motion. *Privette v. Privette*, 230 N. C. 52, 51 S. E. (2d) 925 (1949).

Judicial Nature of Decision.—An appeal lies in all cases from the judgment applying the law to the facts found. *Norton v. McLaurin*, 125 N. C. 185, 34 S. E. 269 (1899); *Ladd v. Teague*, 126 N. C. 544, 36 S. E. 45 (1900); *Stokes v. Cogdell*, 153 N. C. 181, 69 S. E. 65 (1910).

Where there is legal evidence submitted to the jury, under correct instructions from the trial judge, no appeal lies from the verdict and judgment to review the findings of fact. *Pender v. North State Life Ins. Co.*, 163 N. C. 98, 79 S. E. 293 (1913).

Refusal to Dismiss Action.—An appeal does not lie from the refusal to dismiss an action. *Winder v. Penniman*, 181 N. C. 7, 105 S. E. 884 (1921); *Capps v. Atlantic, etc., R. Co.*, 182 N. C. 758, 108 S. E. 300 (1921); *Goldsboro v. Holmes*, 183 N. C. 203, 111 S. E. 1 (1922); *Johnson v. Pilot Life Ins. Co.*, 215 N. C. 120, 1 S. E. (2d) 381 (1939).

Appeal taken from an order denying a motion to dismiss a special proceeding is premature. After denying such motion, the judge should proceed with the hearing, and the appeal should be from the final decision. *Mitchell v. Kilburn*, 74 N. C. 483 (1876); *Mitchell v. Hubbs*, 74 N. C. 484 (1876); *Mitchell v. West*, 74 N. C. 485 (1876).

Dismissal of Appeal.—A party who loses on appeal to the Supreme Court can not review its decision by second appeal, but the only way is by petition to rehear. *Carter v. White*, 134 N. C. 466, 46 S. E. 983 (1904); *Holland v. Railroad*, 143 N. C. 435, 55 S. E. 835 (1906).

Refusal of Motion for Judgment upon Special Verdict.—An order by the trial court, denying defendants' motions for judgment on the special verdict, setting

aside the verdict on one issue, and continuing the cause for the trial of such further issue as may be necessary to determine the rights of the parties, with leave to file amended pleadings, is not a final judgment. *Thomas v. Carteret*, 180 N. C. 109, 104 S. E. 75 (1920).

Application for Citizenship.—Under this section an alien may appeal from decree of superior court denying application for citizenship. *United States v. Ovens*, 13 F. (2d) 376 (1926).

Judgment Confessed.—One who confesses judgment has no right of appeal from such judgment; but where an appeal was allowed, and the plaintiff failed to move to dismiss, the Supreme Court may pass by the irregularities and consider the errors. *Rush v. Halcyon Steamboat Co.*, 67 N. C. 47 (1872).

Decisions of Intermediate Courts.—An appeal lies from the dismissal of an action, or of an appeal from justice court; but it does not lie from a refusal to dismiss, for an exception should be noted, and an appeal lies from the final judgment. *Bargain House v. Jefferson*, 180 N. C. 32, 103 S. E. 922 (1920).

Decisions and Orders Favorable to Appellant.—See post, this note, "Estoppel to Allege Error," II, D.

Matters in Discretion of the Trial Court.—The discretion of the trial court will not be reviewed, unless it appears that such discretion was abused or that the ruling was based upon a matter of law. *Fayetteville Light, etc., Co. v. Lessem Co.*, 174 N. C. 358, 93 S. E. 836 (1917); *Gordon v. Pintsch Gas Co.*, 178 N. C. 435, 100 S. E. 878 (1919). See 5 N. C. Law Rev. 14.

A judgment or order rendered by a judge of the superior court in the exercise of a discretionary power is not subject to review by appeal to the Supreme Court in any event, unless there has been an abuse of discretion on his part. *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

This section applies only to "matters of law or legal inferences," and not to an order involving a mere discretion. *Jenkins v. N. C. Ore Dressing Co.*, 65 N. C. 563 (1871).

If, in the trial court, the verdict of the jury is, in the opinion of the presiding judge, contrary to the weight of the evidence, he has a discretion to set such verdict aside, which discretion cannot be reviewed in an appellate court. *Watts v. Bell*, 71 N. C. 405 (1874).

When a motion on which an order is based is made as a matter of right and is

not addressed to the court's discretion, upon its denial the movant may appeal immediately to the Supreme Court and have his motion decided there on its merits. *Parrish v. Atlantic Coast Line R. Co.*, 221 N. C. 292, 20 S. E. (2d) 299 (1942).

Exceptions to and Motion to Strike Referee's Report.—An appeal from the overruling of exceptions to the report of the referee and to the overruling of the motion that the entire evidence reported by the referee be stricken because not signed by the witnesses, § 1-193, will be dismissed as premature. *Bakami Constr., etc., Co. v. Thomas*, 230 N. C. 516, 53 S. E. (2d) 519 (1949).

Appeals from Subsidiary Proceedings.—Where, after the issuing of an injunction from which an appeal is taken, it appears that the case has been tried, and the issues found, and judgment rendered against appellant, the appeal will be dismissed. *Pritchard v. Baxter*, 108 N. C. 129, 12 S. E. 906 (1891).

Detached Rulings.—The Supreme Court will not entertain appeals from detached rulings upon some of the matters in dispute; but all matters necessary to a disposition of the case should be passed on and settled in a single trial, and the whole case brought up on appeal. *Arrington v. Arrington*, 91 N. C. 301 (1884).

Removal of Public Officer.—An appeal from proceedings in superior court to remove a public officer for willful misconduct or maladministration in office, is allowed by this section. *State v. Hamme*, 180 N. C. 684, 104 S. E. 174 (1920).

C. What Supreme Court Will Consider.

See post, this note, "Presumption on Appeal—Burden of Proof," II, E.

Record Discloses No Error.—Where the record discloses no error of law or legal inference made upon the trial, the Supreme Court on appeal cannot consider whether a miscarriage of justice has resulted in the case appealed. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175 (1927).

Exception Not Considered by Trial Court.—An exception which the trial court, through inadvertence, did not consider, can not be reviewed on appeal, but the case will be remanded that such exception may be passed on. *Scroggs v. Stevenson*, 100 N. C. 354, 6 S. E. 11 (1888).

Points Reviewed Must Have Been Passed On.—In case of an appeal, from the probate court to the judge, if there be a further appeal from the judge to the Supreme Court, the latter tribunal can review no point before the probate court that

was not passed upon by the judge. *Rowland v. Thompson*, 64 N. C. 714 (1870).

Error Not Based on Exceptions.—An assignment of error not based on any exception in the record can not be considered. *Thompson v. Seaboard, etc., R. Co.*, 147 N. C. 412, 61 S. E. 286 (1908); *Morse v. Freeman*, 157 N. C. 385, 72 S. E. 1056 (1911).

Will Not Go Behind Judge's Finding of Fact.—A finding by the trial judge as a fact that plaintiff moved to set aside a judgment only upon ground of excusable neglect prevents Supreme Court from considering any other ground. *Shepherd v. Shepherd*, 180 N. C. 494, 105 S. E. 4 (1920).

Questions Decisive of Appeal.—The Supreme Court will pass only on the questions decisive of the appeal. *Richardson v. Southern Exp. Co.*, 151 N. C. 60, 65 S. E. 616 (1909).

Where there is not enough evidence to take case to the jury, it will not be decided whether defendant would be liable to plaintiff if allegations of complaint had been established. *Pegram v. Canton*, 179 N. C. 700, 103 S. E. 371 (1920).

Questions Which May Not Arise on New Trial.—Where a new trial must be granted for certain reasons, questions in controversy, which may not arise again in the case, need not be decided. *Supervisor & Comm'rs v. Jennings*, 181 N. C. 393, 107 S. E. 312 (1921); *Moore v. Chicago Bridge, etc., Works*, 183 N. C. 438, 111 S. E. 776 (1922).

Appellant Not Entitled to Favorable Decision in Any Event.—Plaintiff can not complain of technical error of the court in the exclusion of evidence offered, where the whole case shows that he could not recover in any event. *Wilcox v. McLeod*, 182 N. C. 637, 109 S. E. 875 (1921); *Rankin v. Oates*, 183 N. C. 517, 112 S. E. 32 (1922).

Defendant's Appeal.—Where, on plaintiff's appeal, it was decided that plaintiff could not maintain his action, defendant's appeal need not be considered. *Beard v. Sovereign Lodge, W. O. W.*, 184 N. C. 154, 113 S. E. 661 (1922).

Verdict Bars Right of Action.—Where jury's answer to one issue is a complete bar to plaintiff's right of action, and no error is alleged in determination of that issue, it is unnecessary to consider exceptions relating to other issues. *Lamm v. Holloman*, 176 N. C. 686, 97 S. E. 161 (1918).

Error Must Be Prejudicial.—Error to warrant reversal must be prejudicial. *McKeel v. Holloman*, 163 N. C. 132, 79 S.

E. 445 (1913); *Brogden v. Gibson*, 165 N. C. 16, 80 S. E. 966 (1914); *Steeley v. Dare Lumber Co.*, 165 N. C. 27, 80 S. E. 963 (1914).

"Error alone is not sufficient to reverse, but there must be harm to the party who excepts, by reason thereof; not that he must affirmatively show injury, but if it appears that there is none, his exception fails." *Carter v. Seaboard, etc., R. Co.*, 165 N. C. 244, 81 S. E. 321 (1914).

Errors Not Affecting Result.—The finding for defendant upon one issue renders harmless any error in regard to that issue, and judgment for plaintiff is not reversible therefor. *Vickers v. Leigh*, 104 N. C. 248, 10 S. E. 308 (1889); *Perry v. Insurance Co.*, 137 N. C. 402, 49 S. E. 889 (1905).

Error Must Be Material.—Mere error in the trial of a cause is not sufficient grounds for reversal but it should be made to appear that the ruling was material and prejudicial to appellant's rights. *Schas v. Equitable Life Assur. Soc.*, 170 N. C. 420, 87 S. E. 222 (1915); *Shaw Cotton Mills v. Acme Hosiery Mills*, 181 N. C. 33, 106 S. E. 24 (1921).

Trivial Errors.—Courts do not lightly grant reversals or set aside verdicts, and a motion for such to be meritorious should not be based on any merely trivial errors committed manifestly without prejudice. *Rierson v. Carolina Steel, etc., Co.*, 184 N. C. 363, 114 S. E. 467 (1922).

Technical Errors.—Verdicts and judgments will not be set aside and new trial granted for a technical or formal error, but to accomplish this result it must appear not only that the ruling was erroneous, but that it amounted to a denial of some substantial right, and this rule applies especially where the trial was a long drawn out and vigorous contest. In *re Will of Ross*, 182 N. C. 477, 109 S. E. 365 (1921).

Error Cured by Verdict or Judgment.—Exceptions to a portion of a charge on an issue which was immaterial under the special verdict, can not be sustained. *Fourth Nat. Bank v. Wilson*, 168 N. C. 557, 84 S. E. 866 (1915); *Gambier v. Kimball*, 168 N. C. 642, 85 S. E. 3 (1915).

Error Cured by Withdrawal.—An exception has no point on appeal, where the testimony objected to was stricken on the appellant's motion. In *re Will of Staub*, 172 N. C. 138, 90 S. E. 119 (1916); *Raulf v. Elizabeth City Light, etc., Co.*, 176 N. C. 691, 97 S. E. 236 (1918).

Error Not Involved on Appeal.—Any error in instructions, which were expressly confined to other issues than the one involved on appeal, is harmless. In *re Rawl-*

ings' Will, 170 N. C. 58, 86 S. E. 794 (1915).

Opinion in Case Not Properly before Court.—The Supreme Court will sometimes express its opinion on a question involved in an appeal not properly before it where the matter is of moment and the decision may serve to save the parties cost and harassment of further litigation. Taylor v. Johnson, 171 N. C. 84, 87 S. E. 981 (1916); Bargain House v. Jefferson, 180 N. C. 32, 103 S. E. 922 (1920).

On dismissal of a fragmentary appeal, the Supreme Court may in its discretion express its opinion upon the merits so far as it may be a guide in further proceedings in the court below. Penn-Allen Cement Co. v. Phillips, 182 N. C. 437, 109 S. E. 257 (1921).

Where Supreme Court, on premature appeal, rendered opinion on the merits, though dismissing the appeal, its opinion is authoritative on subsequent appeal. Yates v. Dixie Fire Ins. Co., 176 N. C. 401, 97 S. E. 209 (1918); North Carolina Public Service Co. v. Southern Power Co., 181 N. C. 356, 107 S. E. 226 (1921).

When Court Gave Wrong Reason for Judgment.—A correct judgment will not be disturbed on writ of error because the trial court gave a wrong reason therefor. Burns v. McFarland, 146 N. C. 382, 59 S. E. 1011 (1907); Brown v. Elm City Lumber Co., 167 N. C. 9, 82 S. E. 961 (1914); King v. McRacken, 171 N. C. 752, 88 S. E. 226 (1916).

Errors in Case of Decisions Correct on Merits. — A judgment will be affirmed, though irregularly rendered, where the correct result was accomplished. Rankin v. Oates, 183 N. C. 517, 112 S. E. 32 (1922).

Moot Question.—Where the record on appeal presents only a moot question, the court will not express an opinion concerning it. Kistler v. Southern R. R., 170 N. C. 666, 79 S. E. 676 (1914); Waters v. Boyd, 179 N. C. 180, 102 S. E. 196 (1920); Greenleaf Johnson Lumber Co. v. Valentine, 179 N. C. 423, 102 S. E. 774 (1920).

Appellate courts will not hear and decide what may prove to be only a moot case, or review a judgment at the instance of appellants who represent that compliance will be forthcoming only in the event of a favorable decision. In re Morris' Custody, 225 N. C. 48, 33 S. E. (2d) 243 (1945).

Proceedings Frivolous or for Delay. — Where it appears upon record that no serious assignment of error is made and that appeal is frivolous and taken solely for delay, appeal will be dismissed. Blount v. Jones, 175 N. C. 708, 95 S. E. 541 (1918);

Barnes v. Saleeby, 177 N. C. 256, 98 S. E. 708 (1919).

An appeal by defendant from an order denying a change of venue made at a term subsequent to denial of a motion for change of venue on another ground will be dismissed as made for delay. Ludwick v. Uwarra Min. Co., 171 N. C. 60, 87 S. E. 949 (1916).

Premature Appeal.—The Supreme Court will not entertain premature or fragmentary appeals. Thomas v. Carteret, 180 N. C. 109, 104 S. E. 75 (1920). See Joyner v. Reflector Co., 176 N. C. 274, 97 S. E. 44 (1918); Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833 (1921).

A premature or fragmentary appeal will not be considered. Railway v. King, 125 N. C. 454, 34 S. E. 541 (1899); Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833 (1921).

Fragmentary appeals will not be entertained when no substantial right is put in jeopardy by such refusal. Brown v. Nimocks, 126 N. C. 808, 36 S. E. 278 (1900).

Where no final judgment was given, nor was there any interlocutory order or determination that put an end to the proceeding, or that could destroy or seriously impair some substantial right of the appellants, if the appeal should be delayed until the final judgment, an appeal will not lie. Fragmentary appeals are not allowed. Leak v. Covington, 95 N. C. 193 (1886), and cases there cited; Martin v. Flippin, 101 N. C. 452, 8 S. E. 345 (1888).

When Appeal Is Premature. — Where the pleadings present issues of fact that have not been tried below, an appeal is premature. Goode v. Rogers, 126 N. C. 62, 35 S. E. 185 (1900).

Though exceptions are noted, an appeal before a final judgment is rendered is premature, and will be dismissed. Graded School Trustees v. Hinton, 156 N. C. 586, 71 S. E. 1087 (1911).

Same—Effect of Dismissal.—Though an appeal is dismissed as premature, its entry is equivalent to "noting an exception." Alexander v. Alexander, 120 N. C. 472, 27 S. E. 121 (1897); Bernard v. Shemwell, 139 N. C. 446, 52 S. E. 64 (1905); Gray v. James, 147 N. C. 139, 60 S. E. 906 (1908); Kerr v. Hicks, 154 N. C. 265, 70 S. E. 463 (1911).

Fictitious Action.—The Supreme Court will not hear an appeal in a fictitious action. Blake v. Askew, 76 N. C. 325 (1877).

Abstract Propositions. — The Supreme Court will not entertain a cause to settle abstract propositions no longer at issue. Reid v. Norfolk, etc., R. Co., 162 N. C. 355,

78 S. E. 306 (1913); *Davis v. Pierce*, 167 N. C. 135, 83 S. E. 182 (1914).

Admission Rendering Question Academic.—That in a referendum election, to amend city charter pursuant to a legislative enactment, no booth was provided, etc., becomes academic upon express admission that no person was interfered with or prevented from casting free ballot. *Taylor v. Greensboro*, 175 N. C. 423, 95 S. E. 771 (1918).

Where Appeal Becomes Irrelevant.—Where an appeal becomes irrelevant and improvident through a decision of the material questions in another appeal taken in the same case, it will be dismissed. *Page v. Page*, 167 N. C. 350, 83 S. E. 627 (1914); *Cannon v. Commissioners*, 170 N. C. 677, 87 S. E. 31 (1915).

Case Not before Appellate Court.—An agreement that other pending causes shall abide the determination in the one in question is a matter between the parties, and does not authorize the Supreme Court to assume jurisdiction in cases not before it, or warrant the expression of a purely speculative opinion. *Belden v. Snead*, 84 N. C. 243 (1881).

D. Estoppel to Allege Error.

In General.—A defendant can not ask that a party be brought in, and when it is so ordered object because he is an improper party. *Armfield Co. v. Saleeby*, 178 N. C. 298, 100 S. E. 611 (1919).

A party to an action can not except to an instruction which was given by the trial court at his request. *Bell v. Harrison*, 179 N. C. 190, 102 S. E. 200 (1920); *Washington Horse Exch. Co. v. Bonner*, 180 N. C. 20, 103 S. E. 907 (1920).

The defendant can not object on appeal to evidence to the same effect as that elicited by his cross-examination of the witness. *Jenkins v. Long*, 170 N. C. 269, 87 S. E. 47 (1915).

Prevailing Parties.—A plaintiff has no right to appeal or bring error from a judgment in his own favor, particularly if he is not injured by it. *Lenoir v. South*, 32 N. C. 237 (1849); *Hoke v. Carter*, 34 N. C. 327 (1851).

If a judgment is only partly in favor of a party, or is less favorable than he thinks it should be, he may appeal to correct the judgment or to obtain a more favorable verdict and judgment on a new trial; but where the judgment is entirely in his favor, so that he does not desire a new trial his appeal must be dismissed. *McCulloch v. North Carolina R. Co.*, 146 N. C. 316, 59 S. E. 882 (1907).

Errors Favorable to Party Complaining.

—A party can not complain of error in his favor. *Shaw v. North Carolina Public Service Corp.*, 168 N. C. 611, 84 S. E. 1010 (1915); *Gaston Farmers Warehouse Co. v. American Agr., etc., Co.*, 176 N. C. 509, 97 S. E. 472 (1918); *Nance v. King*, 178 N. C. 574, 101 S. E. 212 (1919).

A ruling in appellant's favor is not reviewable, where appellee does not complain of it. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155 (1900); *Miller v. Curl*, 162 N. C. 1, 77 S. E. 932 (1913).

Favorable Instructions.—A party can not complain of charges favorable to himself. *Lupton v. Southern Exp. Co.*, 169 N. C. 671, 86 S. E. 614 (1915); *Borden v. Carolina Power, etc., Co.*, 174 N. C. 72, 93 S. E. 442 (1917); *Belk v. Belk*, 175 N. C. 69, 94 S. E. 726 (1917).

Acceptance of Benefits.—Where plaintiff recovered judgment on two of the causes of action alleged in the complaint, and no exception was taken to the ruling of the court, the plaintiff by the payment of the judgment was not estopped from complaining on appeal of exclusion of evidence as to other causes of action pleaded in the complaint. *Garland v. Linville Improv. Co.*, 184 N. C. 551, 115 S. E. 164 (1922).

Party Who Acquiesces in Judgment.—Where, after judgment sustaining a demurrer to the complaint, plaintiff did not except, but amended his complaint in accordance with the views of the trial court, he acquiesced in the judgment, and cannot assign it as error. *Rice v. McAdams*, 149 N. C. 29, 62 S. E. 774 (1908).

Consent Judgment.—No appeal lies from a consent judgment. *Union Bank v. Commissioners*, 119 N. C. 214, 25 S. E. 966 (1896); *Overman v. Lanier*, 156 N. C. 537, 72 S. E. 575 (1911); *Hartsoe v. Southern R. Co.*, 161 N. C. 215, 76 S. E. 684 (1912).

Order in Furtherance of Parties' Own Demand.—A party has no right of appeal from an order which does not affect a substantial right claimed in the action and which is in furtherance of his own demand. *Leak v. Covington*, 87 N. C. 501 (1882); *Hocutt v. Wilmington, etc., R. Co.*, 124 N. C. 214, 32 S. E. 681 (1899).

E. Presumptions on Appeal—Burden of Proof.

Presumption against Error.—On appeal there is a presumption against error. In *re Will of Ross*, 182 N. C. 477, 109 S. E. 365 (1921); *Fellows v. Dowd*, 182 N. C. 776, 109 S. E. 69 (1921); *Carstarphen v. Carstarphen*, 193 N. C. 541, 137 S. E. 658

(1927); *Mason v. Andrews*, 193 N. C. 854, 138 S. E. 341 (1927).

The presumptions are in favor of the correctness of the rulings of law of the superior court, with the burden upon appellant to show error. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175 (1927).

Prejudicial error will not be presumed. *Blevins v. Norfolk, etc., R. Co.*, 184 N. C. 324, 114 S. E. 298 (1922).

Burden on Appellant to Show Error.—The burden is on the party alleging error to show it affirmatively by the record. *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 713 (1917); *Baggett v. Lanier*, 178 N. C. 129, 100 S. E. 254 (1919); *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175 (1927).

Facts Not Shown by Record.—Where the testimony on which the trial court based its findings is not in the record, the findings must be accepted on appeal as final, as it is presumed that they are supported by the evidence. *Caldwell v. Robinson*, 179 N. C. 518, 103 S. E. 75 (1920).

In the absence of a statement of facts, it will be presumed that the trial court found such facts as would support its judgment. *Bowers v. Bryan Lumber Co.*, 152 N. C. 604, 63 S. E. 19 (1910).

Where the charge is not in the record, it will be presumed that it correctly stated the law. *Ellison v. Western Union Tel. Co.*, 163 N. C. 5, 79 S. E. 277 (1913); *Harrison v. Western Union Tel. Co.*, 163 N. C. 18, 79 S. E. 281 (1913).

Burden to Show Prejudice from Error.—The burden is on the appellant to show clearly that error was prejudicial. *Mercer v. Hitch Lumber Co.*, 173 N. C. 49, 91 S. E. 588 (1917); *Universal Oil, etc., Co. v. Burney*, 174 N. C. 382, 93 S. E. 912 (1917); *Quelch v. Futch*, 175 N. C. 694, 94 S. E. 713 (1917).

But the immateriality of an error must clearly appear to warrant the court to treat it as surplusage. *McLenan v. Chisholm*, 64 N. C. 323 (1870).

Admission of Evidence.—Evidence improperly admitted will be presumed to be prejudicial. *Patton v. Porter*, 48 N. C. 539 (1856); *Johnson v. Railroad Co.*, 140 N. C. 574, 53 S. E. 362 (1906).

F. Effect of Appeal on Proceedings in Lower Court.

See § 1-294 and annotations thereunder. For undertaking to stay execution on appeal, see § 1-289.

III. APPEAL AS TO PARTICULAR SUBJECTS.

A. Costs.

As to costs on appeal, see §§ 6-23 et seq., and the notes thereto.

Costs Alone Involved.—An appeal will be dismissed where it satisfactorily appears that the question of costs is the only matter involved. *Martin v. Sloan*, 69 N. C. 128 (1873); *State v. Richmond, etc., R. Co.*, 74 N. C. 287 (1876); *Hasty v. Funderburk*, 89 N. C. 93 (1883); *Russell v. Campbell*, 112 N. C. 404, 17 S. E. 149 (1893).

Where, pending an appeal, the subject matter of an action, or the cause of action, is destroyed, in any matter whatever, the Supreme Court will not go into a consideration of the abstract question which party should rightly have won, merely in order to adjudicate the costs, but the judgment below as to the costs will stand. *Wikel v. Board*, 120 N. C. 451, 27 S. E. 117 (1897); *Herring v. Pugh*, 125 N. C. 437, 34 S. E. 538 (1899).

When Appeal Lies for Costs.—The exceptions to the general rule that the Supreme Court will not decide upon a mere question of costs are: (1) Where the very question at issue is the legality of a particular item of costs (*Elliott v. Tyson*, 117 N. C. 114, 23 S. E. 102 (1895); *Blount v. Simmons*, 120 N. C. 19, 26 S. E. 649 (1897); or (2) the liability of a prosecutor for costs in a criminal action (*State v. Byrd*, 93 N. C. 624 (1885)); or, (3) taking the case below as properly decided, whether the costs of that court were adjudicated against the proper party (*State v. Horne*, 119 N. C. 853, 26 S. E. 36 (1896)). *Herring v. Pugh*, 125 N. C. 437, 34 S. E. 538 (1899).

If some important substantial right be involved an exception will be made and an opinion given. *Martin v. Sloan*, 69 N. C. 128 (1873).

An order taxing defendant with the entire cost of copying the transcript on plaintiffs' appeal, it having been adjudged that unnecessary matter was sent up at the instance of plaintiff, is appealable. *Waldo v. Wilson*, 177 N. C. 461, 100 S. E. 182 (1919).

Fiduciaries.—Although the general rule is that no appeal lies from a judgment for costs only, yet there is an exception in favor of fiduciaries from the statutes which makes the decision in those cases "one affecting substantial rights." *May v. Darden*, 83 N. C. 237 (1880).

Denial of Motion to Retax Costs.—Denial of party's motion to retax costs is reviewable on questions as to what are the costs, how much is due from party taxed, or whether one or more items have been erroneously inserted in bills of costs. *Vandyke v. Aetna Life Ins. Co.*, 174 N. C. 78, 93 S. E. 444 (1917).

Rulings Founded upon Lack of Power.—

A ruling of the court below on a motion to allow and apportion costs founded upon a lack of power is reviewable. *Martin v. Bank*, 131 N. C. 121, 42 S. E. 558 (1902); *Horner v. Oxford Water, etc., Co.*, 156 N. C. 494, 72 S. E. 624 (1911).

B. Demurrer.

Demurrer to Whole Cause.—An appeal lies from an order sustaining or overruling a demurrer to a whole cause of action or defense. *Pender v. Maliett*, 122 N. C. 163, 30 S. E. 324 (1898); *Abbott v. Hancock*, 123 N. C. 89, 31 S. E. 271 (1898); *Shelby v. Charlotte Elect. R., etc., Co.*, 147 N. C. 537, 61 S. E. 377 (1908).

Demurrer Sustained but No Verdict Rendered.—The Supreme Court will not entertain an appeal from an order sustaining a demurrer to a counterclaim where no verdict or judgment was rendered. *Bazemore v. Bridges*, 105 N. C. 191, 10 S. E. 888 (1890); *Teal v. Liles*, 183 N. C. 678, 111 S. E. 617 (1922).

Overruling Demurrer.—On an overruling of its demurrer a party made a defendant is entitled to appeal, unless the demurrer has been held frivolous. *Joyner v. Champion Fibre Co.*, 178 N. C. 634, 101 S. E. 373 (1919).

An appeal lies to the Supreme Court from an order of the court below overruling a demurrer. *Commissioners v. Mag-nin*, 78 N. C. 181 (1878).

An order overruling demurrer to part of answer with leave to reply is not a final order and an appeal therefrom will be dismissed. *Chambers v. Seaboard Air Line R. Co.*, 172 N. C. 555, 90 S. E. 590 (1916).

Court, on appeal having considered those grounds of demurrer to complaint which may finally dispose of action, will not review the overruling of demurrer to allegation embracing only part of cause of action, and which, if sustained, will not dismiss it. *Headman v. Board*, 177 N. C. 261, 98 S. E. 776 (1919).

Refusal to Hold Demurrer or Answer Frivolous.—The refusal to hold a demurrer or answer frivolous, and to render judgment thereon is not appealable. *Walters v. Starness*, 118 N. C. 842, 24 S. E. 713 (1896); *Morgan v. Harris*, 141 N. C. 358, 54 S. E. 381 (1906).

Withdrawal of Matter Demurred to.—An appeal cannot be taken from a refusal of the court to proceed to try the action on the demurrer, after the withdrawal of the subject matter to which it relates and the consequent order of continuance. *Gay v. Brookshire*, 82 N. C. 409 (1880).

C. Granting or Denying New Trial.

In General.—An appeal from an order

granting or refusing a new trial, only lies from some order or judgment involving a matter of law or legal inference; that is, the order or judgment must be one that involves the question, whether or not a party to the action is entitled to a new trial as of right, and as a matter of law. *Braid v. Lukins*, 95 N. C. 123 (1886).

An application for a new trial, except for error of law in its conduct, is addressed solely to the discretion of the presiding judge, whose decision is not reviewable on appeal. *Thomas v. Myers*, 87 N. C. 31 (1882); *Carson v. Dellinger*, 90 N. C. 226 (1884).

The Supreme Court has jurisdiction to review, upon appeal, the decision of the court below, granting, or refusing to grant, a new trial, where a matter of law or legal inference is involved. *Johnson v. Bell*, 74 N. C. 355 (1876).

Setting Aside Verdict and Granting New Trial.—The determination of a motion to set aside the verdict and grant a new trial is a matter within the sound discretion of the trial judge, and is not reviewable, except where there has been an abuse of discretion. *Coats v. Norris*, 180 N. C. 77, 104 S. E. 71 (1920); *Harrill v. Seaboard Air Line R. Co.*, 181 N. C. 315, 107 S. E. 136 (1921).

An appeal from an order setting aside the award of damages as excessive is premature. *Rogerson v. Lumber Co.*, 136 N. C. 266, 48 S. E. 647 (1904); *Billings v. Observer*, 150 N. C. 540, 64 S. E. 435 (1909).

Order setting aside verdict, as matter of law is appealable. *Tuthill v. Norfolk, etc., R. Co.*, 174 N. C. 77, 93 S. E. 446 (1917).

Grant of Partial New Trial.—An appeal from refusal of motion for judgment upon verdict and a grant of partial new trial, which has been granted as matter of law and not of discretion is not fragmentary and premature. *Grove v. Baker*, 174 N. C. 745, 94 S. E. 528 (1917).

Contents of Record When New Trial Granted or Refused.—To give parties the benefit of the provision of this section allowing an appeal from an order granting or refusing a new trial, the presiding judge should put upon the record the matters inducing the order, so that the appellate court can see whether the order presents a matter of law which is a subject of review, or matter of discretion which is not. *Carson v. Dellinger*, 90 N. C. 226 (1884).

D. Injunction.

Order Refusing Injunction.—A plaintiff can appeal from a decision of a judge at chambers refusing an injunction. First

National Bank v. Jenkins, 64 N. C. 719 (1870).

Interlocutory Injunction. — An appeal from an injunction pendente lite against counting and certifying the result of a special election granted on the ground that women, infants, and nonresidents, though freeholders, were not counted in determining the necessary number of the signers, is not subject to dismissal as fragmentary and premature. Gill v. Board, 160 N. C. 176, 76 S. E. 203 (1912).

Order Continuing Injunction. — Overruling a motion to dismiss is not ordinarily an appealable order, as no substantial right of the litigant is thereby affected; but, when an injunction has been issued, an order continuing the same affects a substantial right, and an appeal may be taken from an order entered on a motion to dismiss. Warlick v. Reynolds & Co., 151 N. C. 606, 66 S. E. 657 (1910).

Finding of Fact Reviewable in Injunction Cases. — While the Supreme Court may review findings of fact in an action for injunction, it will not, where no special findings are set out in the case, reverse what were apparently the judge's findings necessary to sustain his judgment unless such findings are clearly wrong. Davenport v. Board, 183 N. C. 570, 112 S. E. 246 (1922).

Overruling Demurrer to Complaint for Injunction. — An appeal taken from a judgment overruling demurrers to the complaint and allowing defendants to answer for the purposes of a motion to restrain one of defendants from suing plaintiff in the federal court, remains in the court below, and he must obtain relief there and not by appeal. Worth v. Knickerbocker Trust Co., 152 N. C. 242, 67 S. E. 590 (1910).

Seeking to Restrain Act Already Committed. — The correctness of a ruling dissolving a restraining order will not be considered on appeal, when it is made to appear that the act sought to be restrained has been committed. Wallace v. North Wilkesboro, 151 N. C. 614, 66 S. E. 657 (1910); Moore v. Cooper Monument Co., 166 N. C. 211, 81 S. E. 170 (1914); Kilpatrick v. Harvey, 170 N. C. 668, 86 S. E. 596 (1915); Galloway v. Board, 184 N. C. 245, 114 S. E. 165 (1922).

E. Nonsuit.

In General. — If, as a matter of law, plaintiff was not entitled to a verdict, he could not take a voluntary nonsuit, and have the decision reviewed, as the setting aside of a verdict for such reason is not

reviewable; being controlled by the sound discretion of the court. McKinney v. Patterson, 174 N. C. 483, 93 S. E. 967 (1917).

No appeal lies to set aside a voluntary nonsuit. White v. Harris, 166 N. C. 227, 81 S. E. 687 (1914); Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337 (1914).

An order sustaining a motion for nonsuit as to one cause of action and overruling it as to other causes of action is not appealable by defendant. Farr v. Babcock Lumber Co., 182 N. C. 725, 109 S. E. 833 (1921).

An appeal will lie from the judgment of the superior court reversing the clerk's order permitting the plaintiff to take a voluntary nonsuit. Goldsboro v. Holmes, 183 N. C. 203, 111 S. E. 1 (1922); Caldwell v. Caldwell, 189 N. C. 805, 128 S. E. 329 (1925).

An appeal can not be taken from a nonsuit to test an adverse ruling of the judge, leaving issuable matter presented and undetermined. Gilbert v. Waccamaw Shingle Co., 167 N. C. 286, 83 S. E. 337 (1914).

Where Court Intimates Opinion.—Where the court on the trial intimates an opinion that plaintiff can not maintain his action, he may take a judgment of nonsuit and appeal; and the appeal will not be dismissed on the ground that plaintiff voluntarily took a nonsuit. Wharton v. Commissioners, 82 N. C. 12 (1880); Hedrick v. Pratt, 94 N. C. 101 (1886); Midgett v. Manufacturing Co., 140 N. C. 361, 53 S. E. 178 (1906); Morton v. Blades Lumber Co., 144 N. C. 31, 56 S. E. 551 (1907).

A plaintiff may, in deference to an intimation from the court that he can not maintain his action, submit to a nonsuit and have the questions of law reviewed upon appeal. Hedrick v. Pratt, 94 N. C. 101 (1886); Warner v. Western, etc., R. Co., 94 N. C. 250 (1886).

Where court intimated that he would charge jury that certain deed did not convey land described in complaint, which was vital to plaintiff's recovery, plaintiff had the right to submit to a nonsuit and appeal. Quelch v. Futch, 172 N. C. 316, 90 S. E. 259 (1916).

But where the court intimated that the complaint stated a cause of action for rescission of a contract, but not for reformation; whereupon plaintiff suffered nonsuit, and appealed. Held that, as the intimation by the court was open to reconsideration, an appeal was error. Davis v. Ely, 100 N. C. 283, 5 S. E. 239 (1888). See also, Tiddy v. Harris, 101 N. C. 589, 8 S. E. 227 (1888); Hayes v. Railroad, 140 N. C. 131, 52 S. E. 416 (1905).

Construction of Evidence in Nonsuit Cases.—Where the Supreme Court passes on a motion to nonsuit, the plaintiff is entitled to have the evidence considered as true and construed most favorably for him, and he must also have the benefit of every inference that may reasonably be drawn therefrom. *Munick v. Durham*, 181 N. C. 188, 106 S. E. 665 (1921); *Allen v. Gardner*, 182 N. C. 425, 109 S. E. 260 (1921).

The court is not limited to a consideration of the evidence of defendant, but must examine all the evidence. *Ridge v. Norfolk Southern R. Co.*, 167 N. C. 510, 83 S. E. 762 (1914).

F. Order of Reference and Referee's Report.

As to reference generally, see §§ 1-188 et seq. and the notes thereto.

Motion to Refer.—Where the answer in a proceeding to compel an accounting did not constitute a valid plea in bar, the denial of a motion to refer on the ground that such answer did not set up a valid plea in bar affected a substantial right, and was appealable. *Jones v. Sugg*, 136 N. C. 143, 48 S. E. 575 (1904).

Appointing Referee.—An appeal from a judgment adjudging that plaintiff recover nothing on account of certain items, and referring all matters in controversy as to other items to a referee to take and state an account, is premature. *International Waste Co. v. Bloomfield Mfg. Co.*, 168 N. C. 92, 83 S. E. 609 (1914).

An appeal will not lie from an interlocutory judgment adjudging plaintiff entitled to recover damages and appointing a referee to hear evidence as to the amount. *Richardson v. Southern Exp. Co.*, 151 N. C. 60, 65 S. E. 616 (1909).

Relating to Reference of Cause.—Where the court ordered a reference to take an account of partnership receipts and expenses, an appeal from such order before judgment on the report thereon is premature. *Leroy v. Saliba*, 182 N. C. 757, 108 S. E. 303 (1921).

Plea in Bar.—When there is a plea in bar, a party to the action may except to an order of reference made by the trial judge and appeal at once, or wait until there is a final judgment and then appeal. *Pritchett v. Greensboro Supply Co.*, 153 N. C. 344, 69 S. E. 249 (1910).

An appeal lies from a judgment sustaining or overruling a plea in bar, and no reference should be ordered until the plea is finally determined. *Jones v. Beaman*, 117 N. C. 259, 23 S. E. 248 (1895); *Royster v. Wright*, 118 N. C. 152, 24 S. E. 746 (1896).

Where a matter pleaded in bar is an estoppel was discussed in *Rogers v. Ratcliffe*, 48 N. C. 225 (1855).

Order of Reference Made before Disposition of Plea in Bar.—An order of reference made before disposition of a plea in bar of an action is one from which an appeal can be immediately taken. *Austin v. Stewart*, 126 N. C. 525, 36 S. E. 37 (1900); *Jones v. Wooten*, 137 N. C. 421, 49 S. E. 915 (1905); *Duckworth v. Duckworth*, 144 N. C. 620, 57 S. E. 396 (1907).

Submitting Issue on Plea in Bar.—An action on the part of the court submitting to the jury an issue on a plea in bar before ordering a reference decides no substantial right, and is not the subject of an appeal. *Sloan v. McMahon*, 85 N. C. 296 (1881).

Setting Aside Judgment.—The Supreme Court can review the ruling of the judge below on a motion to set aside a judgment. *Clegg v. New York White Soapstone Co.*, 67 N. C. 302 (1872).

Order to Show Cause.—An order of a judge for the defendant to appear at a subsequent time and show cause why a receiver should not be appointed is not such an order as can be appealed from. *Gray v. Gaither*, 71 N. C. 55 (1874).

Exceptions Must Be Passed On by Judge.—The Supreme Court will not review exceptions of law to a referee's report, unless they are passed upon by the judge. *John Church Co. v. Dawson*, 157 N. C. 566, 72 S. E. 1009 (1911).

Exceptions Overruled.—Where some of the exceptions to a referee's report were overruled, and the case retained by the court to try the other issues raised by the pleadings, it was held that this was an interlocutory order and not appealable. *Leak v. Covington*, 95 N. C. 193 (1886).

Exception to Partial Report of Referee.—A judgment passing on exceptions to a referee's report, distributing part of the fund, and sending the case back for further report as to certain claims, is not final so as to support an appeal. *Pritchard v. Panacea Spring Co.*, 151 N. C. 249, 65 S. E. 968 (1909); *Smith v. Miller*, 155 N. C. 242, 71 S. E. 353 (1911).

Sustaining Exceptions.—An appeal from an order sustaining an exception to a referee's report, and recommitting the case to the referee to take further evidence, is premature. *Grant v. Reese*, 90 N. C. 3 (1884); *Wallace Bros. v. Douglas*, 105 N. C. 42, 10 S. E. 1043 (1890).

Where the rulings on exceptions to a referee's report and an order of recommitment do not affect the substantial rights of either party, no appeal will lie. *Lutz v.*

Cline, 89 N. C. 186 (1883); Jones v. Call, 89 N. C. 188 (1883).

Approval of Findings Supported by Evidence. — Where a referee's finding of fact is supported by evidence and approved by the judge on exception to the report, it will not be reviewed by the Supreme Court. Marler-Dalton-Gilmer Co. v. Golden, 172 N. C. 823, 90 S. E. 909 (1916); Lewis v. May, 173 N. C. 100, 91 S. E. 691 (1917).

Necessity for Further Action.—Where an order based on the report of a receiver as to claims establishes the priority of a claim, but continues the proceeding for further consideration of the report except as to matters "adjudicated herein," an appeal from such order as to the claim mentioned is premature. Corporation Comm. v. Farmers Bank, etc., Co., 183 N. C. 170, 110 S. E. 839 (1922). See Beck & Co. v. Bank, 157 N. C. 105, 72 S. E. 632 (1911).

Setting Aside Referee's Report and Ordering a Trial by Jury.—An order setting aside a report of a referee, and ordering a

jury trial, is appealable, as affects the substantial rights of the parties. Stevenson v. Felton, 99 N. C. 58, 5 S. E. 399 (1888).

Report Set Aside for Newly Discovered Evidence. — The discretion of a superior court judge to set aside a report of a referee, on the ground of newly discovered testimony, can not be reviewed in the Supreme Court. Vest v. Cooper, 68 N. C. 131 (1873); Braid v. Lukins, 95 N. C. 123 (1886).

G. Appeals as to Miscellaneous Subject.

Editor's Note. — In the foregoing note most of the salient rules controlling the subject of appeals have been discussed. The cases illustrating these principles are legion in number and in a work of this nature it is impossible to give all the citations. Many of the subjects are treated under the particular sections of the General Statutes relating to them; for example under § 1-176 the appealability of a decision as to continuances is treated.

§ 1-278. **Interlocutory orders reviewed on appeal from judgment.**—Upon an appeal from a judgment, the court may review any intermediate order involving the merits and necessarily affecting the judgment. (C. C. P., s. 313; Code, s. 562; Rev., s. 589; C. S., s. 640.)

Cross References. — As to appeals from interlocutory orders, see § 1-277. As to effect of appeal from interlocutory orders on proceeding in lower court, see § 1-277—analysis line, "Effect of Appeal on Pro-

ceedings in Lower Court, II, F."

Applied in Patterson v. Durham Hosiery Mills, 214 N. C. 806, 200 S. E. 906 (1939).

Stated in Veazey v. Durham, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

§ 1-279. **When appeal taken.**—The appeal must be taken from a judgment rendered out of term within ten days after notice thereof, and from a judgment rendered in term within ten days after its rendition, unless the record shows an appeal taken at the trial, which is sufficient, but execution shall not be suspended until the giving by the appellant of the undertakings hereinafter required. (C. C. P., s. 300; Code, s. 549; 1889, c. 161; Rev., s. 590; C. S., s. 641.)

Intimation of Intent to Appeal.—Under this section it is not necessary that there should be at the time of the trial an intimation by the dissatisfied party that he desires to appeal, it being a sufficient indication of his desire at the time of the trial if he fulfills the requirements of the statute within the time prescribed by law. Russell v. Hearne, 113 N. C. 361, 18 S. E. 711 (1893).

Appeal by Serving Notice.—A party to an action may appeal by serving notice thereof within ten days after the adjournment of court. Houston v. Lumber Co., 136 N. C. 328, 48 S. E. 738 (1904).

Computation of Time.—Within ten days notice thereof, means ten days after notice of the rendition thereof. Fisher v. Fisher, 164 N. C. 105, 80 S. E. 395 (1913). See Delafield v. Lewis Mercer Constr. Co., 115 N. C. 21, 20 S. E. 167 (1894).

Applied in Mason v. Moore County Board of Com'rs, 229 N. C. 626, 51 S. E. (2d) 6 (1948).

Cited in Brantley v. Jordan, 90 N. C. 25 (1884); Jones v. Asheville, 114 N. C. 620, 19 S. E. 631 (1894); Seaboard Air Line R. Co. v. Brunswick County, 198 N. C. 549, 152 S. E. 627 (1930); Veazey v. Durham, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

§ 1-280. **Entry and notice of appeal.**—Within the time prescribed in § 1-279, the appellant shall cause his appeal to be entered by the clerk on the judgment docket, and notice thereof to be given to the adverse party unless the record

shows an appeal taken or prayed at the trial, which is sufficient. (C. C. P., s. 301; Code, s. 550; Rev., s. 591; C. S., s. 642.)

Former Rule.—Under the statute in force before the adoption of the Code, a notice of appeal filed in the clerk's office was sufficient to charge the appellee with notice, he having failed to designate a person to receive notices in the case. *Brantley v. Jordan*, 90 N. C. 25 (1884).

Record Must Show Appeal by Party Seeking Review.—Appeal by the party seeking review is necessary to give the Supreme Court jurisdiction, and this fact must appear by appeal entry of record, and in the absence of appeal entry of record the purported appeal must be dismissed. The Supreme Court is without power to correct the record, since it can have no jurisdiction of the cause, nor may counsel correct the record proper by stipulation. *Mason v. Moore County Board of Com'rs*, 229 N. C. 626, 51 S. E. (2d) 6 (1948).

Appellee Entitled to Notice.—In all cases the appellee is entitled to notice of an appeal as provided by statute. *Marion v. Tilley*, 119 N. C. 473, 26 S. E. 26 (1896).

Effect of Failure to Give Notice.—Where the notice of appeal is not given in the prescribed time, the appeal will be dismissed. *Campbell v. Allison*, 63 N. C. 568 (1869); *Bryan v. Hubbs*, 69 N. C. 423 (1873); *Applewhite v. Fort*, 85 N. C. 596 (1881); *Brantley v. Jordan*, 90 N. C. 25 (1884).

No Presumption of Notice.—Notice must be given in case of appeal; it will not be presumed, merely because the appeal was taken during a term of the court from which it was taken. *Campbell v. Allison*, 63 N. C. 568 (1869).

Record Must Show Notice.—The appeal will be dismissed, where the record does not show service of notice of appeal. *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889 (1891).

When Record Need Not Show Notice.—The record need not show service of notice of appeal, where the findings of fact and the judgment thereon, constituting the case on appeal, state that appeal was taken. *Delozier v. Bird*, 123 N. C. 689, 31 S. E. 834 (1898).

Filing of Bond as Notice.—The filing of an appeal bond and its approval in open court afford notice to the appellee of the appeal. *Capehart v. Biggs & Co.*, 90 N. C. 373 (1884).

Codefendant.—Where one appeals from so much of a judgment as is in favor of his codefendant, he must give such codefendant notice of his appeal. *Rose v. Baker*, 99 N. C. 323, 5 S. E. 919 (1888).

When Party Resides Out of State.—A writ of error may be granted upon notice to the attorney at law who obtained the judgment when the party resides out of the State. *Leake v. Murchie*, 1 N. C. 258 (1800).

Notice Held to Be in Proper Time.—Where appellant's counsel, five days after the adjournment of court, mails notice of appeal to the sheriff at the county seat, so as to leave ample time for the latter to serve it on appellee's counsel, laches is not imputable to appellant because the sheriff does not take it from the post office till after the ten days allowed for service. *Arrington v. Arrington*, 114 N. C. 113, 19 S. E. 105 (1894).

Notice to a Co-Party.—Notice must be given to the real party in interest, notice to a co-party, not a real party in interest, is insufficient. *Barden v. Pugh*, 129 N. C. 60, 39 S. E. 724 (1901).

Waiver of Notice.—Agreements of counsel, to waive notice of appeal, to be recognized in the appellate court, must appear upon the record. *Wade v. New Bern*, 72 N. C. 498 (1875).

Disagreement as to Waiver of Notice.—Notice of appeal will not be considered when filed after the statutory time, where one counsel swears that consent to an extension was given, and the other denies such statement. *Pipkin v. McCartan*, 122 N. C. 194, 29 S. E. 334 (1898).

A statement in the case on appeal, that notice of appeal was waived, can not be contradicted for the first time on argument in the appellate court. *Atkinson v. Asheville St. R. Co.*, 113 N. C. 581, 18 S. E. 254 (1893).

Notice as a Waiver of Objection.—The fact that a notice of appeal served after the expiration of the term at which judgment was rendered, stated only that the appeal was "on account of the erroneous rulings of the judge on motion for a new trial," did not constitute a waiver of an exception to the judgment. *Ferrell v. Thompson*, 107 N. C. 420, 12 S. E. 109 (1890).

Entry of Appeal Not Absolutely Necessary.—That an appeal was not entered of record as required was not material, where the fact of the appeal having been taken was not denied, and notice had been served. *Barden v. Stickney*, 130 N. C. 62, 40 S. E. 842 (1902).

The record need not show that an appeal was duly entered, when it affirmatively appears from the case on appeal, which

bears date within the time within which an appeal could be taken, that the appeal was taken, and notice thereof waived. *Atkinson v. Asheville St. R. Co.*, 113 N. C. 581, 18 S. E. 254 (1893).

Effect of Failure to Enter.—Failure of the clerk to enter the appeal is not ground for dismissal. *Allison v. Whittier*, 101 N. C. 490, 8 S. E. 338 (1888); *Simmons v.*

Allison, 119 N. C. 556, 26 S. E. 171 (1896). But see *Bryan v. Hubbs*, 69 N. C. 423 (1873); *Moore v. Vanderburg*, 90 N. C. 10 (1884).

Cited in *Seaboard Air Line R. Co. v. Brunswick County*, 198 N. C. 549, 152 S. E. 627 (1930); *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

§ 1-281. **Appeals from judgments not in term time.**—When appeals are taken from judgments of the clerk or judge not made in term time, the clerk is authorized to make any and all necessary orders for the perfecting of such appeals. (Ex. Sess. 1921, c. 92, s. 19a; C. S., s. 642(a).)

§ 1-282. **Case on appeal; statement, service, and return.**—The appellant shall cause to be prepared a concise statement of the case, embodying the instructions of the judge as signed by him, if there be an exception thereto, and the request of the counsel of the parties for instructions if there be any exception on account of the granting or withholding thereof, and stating separately, in articles numbered, the errors alleged. A copy of this statement shall be served on the respondent within fifteen days from the entry of the appeal taken; within ten days after such service the respondent shall return the copy with his approval or specific amendments indorsed or attached; if the case be approved by the respondent, it shall be filed with the clerk as a part of the record; if not returned with objections within the time prescribed, it shall be deemed approved: Provided, that the judge trying the case shall have the power, in the exercise of his discretion, to enlarge the time in which to serve statement of case on appeal and exceptions thereto or counter statement of case. (C. C. P., s. 301; Code, s. 550; 1905, c. 448; Rev., s. 591; C. S., s. 643; 1921, c. 97.)

I. Editor's Note.

II. General Consideration—Counter case.

III. Requisites of Case on Appeal—Exceptions.

IV. Appeals from Instructions.

V. Service of Case and Counter case.

A. Necessity and Mode of Service.

B. Time of Service.

1. In General.

2. Computation of Time.

3. Effect of Failure to Serve in Time.

VI. Relief Granted.

Cross References.

As to necessity and requisites of exceptions, see § 1-206 and annotations thereunder. As to settlement of case on appeal, see § 1-283. As to transcript, see § 1-284.

I. EDITOR'S NOTE.

Prior to the adoption of the Reformed Procedure in 1868, all cases on appeal were settled by the judges, whose practice was to perform this duty before leaving the court at which the case was tried. It was thought that their duty in this respect might be lightened by changing the statute, so as to permit counsel to agree upon settlement of the case on appeal and to

call in the aid of the judge only where counsel failed to agree. The time originally allowed for this purpose was five days for the appellant to serve case on appeal and three days for the appellee to serve a counter case. This was lengthened from time to time until by this section it is now fifteen days to serve case on appeal and ten days to serve counter case, except where the parties consent to extend the time. The result has not been beneficial. There has been an increasing tendency to postpone and put off the settlement of cases on appeal by lengthening the time, and the legislature in 1921, Acts 1921, ch. 97, added the portion of the section which permitted the judges to extend the time even when counsel do not agree. But the Supreme Court has never changed its rule, of which it is sole judge, that in every instance when the case on appeal is not docketed in the time required, at the term, the appellant must docket the record proper and ask for a certiorari. Whenever this is not done the case not docketed until the next succeeding term will be dismissed. See *State v. Johnson*, 183 N. C. 730, 110 S. E. 782 (1922).

This section and Supreme Court Rule 19 (3) require the assignment of errors relied on to be tabulated and inserted in the

case on appeal or record, preferably at the end.

Formerly when two or more appeals were taken in the same case separate transcripts were required but the Supreme Court Rules adopted in 1926 changed this. Now only one transcript is required but it shall contain separate statements of the cases on appeal. See Supreme Court Rule 19 (2).

II. GENERAL CONSIDERATION—COUNTERCASE.

Strict Observance Required.—The statutory requirements as to making up cases on appeal to the Supreme Court and docketing them are conditions precedent which must be complied with, or the appeal will be dismissed. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Record Imports Verity.—The record on appeal imports verity and the Supreme Court is bound thereby. *State v. Brown*, 207 N. C. 156, 176 S. E. 260 (1934); *Abernethy v. Burns*, 210 N. C. 636, 188 S. E. 97 (1936); *State v. Stiwinter*, 211 N. C. 278, 189 S. E. 868 (1937).

Distinction between Record and Case on Appeal.—The record on appeal consists of the "record proper," i. e., the summons, pleadings and judgment, and the case on appeal, which consists of the exceptions taken and such of the evidence, charge, prayers, and other matters occurring at the trial as are necessary to present the matters excepted to. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

The trial judge is without authority to change appellant's case on appeal, though regarded by him as erroneous, when that case has become the case on appeal. *State v. Dee*, 214 N. C. 509, 199 S. E. 730 (1938).

Certiorari to Correct Record Refused.—Under this section, if the case on appeal as served by the appellant be approved by the respondent or appellee, it becomes the case and a part of the record on appeal, and in connection with the record, may alone be considered in determining the rights of the parties interested in the appeal, and the State's motion for certiorari for correction of the record may not be allowed. *State v. Dee*, 214 N. C. 509, 199 S. E. 730 (1938).

No Presumption of Regularity.—An appeal being now the act of the appellant alone, no presumption of regularity arises because of its having been taken during a term of the court from which it comes. *Campbell v. Allison*, 63 N. C. 568 (1869).

Necessity for Taking Appeal.—An ap-

peal will be dismissed if the record fails to show affirmatively that an appeal was taken. *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923 (1887); *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889 (1891).

When Grouping of Exceptions Unnecessary.—Where the exceptions are separately stated and numbered, but are not brought together at the end of the case, a motion by the appellee to affirm will be denied, if the error intended to be assigned is plainly apparent. *Hicks v. Kenan*, 139 N. C. 337, 51 S. E. 941 (1905).

Duty When Case on Appeal Not Settled.—Where an appeal is taken, the record should be transmitted to the Supreme Court and the appeal docketed, whether the case is settled or not, so that all proper action can at once be taken to perfect it for hearing. *Owens v. Phelps*, 91 N. C. 253 (1884).

When Case on Appeal Dispensed With.—A "case on appeal" can be dispensed with only when the errors are presented by the record proper. Errors occurring during the trial can be presented only by case on appeal. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

Upon exception and appeal from judgment denying a motion upon facts found and incorporated in the judgment, the record constitutes the case on appeal, and appellant is not required to serve a statement of case on appeal, and motion to dismiss for his failure to do so will be denied. *Privette v. Allen*, 227 N. C. 164, 41 S. E. (2d) 364 (1947).

Same—Order Entered at Chambers.—On appeal from an order of court entered by the judge at chambers no case is necessary. *North Carolina Bessemer Co. v. Piedmont Hdw. Co.*, 171 N. C. 728, 88 S. E. 867 (1916).

Same—Appeal from Judgment.—An appeal from a judgment alone is maintainable without any case on appeal. *American Soda Fountain Co. v. Schell*, 160 N. C. 529, 76 S. E. 631 (1912).

Same—Case Tried on Agreed Statement of Facts.—On appeal from the judgment in a case tried on an agreed statement of facts, no separate "case" is necessary. *Chamblee v. Baker*, 95 N. C. 98 (1886); *Davenport v. Leary*, 95 N. C. 203 (1886).

Same—Granting or Refusing Injunction.—On appeal from an order granting or refusing an injunction, no case on appeal is necessary, as the pleadings and affidavits constitute the record proper. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893); *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713 (1908).

Same—Order of Reference. — It is not necessary to make a statement of the case on appeal from an order of reference, where the appeal itself and the exception noted in the record sufficiently raises the question of the validity of the order. *Cape Fear, etc., R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638 (1903); *Duckworth v. Duckworth*, 144 N. C. 620, 57 S. E. 396 (1907).

On appeal to the Supreme Court from the action of the superior court judge in passing upon the report of a referee, the facts found and the conclusions of law by the lower court must be regularly stated with the exceptions thereto in the record of the case on appeal. *Wilson v. Beasley*, 192 N. C. 231, 134 S. E. 485 (1926).

When Case on Appeal Essential. — In *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948), it is said: "Exceptions which point out alleged errors occurring during the progress of a trial in which oral testimony is offered can be presented only through a 'case on appeal' or 'case agreed' * * * This is the sole statutory means of vesting this court with jurisdiction to hear the appeal." *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

Appeal from Construction of Will.—On an appeal involving the construction of a will in which it is essential, for a determination, to know whether or not a certain person died without issue, a statement in the case made up by counsel, that "plaintiffs claim that he died without issue," is not sufficient. *Arnold v. Hardy*, 131 N. C. 113, 42 S. E. 553 (1902).

Appellee May Prepare Countercase.—It is no objection to the objections filed by the appellee to the appellant's case that it is in the form of a countercase, and not of specific objections. *State v. Gooch*, 94 N. C. 982 (1886).

Where the exceptions to appellant's case on appeal are served within the required time, appellant can not complain that the statement of his case on appeal was not returned to him, but must have the case on appeal settled. *Stevens v. Smathers*, 123 N. C. 497, 31 S. E. 721 (1898).

Appellee May Make Specific Objections.—Upon the appellant's serving of his case on appeal, the appellee may file specific objections. *Holloman v. Holloman*, 172 N. C. 835, 90 S. E. 10 (1916).

Request for Substitution.—Where the appellee makes his objections to the appellant's statement of the case on appeal by asking that a statement prepared by him be substituted, it is a sufficient compliance with the section. *Horne v. Smith*, 105 N. C. 322, 11 S. E. 373 (1890).

Countercase May Become Case on Appeal.—Where appellee returned a countercase as a statement of his exceptions to appellant's case, and such countercase was adopted by the court, it constitutes the "case on appeal." *Harris v. Carrington*, 115 N. C. 187, 20 S. E. 452 (1894); *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451 (1894).

Effect of Failure to Serve Countercase.—Where the appellant's case on appeal is served in time, and no exceptions are taken thereto, nor any countercase served, it stands as the case on appeal. *State v. Carlton*, 107 N. C. 956, 12 S. E. 44 (1890); *Abernethy v. Burns*, 210 N. C. 636, 188 S. E. 97 (1936).

Countercase Not Considered. — When countercase of the State has not been served or service acknowledged thereon or filed for more than a month after the State has accepted service of case of defendants, in an appeal by the defendant the countercase will not be considered. *State v. Freeman*, 127 N. C. 544, 37 S. E. 206 (1900).

Clerk Authorized to Complete Case.—A mere outline of the case incorporating instructions to the clerk to fill in certain portions of the evidence stenographically taken and transcribed, the charge of the court, &c., is not sufficient compliance with this section, it being the duty of the appellant to make out his case and fully perfect it before serving it upon the appellee, and no part of the duty of the clerk to do so. *Sloan v. Equitable Life Assur. Soc.*, 169 N. C. 257, 85 S. E. 216 (1915).

No Return of Appellant's Case.—If the appellant's case on appeal is not returned by appellee in ten days with objections, it shall be deemed approved. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445 (1905); *Coral Gables v. Ayres*, 208 N. C. 426, 181 S. E. 263 (1935).

Conflict between Statements of Judge and Counsel.—Where the case on appeal prepared by counsel conflicts with a statement of a fact found by the judge, the latter must control. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

Service of Countercase.—See post, this note, "Service of Case and Countercase," V.

Applied in *State v. Cannon*, 227 N. C. 336, 42 S. E. (2d) 343 (1947); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407 (1947).

Cited in *Carter v. Bryant*, 199 N. C. 704, 155 S. E. 602 (1930); *McMahan v. Southern R. Co.*, 203 N. C. 805, 167 S. E. 225 (1933); *State v. Barnett*, 218 N. C. 454, 11 S. E. (2d) 303 (1940); *State v. Dover*, 231 N. C. 735, 61 S. E. (2d) 63 (1950).

III. REQUISITES OF CASE ON APPEAL—EXCEPTIONS.

See Supreme Court Rules 19 (1) and (3), 21.

Concise Statement of Case.—One of the essential requisites of an appeal to the Supreme Court is that a "concise statement of the case" shall be made and filed with the clerk, to be transmitted to this court as part of the record, for the want of which the judgment will be affirmed unless there is error apparent in the record, in which case it would be the duty of the judge to arrest the judgment or award a venire de novo. *State v. Thompson*, 83 N. C. 595 (1880).

The appellant is required, in stating his case on appeal, to make a concise statement of the entire case necessary to present the assignments of error relied upon, and set out the necessary and pertinent evidence in narrative form, together with the charge of the court necessary to be considered; and when this is not done the appellee may move before the trial judge to dismiss the appeal. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100 (1876).

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict and judgment and the case on appeal, setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Southern R. Co.*, 135 N. C. 181, 47 S. E. 420 (1904).

And the statement should only contain matter explanatory of exceptions taken. *Surratt v. Crawford*, 87 N. C. 372 (1882).

Although case on appeal was not a concise statement of case it was held that the appeal would be allowed as a dismissal would have been a denial of justice. *Messick v. Hickory*, 211 N. C. 531, 191 S. E. 43 (1937).

Narrowed to Matters of Substance and Moment.—When counsel come to prepare the statement of case on appeal, both record and briefs should be narrowed to matters of substance and moment. *State v. Davis*, 203 N. C. 13, 164 S. E. 737 (1932).

Testimony Should Be in Narrative Form.—Testimony reported by the stenographer should be sent up on appeal in narrative form, instead of in questions and answers. *Overman v. Lanier*, 157 N. C. 544, 73 S. E. 192 (1911). The sending up of the stenographer's notes is a failure to prepare "a concise statement of the case." *Skipper v. Kingsdale Lbr. Co.*, 158 N. C. 322, 74 S. E. 342 (1912).

This rule must be observed, though the

case on appeal is settled by agreement of counsel. *Boggs v. Cullowhee Min., etc., Co. (N. C.)*, 76 S. E. 717 (1912).

When the stenographer's full notes of the evidence taken on the trial of a case on appeal are transcribed in the record, immediately followed by an unsigned entry, repudiated by appellee's counsel, that "the record, stenographer's notes, the judgment, and the exception to the nonsuit shall constitute the case on appeal to the Supreme Court," the case on appeal is not properly constituted. *Brewer v. Mineola Mfg. Co.*, 161 N. C. 211, 76 S. E. 237 (1912).

This requirement can not be waived by the parties. *First Nat. Bank v. Fries*, 162 N. C. 516, 77 S. E. 678 (1913).

Appellant must make concise statement necessary to present assignments of error, and should set out all pertinent evidence in narrative form, with the charge, and the judge must correct the narrative. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100 (1918).

For penalty for violation of this rule see *Fisher v. Montvale Lumber Co.*, 162 N. C. 531, 78 S. E. 286 (1913).

Evidence to Present Questions of Law.

—The appeal should only state so much of the evidence as raised a question of law at the trial, and then the opinion prayed and given thereon, with simplicity and precision. *Green v. Collins*, 28 N. C. 139 (1845); *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Sufficiency of Evidence Brought Up.

—Only so much of the evidence as is needed to show the questions raised by the exceptions should be made a part of the case on appeal. *Surratt v. Crawford*, 87 N. C. 372 (1882); *Durham v. Richmond, etc., R. Co.*, 108 N. C. 399, 12 S. E. 1040, 13 S. E. 1 (1891).

Evidence Unnecessary.—Where the findings of the court below are admitted by both parties to be true, it is unnecessary that the case contain the evidence. *Tayloe v. Tayloe*, 108 N. C. 69, 12 S. E. 836 (1891).

Necessity of Setting Forth Evidence Excluded.—A judgment will not be reversed because of the exclusion of evidence, where such evidence is not set out in the record. *Elm City Lumber Co. v. Childerhose*, 167 N. C. 34, 83 S. E. 22 (1914).

The exclusion of evidence can not be reviewed where the record does not disclose what the witness would have testified to, or what was proposed to be proven. In re *Will of Smith*, 163 N. C. 464, 79 S. E. 977 (1913).

Omission of Matter Not Pertinent to Issue.—Matter not pertinent to the points raised should be omitted. *Sampson v. Atlantic, etc.*, R. Co., 70 N. C. 404 (1874); *Hilton v. McDowell*, 87 N. C. 364 (1882); *Surratt v. Crawford*, 87 N. C. 372 (1882).

Exhibits Should Accompany Case.—Where deeds, records, etc., are referred to, and make a necessary part of the case transmitted to the Supreme Court, it is the duty of the appellant to see that they accompany the case. *Waugh v. Andrews*, 24 N. C. 75 (1841).

Surveys.—In an action for the diversion of surface water by the construction of a railway, surveys of the locality, made under order of the court, must accompany the record on appeal, or showing be made by appellant that he was prevented by the court or the opposite party from so doing. *Whichard v. Wilmington, etc.*, R. Co., 117 N. C. 614, 23 S. E. 437 (1895).

Exceptions—Case Must Show Exceptions.—If the case on appeal does not show that exceptions were taken to the ruling of the court below, the appellate court will not review the same on appeal. *Power v. Wilmington*, 177 N. C. 361, 99 S. E. 102 (1919). See § 1-206 and the notes thereto.

Questions can not be considered on appeal which are not presented by motion or exception in the case on appeal. *Trimmer v. Gorman*, 129 N. C. 161, 39 S. E. 804 (1901).

The presentation of matters for the first time in the assignments of error on appeal is too late. *Bloxham v. Stave, etc., Corp.*, 172 N. C. 37, 89 S. E. 1013 (1916).

Assignments of error must be based upon exceptions duly taken in apt time during the trial and preserved as required by this section and the rules of the Supreme Court. *State v. Moore*, 222 N. C. 356, 23 S. E. (2d) 31 (1942).

Same — Broadside Exceptions.—As a general rule a broadside exception to the judge's charge is inadmissible. In *favorem vitae*, in a capital case, the Attorney General will readily assent to the assertion of proper exceptions, *nunc pro tunc*. *State v. Kinsauls*, 126 N. C. 1095, 36 S. E. 31 (1900).

An "unpointed broadside" exception to the court's instructions to the jury will not be considered. Exception to the charge of the court in general terms, not sufficiently specific to call the attention of the court to the particular point claimed to be erroneous, cannot be considered by an appellate court. *Lambert v. Caronna*, 206 N. C. 616, 175 S. E. 303 (1934); *Arnold v. State Bank, etc., Co.*, 218 N. C. 433, 11 S. E. (2d) 307 (1940).

What Need Not Be Set Out.—The court will not consider any exceptions not set out in the "case on appeal," other than exception to the jurisdiction or because complaint does not state a cause of action, or to the sufficiency of an indictment. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266 (1890); *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364 (1890).

The object of the "case on appeal" is to set forth the alleged errors appealed from, and, if it sufficiently discloses these, the appeal will not be dismissed, though the record does not show formal exceptions. *Singer Mfg. Co. v. Barrett*, 95 N. C. 36 (1886).

Same—Must Point Out Error.—The Supreme Court will not consider exceptions, unless they point out in terms, or by reasonable implication, the error intended to be reviewed. So where the record showed that the appellant excepted generally to the entire charge, the exception was not considered. *Clements v. Rogers*, 95 N. C. 247 (1886).

Same—Judge May Pass on Exceptions.—When exceptions are filed the recitals contained therein are not conclusive, but it is open to the appellee to controvert them, and to have the judge pass upon their correctness in "settling the case on appeal." *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364 (1890).

The object of an assignment of error is not to create a new exception, which was not taken at the hearing, but to select from those which were taken such as the appellant then relies on after he has given more deliberate consideration to them than may have been possible during the progress of the trial or hearing. *State v. Bittings*, 206 N. C. 798, 175 S. E. 299 (1934).

What Assignments of Error Considered.—The Supreme Court will not consider any assignments of error except those appearing in the record proper and in the case settled on appeal. *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 888 (1889); *State v. Campbell*, 184 N. C. 765, 114 S. E. 927 (1922).

The assignment of error must be based upon the exception duly taken at the time it was due in the orderly course of procedure, and should coincide with and not be more extensive than the exception itself. In other words, no assignment of error will be entertained which has not for its basis an exception taken in apt time. *State v. Bittings*, 206 N. C. 798, 175 S. E. 299 (1934).

Requirements Mandatory.—The requirements that assignments of error must be based upon exceptions duly taken during

the trial to be considered on appeal are statutory, as well as mandatory under numerous decisions of the court. The Supreme Court on appeal exercises only appellate jurisdiction, and it is necessary that the errors alleged should be presented as the law directs. *State v. Bittings*, 206 N. C. 798, 175 S. E. 299 (1934).

When Assignment of Error Unnecessary.—No assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto. *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713 (1908); *North Carolina Bessemer Co. v. Piedmont Hdw. Co.*, 171 N. C. 728, 88 S. E. 867 (1916).

No Error Assigned.—Where no errors were assigned in the case, and none appeared in the record proper, but it appeared that counsel for both sides had agreed that all the papers in the cause should constitute the case on appeal, the case was remanded, in order that error might be properly assigned. *Holly v. Holly*, 94 N. C. 639 (1886).

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the Supreme Court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or counter case under this and § 1-283, and before the lapse of sufficient time for it to have been deemed approved under this section. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The Supreme Court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the Attorney General's motion to affirm is allowed. *State v. Parnell*, 214 N. C. 467, 199 S. E. 401 (1938).

IV. APPEALS FROM INSTRUCTIONS.

Exceptions to Instructions. — See note under § 1-206.

If there is an error in the instruction given, an exception thereto is valid if entered within ten days after adjournment for the term. *Williams v. Harris*, 137 N. C. 460, 49 S. E. 954 (1905). And the appel-

lant is entitled to have his exceptions to the charge included in his statement of the case on appeal. *Paul v. Burton*, 180 N. C. 45, 104 S. E. 37 (1920).

The requests to charge being "separately stated and numbered" an exception for giving them is equally specific and not "broadside" since it gives the judge and the appellee specific information of each instruction excepted to, what evidence should be sent up to throw light thereon, and what propositions of law the appellee should be prepared to discuss on appeal. *Coley v. Statesville*, 121 N. C. 301, 28 S. E. 482 (1897).

Exception Taken after Trial.—Exceptions to the judge's charge taken for the first time after the trial, but set out in the appellant's case on appeal duly tendered or served, are aptly taken under the provisions of our statute, this section and § 1-206, par. 2. *Cherry v. Atlantic Coast Line R. Co.*, 186 N. C. 263, 119 S. E. 361 (1923).

Error in Instructions Must Be Assigned.—The refusal to give instructions, if asked in writing and in apt time, like the charge as given, is deemed excepted to but none the less it is the duty of the appellant to assign such as error in making up his statement of case on appeal and if this is not done, the exception is deemed waived. *Taylor v. Plummer*, 105 N. C. 56, 11 S. E. 266 (1890).

Assignment of Error Must Be Fully Presented.—Exceptions to the charge of the court must specifically relate to the complete portions upon which the appellant bases his exceptions, with each separately numbered in relation to the distinct principle upon which exception is taken, and it must be made to appear in some appropriate and recognized way that the point is fully presented by the exception, or it will be ineffectual as being a broadside exception. *Rawls v. Lupton*, 193 N. C. 428, 137 S. E. 175 (1927).

Necessity of Case on Appeal.—The instructions cannot be reviewed in the absence of a case on appeal. *Oak Hall Clothing Co. v. Bagley*, 147 N. C. 37, 60 S. E. 648 (1908).

Where the case settled does not state that the judge charged as recited in the exceptions, the matter is not before the court on appeal. *Hart v. Cannon*, 133 N. C. 10, 45 S. E. 351 (1903).

Instruction Not in Record.—Where the instructions are not in the record, the Supreme Court cannot judicially determine whether they were as stated in exceptions thereto. *Todd v. Mackie*, 160 N. C. 352, 76 S. E. 245 (1912); *Jenkins v. Carson*, 173 N. C. 725, 92 S. E. 328 (1917).

Where the settled "case" does not show the giving of instructions requested by a party, exceptions to the giving of such instructions will not be considered. *McCord v. Southern R. Co.*, 130 N. C. 491, 41 S. E. 886 (1902).

A statement in the case on appeal that appellant's requests to charge were given "in substance" is insufficient to show what was given, and hence, where the requests are in conflict with the general charge, a new trial will be granted. *Wilson v. Winston-Salem R., etc., Co.*, 120 N. C. 531, 27 S. E. 46 (1897).

Requests for Instructions.—Where the record contains no prayers for instructions, assignments of error in refusing to give defendant's prayers will not be considered. *Davis v. Seaboard, etc., Railway*, 132 N. C. 291, 43 S. E. 840 (1903). As to requests for instructions generally, see § 1-181 and notes thereto.

Setting Out of Instructions.—Appellant is entitled to have the judge set out what he charged in lieu of the prayer, that the appellate court might see that it "fully" covered the prayer asked. *Bennett v. Telegraph Co.*, 128 N. C. 103, 38 S. E. 294 (1901).

Application of Instruction to Evidence.—An objection to a certain instruction on the ground that there was no evidence to sustain it cannot be reviewed unless all of the evidence is contained in the record. *Atwell v. Shook*, 133 N. C. 387, 45 S. E. 777 (1903).

V. SERVICE OF CASE AND COUNTERCASE.

A. Necessity and Mode of Service.

As to counter case in general, see ante, this note "General Consideration—Counter case" II.

Necessity for Serving.—A case on appeal signed only by appellant's counsel, and not showing that it had been served on appellee or his counsel, cannot be considered. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488 (1889); *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. 44 (1890); *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889 (1891).

Necessity for Serving Codefendant.—Where one appeals from so much of the judgment as is in favor of his codefendant, he must serve on such codefendant his statement of the case. *Rose v. Baker*, 99 N. C. 323, 5 S. E. 919 (1888).

Each Appellee Must Be Served.—Where the interests of different appellees are not identical, and they are represented by different counsel, only as to such appellees as have been served with the appellant's "case" in due time, will the appeal be con-

sidered. *Shober v. Wheeler*, 119 N. C. 471, 26 S. E. 26 (1896).

Service of Original Instead of Copy.—This section is complied with by a service of the original instead of a copy. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451 (1894).

Necessity for Service by Officer.—A case on appeal must be served by an officer, unless appellee's attorneys accept service otherwise. *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170 (1893).

Service by Counsel.—A service of the case on appeal by counsel is a nullity unless accepted by appellee. *Roberts v. Partidge*, 118 N. C. 355, 24 S. E. 15 (1896).

Service by Improper Officer.—The case on appeal cannot be considered when it was served by an improper officer during, and by a proper officer after the time limited for service thereof. *McNeill v. Raleigh, etc., R. Co.*, 117 N. C. 642, 23 S. E. 268 (1895), and cases there cited.

Service by Constable.—A constable is not such an officer as can serve on appellee appellant's case on appeal. *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632 (1894).

Service by Mail.—Where service of case on appeal is made by mail, on the last day on which service could have been made, instead of by officer, the failure to promptly return the case does not estop respondent to deny the legality of the service, as, if the case had been promptly returned, it would have been too late for legal service. *Smith v. Smith*, 119 N. C. 311, 25 S. E. 877 (1896).

Service Where Parties Make Common Cause.—When it appears of record that several cases on appeal to the Supreme Court were consolidated by consent and duly served in that form, and the parties made common cause in its prosecution, a motion to dismiss made by one of the appellees on the ground that appellant had not served the case on him individually will be denied. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

Service by Officer May Be Waived.—The improper service of a case on appeal is cured by the appellee's acceptance of the case and filing exceptions thereto, without objection to the mode of service, *Asheville Woodworking Co. v. Southwick*, 119 N. C. 611, 26 S. E. 253 (1896). See also *Willis v. Atlantic, etc., R. Co.*, 119 N. C. 718, 25 S. E. 790 (1896).

Leaving Copy in Office of Solicitor.—Service of statement of case on appeal may be made by a proper officer leaving a copy thereof in the office of the solicitor. *State v.*

Daniels, 231 N. C. 17, 56 S. E. (2d) 2 (1949).

Effect of Failure to Serve Countercase or Exceptions.—Where the appellant prepares his statement of case on appeal and service thereof is accepted by the appellee within the time allowed by the judge, and is certified by the clerk as a part of the record, in the absence of service of exceptions or countercase it is deemed approved by the appellee, and will stand in the Supreme Court as the case on appeal. *Texas Co. v. Beaufort Oil & Fuel Co.*, 199 N. C. 492, 154 S. E. 829 (1930).

Settlement as Curing Failure to Serve Legally.—Failure to serve appellant's case on appeal legally on appellee cannot be cured by the judge's subsequent settlement of the case. *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632 (1894).

Order Allowing Time for Serving Countercase Does Not Affect Rule Prescribing Time of Appeal.—An order of the superior court enlarging the time for serving statement of case on appeal and exceptions thereto or countercase, does not affect the rules of court prescribing the term to which the appeal must be taken and the time within which the appeal must be docketed. *State v. Moore*, 210 N. C. 459, 187 S. E. 586 (1936).

B. Time of Service.

1. In General.

Strict Compliance Required.—The statutory requirements as to making up cases on appeal must be strictly complied with except when there is an agreement to extend the time, in which case the proceeding must be taken within the time so extended. *Kerr v. Drake*, 182 N. C. 764, 108 S. E. 393 (1921).

Waiver of Time.—A motion to dismiss an appeal, because case was not served within time, was fully met by statements in supplemental transcript that appellees accepted service of notice of appeal, and agreed to extend time for serving case, and accepted service of case within extended time. *Sanford v. Junior Order of United American Mechanics*, 176 N. C. 443, 97 S. E. 384 (1918).

Where the appellant in apt time submitted the case on appeal to the appellee's counsel, who declined to sign it, but suggested that he would prepare another and get the judge to settle the case, and agreed that no advantage would be taken of the delay, but failed to prepare a case, the appellee waived the Code time and cannot take advantage of his own negligence. *Mott v. Ramsay*, 91 N. C. 249 (1884).

Where there is a controversy as to whether the exceptions were served within the time fixed or allowed, or service within such time waived, it is the duty of the trial court to find the facts, hear motions and enter appropriate orders thereon. *State v. Ray*, 206 N. C. 736, 175 S. E. 109 (1934).

Same—Promise to Accept Service.—Where appellant's counsel telegraphs, within the time appellee is required to serve his countercase, that he will, on his return home, accept service, he is estopped to claim that the countercase was not served in time. *Watkins v. Raleigh, etc., R. Co.*, 116 N. C. 961, 21 S. E. 409 (1895).

Same—Acceptance of Service Conditionally.—In accepting service of a case on appeal, after time limited by statute, it was competent for counsel to add to the indorsement the date, and that he did not waive the objection that the case was not presented in time. *Barrus v. Wilmington, etc., R. Co.*, 121 N. C. 504, 28 S. E. 187 (1897).

Same—Necessity for Waiver Appearing of Record.—Within certain limits the parties may by consent waive the time of complying with the rules for perfecting an appeal, and the Supreme Court will respect such agreements between counsel if they appear upon the record. If such agreement does not so appear, the Supreme Court will adhere to and enforce the rules prescribed in the Code. *Wade v. New Bern*, 72 N. C. 498 (1875).

Failure of Sheriff to Take Copy from Post Office.—Where appellee mailed his countercase, with fees, to the sheriff of the county in which appellant's counsel resided, and the sheriff, in due course of mail, should have received it in time to serve, but did not take it from the post office till too late, there was no laches on appellee's part. *Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 145 (1894). See also *Arrington v. Arrington*, 114 N. C. 113, 19 S. E. 105 (1894).

Agreement Misunderstood.—When counsel misunderstand terms of written agreement as to time of settling case on appeal, and there is reasonable ground for being misled thereby, and the case, as served by appellant, is lost, the case will be remanded with leave to parties to serve case and countercase de novo. *Mitchell v. Haggard*, 105 N. C. 173, 10 S. E. 856 (1890).

Illness of Counsel.—Illness of counsel is no excuse for failing to settle the case on appeal in time, where such counsel is not the only counsel for appellant, and, even if

he is, it is the duty of the party to obtain other counsel. *Tripp v. Somerset*, 182 N. C. 767, 108 S. E. 633 (1921).

Negligence of Counsel. — That appellant's failure to serve his case in time was the result of negligence of his counsel was no excuse; his remedy being an action against the counsel for damages sustained. *Cozart v. Assurance Co.*, 142 N. C. 522, 55 S. E. 411 (1906).

Stenographer Too Busy to Transcribe Note. — When counsel for appellee consented to an extension of time in which to serve case on appeal, the Supreme Court will not relieve appellant, on an excuse that stenographer was busy and could not transcribe her notes within that time, since the stenographer's notes are not the supreme authority as to what occurred at the trial. *Rogers v. Asheville*, 182 N. C. 596, 109 S. E. 865 (1921).

Illness of Reporter. — The preparation and settlement of cases on appeal belong to the parties and to the judge of the superior court under this and the following section, and while a stenographic report of the trial may be of great assistance, the stenographic notes of the reporter are not conclusive, and the inability of the reporter to transcribe his notes due to continued illness does not excuse defendant from making out and serving his statement of case on appeal within the time allowed. *State v. Wescott*, 220 N. C. 439, 17 S. E. (2d) 507 (1941).

Transcript of Evidence Not Obtained in Time. — It was negligence on part of defendant appellants, not to have had any arrangement with clerk of court to let them have copy of transcript of testimony when filed, and not to have requested him to notify them when transcript was filed, and to have failed to inquire of him thereafter. *Murphy v. Carolina Elect. Co.*, 174 N. C. 782, 93 S. E. 456 (1917).

No Certiorari until Time Is Up. — Where the parties to an action have agreed to an extension of time for service of case and counter case, that will prevent its being docketed in the time prescribed by Supreme Court Rule 5, and consequently no case has been yet settled by the trial judge, appellant's motion in the Supreme Court for a writ of certiorari will be denied. *Waller v. Dudley*, 193 N. C. 354, 137 S. E. 149 (1927).

When Appellant Guilty of Laches. — A motion for a certiorari will not be considered in the Supreme Court when it appears that appellant has been guilty of laches in respect to serving his case. *Peo-*

ples Bank, etc., Co. v. Parks, 191 N. C. 263, 131 S. E. 637 (1926).

2. Computation of Time.

The term ends when the judge leaves, and the time within which a case on appeal can be served must be computed from the day he leaves. *Delafield v. Lewis Mercer Constr. Co.*, 115 N. C. 21, 20 S. E. 167 (1894).

The time for service of a case on appeal must be computed from the day of the actual adjournment of the court, and not from the last day to which a term of court could be extended. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667 (1894).

An agreement "plaintiff may have thirty days to file his case on appeal from adjournment of court, and defendant thirty days thereafter," entitled defendant to thirty days after service of appellant's case. *Mitchell v. Haggard*, 105 N. C. 173, 10 S. E. 856 (1890).

When Appeal Taken after Adjournment. — When an appeal is taken at the trial, the case on appeal must be served within ten days from adjournment of the court, but the appellant has the right to reserve taking his appeal and enter it within ten days after adjournment of the court, in which case he has ten days after entry of the appeal to serve the case on appeal. The same applies to appeals from judgment taken out of term. *Mecke v. Valleytown Mineral Co.*, 122 N. C. 790, 29 S. E. 781 (1898).

When Judgment Becomes Final. — Until the term expires there is no final determination of the cause, so that the case on appeal need only be filed within fifteen days after the end of the term at which judgment is rendered. *Turrentine v. Richmond, etc., R. Co.*, 92 N. C. 642 (1885).

Time Computed from Judgment. — Where, on judgment rendered during the term, it was agreed that entry should be made thereafter, the appellant being allowed 90 days to complete the appeal, he was entitled to 90 days from the judgment, and not from the judgment entry. *Caldwell Land, etc., Co. v. Chester*, 170 N. C. 399, 87 S. E. 111 (1915).

Judgment Rendered during Vacation. — Where judgment is rendered during vacation by a consent of parties, the time in which to appeal is counted from the filing of the judgment in the clerk's office. *Fisher v. Fisher*, 164 N. C. 105, 80 S. E. 395 (1913); *Caldwell Land, etc., Co. v. Chester*, 170 N. C. 399, 87 S. E. 111 (1915).

First and Last Day Counted. — Under an agreement extending the time as to the

service of the case or counter case, in computing the time, the first day allowed in the time extended is counted as well as the last, allowing the full number of days agreed upon. *Board v. Orr*, 161 N. C. 218, 76 S. E. 693 (1912).

3. Effect of Failure to Serve in Time.

Appeal Dismissed. — Where the statement was not made or served in time, the appeal will be dismissed. *Twitty v. Logan*, 85 N. C. 592 (1881).

Service a Nullity. — Service after the expiration of the time granted is a nullity. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667 (1894); *Hardee v. Timberlake*, 159 N. C. 552, 75 S. E. 799 (1912). See *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445 (1905).

Service by the solicitor of exceptions and objections after the expiration of ten days renders the service of such exceptions and objections nugatory in the absence of an extension of time or waiver, and defendant's statement becomes the statement of case on appeal. *State v. Ray*, 206 N. C. 736, 715 S. E. 109 (1934).

Same—Trial Court May Strike Case. — Where a dispute arises in a trial court as to whether there has been service on appellee of appellant's case on appeal within the statutory time, and the court finds that there has not, it may direct appellant's case to be stricken from the files. *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188 (1897).

Agreement to Waive Time. — Where appellant fails to prepare a statement of the case in time, the judgment should be affirmed, unless the record shows a written agreement of counsel waiving the lapse of time, or it appears that the alleged agreement is oral and disputed, and such waiver shown by the affidavit of the appellee. *Twitty v. Logan*, 85 N. C. 592 (1881).

The statute has fixed the time for the settlement of cases on appeal, and this should be strictly observed, unless there is a mutual agreement which is either in writing or admitted. *Tripp v. Somersett*, 182 N. C. 767, 108 S. E. 633 (1921). As to sufficiency of waiver, see *Graham v. Edwards*, 114 N. C. 228, 19 S. E. 150 (1894).

Oral Agreement to Extend Time. — A parol agreement to waive an oral agreement made between the parties as to the time of serving a counter case to an appeal will not be considered by the Supreme Court if denied. *Board v. Orr*, 161 N. C. 218, 76 S. E. 693 (1912).

Where the appellant alleges in an affidavit, or duly verified statement, that there was an agreement for an extension of time and this affidavit is not disputed by the

oath of the appellee, a certiorari, upon proper application, will issue if the court deems it proper. *Justice v. Boone Fork Lumber Co.*, 181 N. C. 390, 107 S. E. 232 (1921).

When Exceptions Returned Alone. — An appellant cannot complain that his original statement of case on appeal was not returned to him within ten days, when in fact the appellee's exceptions thereto were duly filed with him within the ten days. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451 (1894).

Failure to Serve Objections in Time. — An appellant has a right to disregard an objection to the case on appeal, not served on him within ten days. *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170 (1893).

VI. RELIEF GRANTED.

When No Case on Appeal. — An appeal will not be dismissed simply because there is no case on appeal before the Supreme Court, but the judgment will be affirmed, unless error appears on the face of the record proper. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893); *Cummings v. Hoffman*, 113 N. C. 267, 18 S. E. 170 (1893).

Where there is no proper statement of case on appeal the Supreme Court can determine only whether there is error on the face of the record proper. *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

When Judgment Affirmed. — Where there is no case on appeal, and no error on the face of the record proper, the judgment will be affirmed. *State v. Foster*, 110 N. C. 510, 14 S. E. 966 (1892); *Table Rock Lumber Co. v. Branch*, 150 N. C. 110, 63 S. E. 171 (1908).

Where there is no "case agreed" on appeal and none "settled" by the judge, and no error upon the face of the record proper, the judgment must be affirmed. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

The absence of a case on appeal does not entitle appellee to a dismissal. *Rosenthal v. Roberson*, 114 N. C. 594, 19 S. E. 667 (1894); *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188 (1897).

See *Royster v. Burwell*, 90 N. C. 24 (1884), where it was held that an appeal will be dismissed where there is no statement of the case and no bond with proper justification filed within the time allowed by law.

Case Affirmed in Absence of Exception. — In the absence of exceptions in the rec-

ord as a basis for the assignments of error, appellee's motion to affirm must be allowed. *Boyer v. Jarrell*, 180 N. C. 479, 105 S. E. 9 (1920).

In Absence of Motion to Affirm. — Where a case on appeal is required, but none is filed, respondents' remedy is by motion to affirm, and not to dismiss the appeal, since, if the motion to affirm is not made, it is the duty of the court of its own motion to inspect the record proper for errors appearing on the face thereof. *Hicks v. Westbrook*, 121 N. C. 131, 28 S. E. 188 (1897); *Barrus v. Wilmington, etc., R. Co.*, 121 N. C. 504, 28 S. E. 187 (1897); *Wallace v. Salisbury*, 147 N. C. 58, 60 S. E. 713 (1908).

Appeal Not Dismissed for Absence of Statement of Facts. — An appeal will not be dismissed for failure to furnish a statement of facts signed by the judge or by both counsel, as required by rule, where everything necessary to a consideration of the case appears from the record. *Clark v. Feebles*, 120 N. C. 31, 26 S. E. 924 (1897).

Oath of Counsel.—A motion to dismiss an appeal because it does not appear that a case had been made and served as prescribed by the Code will not be granted when an opposing counsel states on oath, in this court, that all the requirements of the Code were complied with in the court below. *Kirk v. Barnhart*, 74 N. C. 653 (1876).

Appeal a Nullity.—Where a case on appeal is signed only by appellant's counsel, and it does not appear that it was served on appellee, it must be treated as a nullity; but the appeal will not be dismissed on that ground, since there may be errors on the face of the record proper. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488 (1889); *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889 (1891).

Exceptions Relating to Oral Testimony

§ 1-283. Settlement of case on appeal.—If the case on appeal is returned by the respondent with objections as prescribed, the appellant shall immediately request the judge to fix a time and place for settling the case before him. If the appellant delays longer than fifteen days after the respondent serves his counter case, or exceptions, to request the judge to settle the case on appeal, and delays for such period to mail the case and counter case or exceptions to the judge, then the exceptions filed by the respondent shall be allowed, or the counter case served by him shall constitute the case on appeal; but the time may be extended by agreement.

The judge shall forthwith notify the attorneys of the parties to appear before him for that purpose at a certain time and place, within the judicial district, which time shall not be more than twenty days from the receipt of the request. At the time and place stated, the judge shall settle and sign the case, and deliver a copy to the attorney of each party, or, if the attorneys are not present, file a copy in the

Treated as Nullity. — Where there is no case on appeal, exceptions relating to the oral testimony must be treated as a nullity, leaving only the exception to the judgment, which presents the sole question whether upon the facts found and admitted the court correctly applied the law. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948).

When New Trial Granted. — Where appellant has been guilty of no laches or fraud and the trial judge certifies, after an appeal, that his notes of the trial have been lost, that he is unwilling to trust to memory to set forth the evidence in detail, as should be done in fairness to both parties, and requests that a new trial be ordered, a new trial will be granted. *Ritter v. Grimm*, 114 N. C. 373, 19 S. E. 239 (1894); *McGowan v. Harris*, 120 N. C. 139, 26 S. E. 690 (1897).

A new trial will be granted, when, from no default of the appellant, no assignment of errors accompanies the record, and the omission can not be supplied by reason of the retirement from office of the presiding judge. *Nichols v. Dunning*, 91 N. C. 4 (1884).

But a new trial will not be granted where it appears that the papers constituting the record of a case in the court below were carried off by the judge and mislaid, and the judge has gone out of office. The appellant should first make an effort to have the papers returned to the court below, for until the filing of a transcript of the record here, the application for a new trial cannot be entertained. *Nichols v. Dunning*, 91 N. C. 4 (1884).

Certiorari to Bring Up Case for Review Denied. — *Womble v. Moncure Mill, etc., Co.*, 194 N. C. 577, 140 S. E. 230 (1927); *State v. Angel*, 194 N. C. 715, 140 S. E. 727 (1927).

office of the clerk of the court. If the judge has left the district before the notice of disagreement, he may settle the case without returning to the district.

In settling the case, the written instructions signed by the judge, and the written request for instructions signed by the counsel, and the written exceptions, are deemed conclusive as to what these instructions, requests, and exceptions were. If a copy of the case settled was delivered to the appellant, he shall within five days thereafter file it with the clerk, and if he fails to do so, the respondent may file his copy.

The judge shall settle the case on appeal within sixty days after the termination of a special term or after the courts of the districts have ended, and if the judge in the meantime has gone out of office, he shall settle the case as if he were still in office. Any judge failing to comply with this section is liable to a penalty of five hundred dollars, for the use of any person who sues for it. (C. C. P., s. 301; Code, s. 550; 1889, c. 161; Rev., s. 591; 1907, c. 312; C. S., s. 644.)

Cross Reference. — As to contents of case on appeal, see § 1-282 and annotations thereunder.

Intent of Section.—Appellants are too often prone to forget that appellees have rights. The intent of this section is to safeguard them. *Board v. Chapman*, 151 N. C. 327, 66 S. E. 221 (1909).

When Settlement Necessary.—It is necessary that the trial judge settle the case on appeal when the parties do not agree. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682 (1912).

Appellant Must Request Notice. — An appellant cannot complain that he was not notified of the time and place of settlement of the case when he did not request to be so notified. *Walker v. Scott*, 106 N. C. 56, 11 S. E. 364 (1890); *State v. Williams*, 109 N. C. 846, 13 S. E. 880 (1891).

When Appellant Fails to Request Settlement.—Upon the service of a counter-case on appeal it is the duty of the appellant to immediately request the judge to appoint a time and place to settle the case, and upon his failure to do so the case of the appellee becomes the case on appeal. *Booth v. Ratcliffe*, 107 N. C. 6, 12 S. E. 112 (1890); *Burlingham v. Canady*, 156 N. C. 177, 72 S. E. 324 (1911).

Same — Case May Be Remanded. — Where an appellant, after exceptions filed to his "case on appeal," fails to apply to the judge to settle the case, this court may consider the appellant's "statement" and the appellee's exceptions as the case on appeal, or in case of any complications, the case will be remanded in order that the judge may settle the case. *McDaniel v. Scurlock*, 115 N. C. 295, 20 S. E. 451 (1894).

Same—Judgment Affirmed. — A judgment will be affirmed, on error being assigned on the record, where the statement has been returned with objections, and appellant has failed to apply to the court below to settle the case. *Kirkman v. Dixon*,

66 N. C. 406 (1872).

Where appellant, after a failure to agree on the case on appeal, does not "immediately" request the trial judge to settle the same, but delays for several weeks, and in the meantime the judge dies, and no excuse is shown for the appellant's laches, the judgment below will be affirmed. *Heath v. Lancaster*, 116 N. C. 69, 20 S. E. 962 (1895).

Same—Excuse Shown.—Where appellant's failure to send appellee's counter-case to the judge to settle was caused by his bona fide contention that it was served too late, the case will be remanded for settlement. *Arrington v. Arrington*, 114 N. C. 115, 19 S. E. 145 (1894).

Time Limitation. — The effect of the time limitation in this section is to substitute "fifteen days" in lieu of "immediately" as the time in which appellant, after receipt of respondent's exceptions or counter-case, can make his request of the judge. *Chozen Confections v. Johnson*, 220 N. C. 432, 17 S. E. (2d) 505 (1941), citing *Chauncey v. Chauncey*, 153 N. C. 12, 68 S. E. 906 (1910).

When Statements Not Submitted to Judge.—When counsel disagree as to the statement of the case on appeal, and instead of submitting the two variant statements to the judge, they are both sent to the Supreme Court, that court will not dismiss the appeal, but will presume that the appellant agrees to the amendments contained in the case of the appellee, which will be taken as the case on appeal. *Owens v. Phelps*, 92 N. C. 231 (1885).

Appellant's Duty When Case Settled.—It is required of the appellant to redraft the case on appeal when the judge in settling it has modified his case by adopting portions of the exceptions or counter-case of the appellee, etc., and have the judge sign the case so redrafted and incorporate it in the record. *Waller v. Dudley*, 193 N. C. 749, 138 S. E. 128 (1927); *Western*

North Carolina Conference v. Talley, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

Same—When Appellant Fails in This Regard.—Where, after the court had adopted “appellant’s case as amended by appellee’s exceptions,” appellant submitted the record in that shape without redrafting and incorporating the amendments and having the same signed by the trial judge there was no “case settled.” *State v. King*, 119 N. C. 910, 26 S. E. 261 (1896); *Gaither v. Carpenter*, 143 N. C. 240, 55 S. E. 625 (1906). See also, *Western North Carolina Conference v. Talley*, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

Duty of Judge.—If counsel agree, the judge has nothing to do with making up the “case on appeal”; but when they differ, he sets a time and place for settling the case, after notice that counsel of both parties may appear before him. He then “settles” the case. In so doing he does not merely adjust the differences between the two cases, but may disregard both cases, and should do so, if he finds that the facts of the trial were different. *State v. Gooch*, 94 N. C. 982 (1886); *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196 (1906).

Upon exception, when the appellant has set out the evidence in narrative form, it is the duty of the trial judge to supervise and correct it, where correction is required. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100 (1918).

The trial judge alone has jurisdiction to modify, amend or strike out entries of appeal or extension of time for service of case on appeal and counterclaim, or motion to strike out purported case on appeal. *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407 (1947).

Where appellant serves his statement of case on appeal and appellee returns same with objections and appellant requests the judge to fix a time and place for settling the case, all within the time allowed by the court or by statute, it is the duty of the judge to settle the case on appeal and the judge may not strike appellant’s statement of case on appeal from the record upon appellee’s motion on the ground that appellant’s statement of case was insufficient to meet the requirements of this section and the rules of practice of the court. *Chozen Confections v. Johnson*, 220 N. C. 432, 17 S. E. (2d) 505 (1941).

He Cannot Settle Case by Anticipatory Order.—When oral evidence is offered, the judge cannot settle the case on appeal by an anticipatory order. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948); *Western North Carolina Conference v.*

Talley, 229 N. C. 1, 47 S. E. (2d) 467 (1948).

A recitation by the court in the entries of appeal that the evidence should be included in the case on appeal is insufficient as a settlement of case on appeal where oral evidence has been offered, since such anticipatory order cannot settle or determine what evidence was adduced at the hearing. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948).

Judge May Act Only Where Counsel Disagree.—The trial court is without authority to settle a case on appeal until and unless there is a disagreement of counsel. *Russos v. Bailey*, 228 N. C. 783, 47 S. E. (2d) 22 (1948).

Judge’s Action Conclusive.—The action of the judge in settling the case on appeal, when the parties cannot agree, is final, and cannot be reviewed by the Supreme Court. *State v. Gooch*, 94 N. C. 982 (1886).

Where the trial judge has certified that the parties have been unable to agree upon the case on appeal, and that he has settled the case on appeal, it is binding upon the Supreme Court and it will not be dismissed on the ground that no case on appeal had been stated and settled. *Thompson v. Williams*, 175 N. C. 696, 95 S. E. 100 (1918).

Statement in Record Considered True.—Any statement in the record is taken as true, and the Supreme Court will act on it, until it shall be modified in some proper way by the judge who made it. *McCoy v. Lassiter*, 94 N. C. 131 (1886).

Conflict between Record and Case.—Where the “case” on appeal prepared by counsel conflicts with a record statement of a fact found by the judge, the latter must control. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

Making and Filing Agreed Case.—The case stated by the judge, having been filed with the transcript of the record, and treated by the parties and the court as a part of it, though not so certified, cannot be displaced by another paper, purporting to be a case agreed on, signed by the counsel. *Walton v. McKesson*, 101 N. C. 428, 7 S. E. 566 (1888).

Supplemental Statement.—The appellate court will not consider assignments of error filed as a “supplemental statement,” which the court below declined to make a part of the case settled for appeal. *Rodman v. Harvey*, 102 N. C. 1, 8 S. E. 888 (1889).

Insertion of Testimony Presented at Hearing.—Where, upon the disagreement of the parties, the trial judge settles the case on appeal from order revoking sus-

pension of judgment, defendant may not complain of the insertion therein of testimony presented at the hearing. *State v. Johnson*, 230 N. C. 743, 55 S. E. (2d) 690 (1949).

Case Not Signed by Judge.—Where the case as settled by the trial judge is not signed by him, and there is no agreed statement of the case, the record contains no proper statement of the case on appeal. *Ingram v. Yadkin River Power Co.*, 181 N. C. 359, 107 S. E. 209 (1921).

Right of Judge to Make Stenographer's Notes Part of Record.—While a stenographer's notes are material for the consultation of the trial judge in making up the case, he may not send them up as a part of the record of his own motion. *Green v. Dunn*, 162 N. C. 340, 78 S. E. 211 (1913).

Failure of Judge to Settle Case.—Where appellant's timely request, for settlement of his case on appeal is denied, he is entitled to certiorari to procure settlement. *Chauncey v. Chauncey*, 153 N. C. 12, 68 S. E. 906 (1910).

The remedy for a refusal to settle a case on appeal, when judgment has been entered by consent, is a motion to set aside the judgment. *King v. Taylor*, 188 N. C. 450, 124 S. E. 751 (1924).

Under this section, the judge is given power to settle the case on appeal, and ordinarily, the only supervision which may be exercised over the judge charged with this duty is to see that it is performed. *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528 (1946).

Where the trial court at the time and place fixed for settlement of case on appeal fails to settle the case and erroneously grants appellee's motion that appellant's case should be struck from the record, the Supreme Court will grant appellant's motion for certiorari to the end that the judge, after notice, may settle the case as provided in this section, since appellant's failure to perfect the appeal is due to error of the court and not to any fault or neglect of appellant or his agent. *Chozen Confections v. Johnson*, 220 N. C. 432, 17 S. E. (2d) 505 (1941).

Failure to Send Up Correct Statement.—The failure of a judge to send up a correct statement is not sufficient ground for mandamus, but the mistake may be corrected by certiorari. *McDaniel v. King*, 89 N. C. 29 (1883).

Prerequisites for Application for Certiorari.—If for any reason the judge fails to settle the case on appeal, in time for the appeal to be docketed in the Supreme Court, the appellant must bring up the record in its imperfect state and have it

docketed, and then move for the proper orders to get the case on appeal before the Supreme Court. *Waynesville Transp. Co. v. Waynesville Lbr. Co.*, 168 N. C. 60, 84 S. E. 54 (1915).

Laches of Appellant.—An application for a certiorari to a judge to settle a case on appeal, made seven months after the appeal was taken, will be denied in the absence of an affidavit to negative laches. *Peebles v. Braswell*, 107 N. C. 68, 12 S. E. 44 (1890). A delay of two months, without excuse, is too long. *Stroud v. Western U. Tel. Co.*, 133 N. C. 253, 45 S. E. 592 (1903).

Delay of Appellee's Counsel.—Where appellant in apt time submitted the case on appeal to appellee, who declined to sign it, but suggested that he would prepare another, and get the judge to settle the case, and promised that no advantage should be taken, it was held, that he was bound by his promise. *Mott v. Ramsay*, 91 N. C. 249 (1884).

Authority of Judge after Settling Case.—Having "settled" the case, at the time and place of which counsel had notice, the judge is functus officio unless, by agreement of parties, or by certiorari from Supreme Court upon proof of his readiness to make correction, opportunity is given him of correcting such errors as have occurred by inadvertence, mistake, misapprehension and the like. *Slocumb v. Construction Co.*, 142 N. C. 349, 55 S. E. 196 (1906).

Authority of Supreme Court over Settled Case.—The Supreme Court has no power to amend a settled case. *Walker v. Scott*, 102 N. C. 487, 9 S. E. 488 (1889).

Authority of Clerk.—The clerk has no authority to find the fact of such delay as provided by this section, nor to settle the case on appeal upon the admission of such fact, it being required that the case on appeal in such instance be settled in an approved manner by agreement of counsel or by the judge. *Weaver v. Hampton*, 206 N. C. 741, 175 S. E. 110 (1934).

Modification of Settled Case.—Where it is made to appear to the Supreme Court by proper evidence, that the judge has made an omission or mistake in the settlement of the case on appeal, the Supreme Court will give him an opportunity to correct it, or to modify an inaccurate statement. *State v. Gooch*, 94 N. C. 982 (1886).

It is only when the trial judge has settled the case on appeal, in the exercise of his proper jurisdiction, that the Supreme Court, upon affidavit of error therein, and a letter from the judge that he wishes to make the correction, will give him such

opportunity. *Barber v. Justice*, 138 N. C. 20, 50 S. E. 445 (1905).

A judge cannot resettle a case on appeal; he can only correct such errors as have resulted from inadvertence, mistake, misapprehension, or the like. *Boyer v. Teague*, 106 N. C. 571, 11 S. E. 330 (1890).

Judge's Duty in Modifying Case.—Where a certiorari is ordered to correct a case on appeal, the trial judge should be given an opportunity to consider the case with reference to the corrections, and counsel should be present at the settlement thereof. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76 (1904).

Place of Settlement.—The requirement that the place appointed for the settlement of the case on appeal shall be within the district, if the judge has not left, is mandatory. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76 (1904).

An appeal will not be dismissed because the statement of the judge below was made out of the district in which the suit was tried, unless the record shows that the appellee demanded to be present and that by reason of his absence he was prejudiced, especially when the error consists in the rejection of material and competent evidence. *Whitesides v. Williams*, 66 N. C. 141 (1872).

The trial judge has no absolute authority to settle a case on appeal outside of the county or district in which it was tried, except by agreement of the parties, or when the countercase or exception had been served, respectively, within the time prescribed by the statute. *State v. Humphrey*, 186 N. C. 533, 120 S. E. 85 (1923).

Effect of Absence of Judge from District.—The absence of the judge from the district does not dispense with the requirements that he should settle the case on appeal upon disagreement of counsel. *Owens v. Phelps*, 92 N. C. 231 (1885); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407 (1947). When he has so left he may settle case upon notice without returning to the district. *Cameron v. Power Co.*, 137 N. C. 99, 49 S. E. 76 (1904).

While it is provided by this section that when the judge from whose ruling appeal is taken to Supreme Court, has left the district before notice of disagreement as to case on appeal, he may settle the case on appeal without returning to the district, he has no authority to do more, except by consent. *White Way Laundry v. Underwood*, 220 N. C. 152, 16 S. E. (2d) 703 (1941).

Case May Be Settled after Expiration of Sixty Days.—Although the failure of

the judge to settle a case on appeal within sixty days after the courts of the district closed, might subject him to a civil action for the penalty prescribed in the statute, he may, after that time, make up the case. *State v. Williams*, 109 N. C. 846, 13 S. E. 880 (1891).

Retirement of Judge.—The mere fact that a judge who tried a cause has gone out of office will not prevent his settling the case on appeal. *Ritter v. Grimm*, 114 N. C. 373, 19 S. E. 239 (1894); *Hoke v. Atlantic Greyhound Corp.*, 227 N. C. 374, 42 S. E. (2d) 407 (1947).

Where the judge who presided at a trial goes out of the office without making up a case of appeal, and the appellant is in no default, a new trial will be awarded. *Simonton v. Simonton*, 80 N. C. 7 (1879).

Illness of Judge.—Where the judge is unable to settle the case on appeal on account of sickness and appellee, to expedite matters, agrees to a new trial, and it appears that the judge will not be able to settle the case within a reasonable time, a new trial will be granted even though appellant opposes one. *Turner v. Southern Gas Improv. Co.*, 171 N. C. 750, 87 S. E. 970 (1916).

Errors and omissions in the case on appeal are corrected upon certiorari and cannot be brought upon exception taken at the time the case is settled. *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528 (1946).

Impossible to Settle Case on Appeal.—Where it appeared by affidavits that the statement of a case upon appeal had been lost by no fault of the attorneys for appellant, and that, by reason of lapse of time, the judge had forgotten the exceptions, and a new case could not be prepared, a new trial will be granted. *Isler v. Had-dock*, 72 N. C. 119 (1875); *Adams v. Reeves*, 74 N. C. 106 (1876); *Board v. Old Dominion Steamship Co.*, 98 N. C. 163, 3 S. E. 505 (1887).

Affirmance.—On appeal from conviction of a capital crime, the "case on appeal" was served on the solicitor and then filed in the Supreme Court without agreement of the solicitor or settlement by the judge, before expiration of the time allowed for filing exceptions or countercase, under this and § 1-282, and before the lapse of sufficient time for it to have been deemed approved under § 1-282. Assignments of error were attached to the "case on appeal" but were not supported by exceptions. The Supreme Court considered the "case on appeal" as "deemed approved" at the time of hearing the appeal, and considered the assignments of error, since the

• life of defendant is involved. Held: The assignments of error being without merit, and the case appearing to have been tried in strict conformity to the law appertaining to the evidence and the charge, the Attorney General's motion to affirm is allowed. *State v. Parnell*, 214 N. C. 467, 199 S. E. 601 (1938).

Applied in *Messick v. Hickory*, 211 N. C. 531, 191 S. E. 43 (1937); *State v. Can-*

non, 227 N. C. 336, 42 S. E. (2d) 343 (1947).

Cited in *State v. Angel*, 194 N. C. 715, 140 S. E. 727 (1927); *Metropolitan Life Insurance Company v. Boddie*, 196 N. C. 666, 146 S. E. 598 (1929); *Penland v. French Broad Hospital*, 199 N. C. 314, 154 S. E. 406 (1930); *McMahan v. Southern R. Co.*, 203 N. C. 805, 167 S. E. 225 (1933).

§ 1-284. Clerk to prepare transcript.—The clerk on receiving a copy of the case settled, as required in the preceding sections, shall make a copy of the judgment roll and of the case, and within twenty days transmit the same, duly certified, to the clerk of the Supreme Court. The clerk, except in cases where parties are allowed to appeal without giving an undertaking on appeal, shall not be required to make the copy of the record in the case for the Supreme Court until the appellant has given the undertaking on appeal or made the deposit required. (C. C. P., s. 302; Code, s. 551; 1889, c. 135; Rev., s. 592; C. S., s. 645.)

I. Editor's Note.

II. General Consideration.

III. Contents of Transcript.

IV. Effect on Appeal of Improper Transcript.

A. When Appeal Remanded.

B. When Appeal Dismissed.

Cross References.

As to the distinction between the record and the case on appeal and the requisites of the latter, see § 1-282 and annotations thereunder. As to the settlement of case on appeal, see § 1-283. As to the jurisdiction acquired by the Supreme Court, see §§ 7-10 et seq.

I. EDITOR'S NOTE.

The transcript of record is necessary to give the Supreme Court jurisdiction of the case. The transcript is prepared by the clerk of the court, but it is the appellant's duty to see that this is properly done. The appellant should comply with the rules of the Supreme Court in regard to the transcript. The penalty for a failure to so comply is the dismissal of the appeal. For regulations as to the arrangement of matter in the transcript, see Supreme Court Rule 19; as to printing, see Supreme Court Rules 22, 23 and 24. See also, Supreme Court Rule 5 in regard to docketing the transcript.

II. GENERAL CONSIDERATION.

Section Is Directory.—This section is directory merely, and where a party has duly perfected his appeal, and tendered the necessary fees, the clerk must forthwith transmit a transcript of the record, notwithstanding the attorneys have not settled a case. *Russell v. Davis*, 99 N. C. 115, 5 S. E. 895 (1888).

Transcript Essential.—Before the Su-

preme Court will entertain an appeal the appellant must cause to be properly filed and docketed therein a duly certified transcript of the record of the action in the court where the judgment sought to be reviewed was rendered. *State v. Preston*, 104 N. C. 733, 10 S. E. 84 (1889).

Matter Not Contained in Transcript.—The Supreme Court will not consider matters not contained in the transcript of the record on appeal. *Presnell v. Garrison*, 122 N. C. 595, 29 S. E. 839 (1898).

How Transcript Drawn.—The transcript of record on appeal should be drawn in accordance with Eaton's Forms. *State v. Butts*, 91 N. C. 524 (1884).

Original Papers.—The requirement that appellant file a transcript on appeal is not complied with by filing the original papers from the court below. *Emmons v. McKesson*, 58 N. C. 92 (1859); *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Duty to Transmit.—On the taking of an appeal, the record should be transmitted to the appellate court, and the appeal docketed, whether the statement of the case on appeal is settled or not. *Owens v. Phelps*, 91 N. C. 253 (1884).

When Appeal Not Properly Constituted.—Where an appeal is not prosecuted according to law, the appellee has the right to have a transcript of the record sent up, or a certificate of the clerk that an appeal was taken, and the case docketed and the appeal dismissed. *Cross v. Williams*, 91 N. C. 496 (1884).

Costs of Irrelevant Matter.—The costs of unnecessary and irrelevant matter, accompanying a transcript, in regard to which no exception is taken below, will be taxed against the appellant, whether he

succeeds or not. *Clayton v. Johnson*, 82 N. C. 423 (1880).

Omission of Evidence and Charge.—The evidence and the charge of the court are properly omitted from the appeal record where there is no exception involving the same. *Parker v. Southern Exp. Co.*, 132 N. C. 128, 43 S. E. 603 (1903).

Contradictory Records.—Where two transcripts are sent, contradictory to each other, and the parties do not agree which is correct, the court will direct the proper officer to attend with the original record. *State v. Reid*, 18 N. C. 377 (1835).

Failure to Tender Required Fees.—Failure of the clerk of the court below to send up a transcript after the case on appeal had been filed by appellant in his office does not excuse appellant's failure to file the transcript or the case on appeal where he does not show that he has tendered the required fees and is otherwise free from laches. *Critz v. Sparger*, 121 N. C. 283, 28 S. E. 365 (1897).

Stenographer's Notes.—A statute authorizing the employment of an official stenographer and providing that the stenographer's notes shall be typewritten, and filed with the clerk of said court, and become a part of the records, does not make those notes a part of the record proper on appeal, or of the case on appeal. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

Bill of Exceptions Unnecessary.—Errors apparent on the record may be reviewed though there is no bill of exceptions. *Cape Fear, etc., R. Co. v. Stewart*, 132 N. C. 248, 43 S. E. 638 (1903).

Demurrer.—A demurrer and the action of the court thereon are part of the record, and no bill of exceptions or case is necessary. *Chamblee v. Baker*, 95 N. C. 98 (1886).

Refusal to Sign Judgment.—The fact that a form of judgment offered by plaintiff, and which the court declined to sign, recited that plaintiff was refused leave to take a nonsuit as to certain defendants, did not make such recital a part of the record; it not being stated in the case by the judge, and nowhere appearing in the record proper. *Tennessee River Land, etc., Co. v. Butler*, 134 N. C. 50, 45 S. E. 956 (1903).

Binding Effect of Record.—The Supreme Court is bound by the record, even though it seems improbable that it can be true. *McDaniel v. King*, 89 N. C. 29 (1883); *Davidson v. Southern R. Co.*, 156 N. C. 578, 72 S. E. 622 (1911).

Amendment of Record.—The appellate

court has no authority to allow an amendment of the record. *Neal v. Cowles*, 71 N. C. 266 (1874).

Showing Additional Facts.—Where the findings of fact made the basis of a judgment denying a motion for vacation of a judgment are not in the record, the record can not be amended so as to show the facts on the request of a single party. *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320 (1895).

How Errors in Record Corrected.—Errors in the record should be corrected by means of certiorari, and not by having the amendment made by the clerk below while the transcript is on file in the appellate court. *State v. Jackson*, 112 N. C. 849, 16 S. E. 906 (1893).

Response to Issue.—An appeal will not be dismissed because the response to the issue was omitted in printing the record, where the omission was palpably a printer's error; the response being recited and printed in the judgment. *Baker v. Hobgood*, 126 N. C. 149, 35 S. E. 253 (1900).

Failure of Judge to Return Papers.—Where the trial judge takes the papers and does not return them in time for the seasonable preparation of appellant's transcript, a dismissal for failure to file will be vacated, and a certiorari issued to bring up the appeal. *Roulhac v. Miller*, 89 N. C. 190 (1883); *Seay v. Yarborough*, 94 N. C. 291 (1886).

Proper Transcript Obtainable.—An appeal will not be dismissed because the clerk of the lower court fails to transmit a proper transcript, especially when a proper transcript is obtainable before the case will stand for argument. *Bryan v. Moring*, 99 N. C. 16, 5 S. E. 739 (1888).

Cited in *Carter v. Bryant*, 199 N. C. 704, 155 S. E. 602 (1930); *Lindsay v. Brawley*, 226 N. C. 468, 38 S. E. (2d) 528 (1946).

III. CONTENTS OF TRANSCRIPT.

In General.—It must appear in the record, with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the place and time prescribed by law. In all cases, it must appear that the court had jurisdiction of the parties and of the subject matter; and so much, not more, of the record in every case, ought to be sent up as will properly present the exceptions taken, that is, as will show that they were taken, the rulings of the court to which they apply, and how they bear upon the action. The Supreme Court must be able to see that a court was held and that the action was properly constituted before it. This requirement is

not a mere matter of form that may be dispensed with. It is an essential part of procedure in every action. And however informal a record may be, these essential requisites must appear in it, else the court cannot proceed to examine the alleged errors, and decide the questions of law sought to be presented. *State v. Butts*, 91 N. C. 524 (1884).

In order for the Supreme Court to acquire jurisdiction, it must appear in the transcript of the record that an action was instituted, that proceedings were had and a judgment rendered from which an appeal could be taken, and that an appeal was taken from such judgment. *Spence v. Tapscott*, 92 N. C. 576 (1885).

And that the action was properly constituted in the court below. *Markham v. Hicks & Co.*, 90 N. C. 1 (1884).

Only enough of the record should be included to show that the case is properly constituted; and this, with the summons, pleadings, verdict, and judgment, and the case on appeal setting out so much of the proceedings at the trial as will throw light upon the exceptions taken, is all that is necessary. *Sigman v. Railroad Co.*, 135 N. C. 181, 47 S. E. 420 (1904).

Jurisdiction of Action.—It is the appeal that puts the Supreme Court in relation with the case in the court below, and that court in respect to the judgment appealed from; and the Supreme Court must be able to see, from the record, the relation thus established. *Moore v. Vanderburg*, 90 N. C. 10 (1884).

Essential Part of Record.—The transcript or record on appeal consists of the record proper (that is, summons, pleadings, and judgment) and the case on appeal, which is the exceptions taken, and such of the evidence, charge, prayers and other matters occurring at the trial as are necessary to present the matters excepted to for review. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

Taking of Appeal.—Where the record on appeal does not show that any appeal was taken, the appellate court has no jurisdiction. *Randleman Mfg. Co. v. Simmons*, 97 N. C. 89, 1 S. E. 923 (1887); *Howell v. Jones*, 109 N. C. 102, 13 S. E. 889 (1891).

Authority of Court or Judge.—Every transcript or record, to be authoritative must set forth before what person or persons the proceedings were had, or by whose authority the record was made, so that it may appear that such proceedings were not coram non iudice. *Howell v. Ray*, 83 N. C. 558 (1880).

A transcript on appeal, which contains a copy of a commission to a judge other than the one regularly designated by statute, to hold a term in the county whence it comes, and of a judgment certified to have been signed by him, does not show, "with reasonable certainty, that a court was held by a judge authorized by law to hold it, and at the time and place prescribed by law," and hence it is insufficient. *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286 (1890).

Opening of Court.—The record on appeal from the superior court of a county is fatally defective if it does not show that a superior court was opened and held for such county at all. *High v. Carolina Cent. R. Co.*, 112 N. C. 385, 17 S. E. 79 (1893).

When the transcript does not show that any court was held, or that any judge was present or gave judgment, it is so defective that the Supreme Court has no jurisdiction to act upon it. *Broadfoot v. McKeithan*, 92 N. C. 561 (1885).

Jurisdiction of Parties.—The transcript is imperfect if it does not appear therefrom, with reasonable certainty, that the court was duly held, and that it had obtained jurisdiction of the parties by service or waiver of process. *Daniel v. Rogers*, 95 N. C. 134 (1886); *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286 (1890).

Agreed Case.—Where a matter is before the Supreme Court on a case agreed, the whole of that paper is an essential part of the record. *Upper Appomattox Co. v. Buffaloe*, 121 N. C. 37, 27 S. E. 999 (1897).

Incidental Matters.—Entries of continuances, and other docket entries, interlocutory judgments, and incidental matters, such as judgments nisi against witnesses, as well as the evidence, prayers for instructions, and charge of the court, are not part of the record on appeal unless there is some exception presenting them for review. *Cressler v. Asheville*, 138 N. C. 482, 51 S. E. 53 (1905).

Second Appeal.—On second appeal, the formal recitals and the proceedings subsequent to the filing of the opinion on reversal and the exceptions only need appear in the record. *Simmons v. Allison*, 119 N. C. 556, 26 S. E. 171 (1896); *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355 (1911).

Special Orders as to Contents.—The clerk of the superior court, in sending up the transcript to the Supreme Court, should be guided solely by the order of the superior judge, and should send no other papers than those directed. *Clark v. Saco-Petee Mach. Works*, 150 N. C. 88, 63 S. E. 153 (1908).

Appeals from Interlocutory Judgments.

—Upon appeals from interlocutory judgments nothing should be certified except so much of the case below as is necessary to present the point to be reviewed. *Smith v. Collier*, 20 N. C. 60 (1838).

IV. EFFECT ON APPEAL OF IMPROPER TRANSCRIPT.**A. When Appeal Remanded.**

Imperfect Transcript.—Where the transcript of the record sent to the Supreme Court is imperfect, the appeal will not be dismissed, but the papers will be remanded, in order that a proper transcript may be sent up. *Spence v. Tapscott*, 92 N. C. 576 (1885).

Fragmentary Record.—Where the transcript did not contain the record, and it was ordered sent up on certiorari, to which the clerk returned fragmentary parts of the record, certifying that these were all he could by diligent search find, it was held, that the case must be remanded to the court below to supply the necessary record, and to make all necessary amendments thereto to perfect the appeal. *Cox v. Jones*, 110 N. C. 909, 14 S. E. 782 (1892).

Remand for Proper Transcript.—A transcript which fails to show any process, or waiver thereof, or any pleading, by which defendant was brought into court, or any agreement for the submission of the controversy without action, is insufficient, and the cause will be remanded for a proper transcript. *Jones v. Hoggard*, 107 N. C. 349, 12 S. E. 286 (1890).

Proper Proceedings Below.—An appeal will be remanded where the transcript does not show that the action was properly constituted in the court below. *Markham v. Hicks & Co.*, 90 N. C. 1 (1884).

Failure to Show Process and Pleading.—Where the transcript on appeal contains only the judgment of the court below, and shows no process or pleading, the cause will be remanded. *Rowland Bros. v. Mitchell & Son*, 90 N. C. 649 (1884); *Bethea v. Byrd*, 93 N. C. 141 (1885).

Failure to Show Contention of Parties.—Where the transcript on appeal merely shows process, a reference to arbitration, an award, exception thereto, the action of the court below thereon, and an appeal, but there are no pleadings, nor an agreed statement of facts, so that the Supreme Court can see the contention of the parties, and that the court below had jurisdiction, and where both parties are not able to file the pleadings nunc pro tunc in the Supreme Court, the cause will be remanded. *Wyatt v. Lynchburg, etc.*, R.

Co., 109 N. C. 306, 13 S. E. 779 (1891).

Failure to Show Entry of Judgment.

Where the record on appeal contains no judgment entry, the appeal or writ of error cannot be considered. *Logan v. Harris*, 90 N. C. 7 (1884); *Harvey v. Rich* (N. C.), 1 S. E. 647 (1887). See *Vann v. Winders*, 184 N. C. 629, 113 S. E. 927 (1922).

B. When Appeal Dismissed.

Absence of All Essential Matters.—An appeal will be dismissed on motion when, in the transcript sent up, there is no record of any trial, verdict or judgment, no errors assigned or statement of the case for appeal, and no appeal bond or order dispensing with one. *State v. Gaylord*, 85 N. C. 551 (1881).

Where there is no case on appeal settled by the judge or by counsel, the evidence is in the record by question and answer, there is no leave to appeal as a pauper, although the action was brought as a pauper, and no appeal bond, printed record, or printed brief for plaintiff, the appeal will be dismissed. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682 (1912).

Failure to Make Transcript.—Where appellant failed to file a transcript, but filed a certificate by the clerk that such a case had been tried, the appellee could docket and dismiss without filing additional certificate of his own. *Lindsey v. Knights of Honor*, 172 N. C. 818, 90 S. E. 1013 (1916).

Incomplete Transcript.—Where the transcript is incomplete, and not such as will enable the appellate court to examine the case on its merits, the appeal will be dismissed. *Mitchell v. Moore*, 62 N. C. 281 (1867).

On appeal to Supreme Court from order dismissing motion to have respondent subjected to contempt order for refusal to pay amounts due under prior judgment, where pleadings in action in which judgment was entered were not brought up as a part of the record and such pleadings were a necessary part of the record as determining the character of the action and jurisdiction and power of the court, motion to dismiss appeal was allowed. *Campbell v. Campbell*, 226 N. C. 653, 39 S. E. (2d) 812 (1946).

Omission of Affidavits.—Where, in settling the case on appeal, the judge directed the clerk to include certain affidavits in the transcript, after which the appellant directed the clerk to omit them, the appeal will be dismissed. *Finch v. Strickland*, 130 N. C. 44, 40 S. E. 841 (1902).

Omission of Complaint.—Appeal will be

dismissed when the consideration of the complaint is essential to determination of the question involved, it not being in the record, and appellant having made no motion for certiorari to perfect the record. *Allen v. Hammond*, 122 N. C. 754, 30 S. E. 16 (1898).

Record Consists Only of Case on Appeal.—Where the record consists only of the case on appeal, without the summons or pleadings, and no excuse is offered for the defective record, nor application for a certiorari, nor that the case be remanded,

the appeal will be dismissed. *Rice v. Guthrie*, 114 N. C. 589, 19 S. E. 636 (1894).

Failure to Pay Fees.—Where a certiorari has been granted to an appellant to complete the record by supplying material evidence that had been omitted from the case as settled, but the clerk of the superior court returns that defendant failed to perfect his appeal, or to pay fees for a transcript of the record, though demanded, the appeal will be dismissed. *Broadwell v. Ray*, 112 N. C. 191, 16 S. E. 1009 (1893).

§ 1-285. Undertaking on appeal; filing; waiver.—To render an appeal effectual for any purpose in a civil cause or special proceeding, a written undertaking must be executed on the part of the appellant, with good and sufficient surety, in such sum as may be ordered by the court, not exceeding two hundred and fifty dollars, to the effect that the appellant will pay all costs awarded against him on the appeal, and this undertaking must be filed with the clerk by whom the judgment or order was entered; or such sum as is ordered by the court must be deposited with the clerk by whom the judgment or order was entered, to abide the event of the appeal. The undertaking or deposit may be waived by a written consent on the part of the respondent. No appeal shall be dismissed in the Supreme Court on the ground that the undertaking on appeal was not filed, or deposit made, earlier, if the undertaking is filed or the deposit made before the record of the case is transmitted by the clerk of the superior court to the Supreme Court. When no undertaking on appeal has been filed, or deposit made before the record of the case is transmitted to the Supreme Court, the Supreme Court shall, upon good cause shown, on such terms as may be just, allow the appellant to file an undertaking or make the deposit. (C. C. P., ss. 303, 312; 1871-2, c. 31; Code, ss. 552, 561; 1889, c. 135, s. 2; Rev., ss. 593, 595; C. S., s. 646.)

I. General Consideration.

II. Time of Filing.

III. Waiver.

IV. Parties.

Cross References.

As to undertaking to stay execution, see §§ 1-289 et seq. See also, annotations under § 1-277. As to costs on appeal, see § 6-33 and annotations thereunder.

I. GENERAL CONSIDERATION.

Compliance with This Section or § 1-288.—As to the necessity, for those desiring an appeal, of complying with either the provisions of this section or those of § 1-288, see annotations under the latter section.

Necessity of Security to Perfect Appeal.

—An appeal bond or undertaking is necessary to the perfection of an appeal. *Hinton v. Pritchard*, 107 N. C. 128, 12 S. E. 242 (1890); *Ex parte Berry*, 107 N. C. 326, 12 S. E. 125 (1890).

The Supreme Court has no power to order a certiorari without requiring bond and security thereon. *Weber v. Taylor*, 66 N. C. 412 (1872). See also, *Walsh v. Burleson*, 154 N. C. 174, 69 S. E. 680 (1910).

Duty to Provide Bond.—Providing an

appeal bond is the duty of the appellant and not of his attorney, and when the latter is authorized to act therein, he does so as the agent of the party appealing, who is, in the relation of principal, responsible for his laches. *Lunsford v. Alexander*, 162 N. C. 528, 78 S. E. 275 (1913).

After Perfecting of Appeal.—When an appeal is perfected, the trial court has no longer any jurisdiction of the cause, and can not require an additional bond. *McRae v. Board*, 74 N. C. 415 (1876).

New Security on Second Appeal.—After a cause has been remanded because the record is imperfect, the trial court may order that an appeal bond be filed to perfect the appeal, an undertaking previously filed having been defective. *Spence v. Tapscott*, 93 N. C. 250 (1885).

Deposit as Security.—Under this section the clerk may accept a deposit of such sum of money as may be ordered by the court in lieu of an undertaking on appeal. *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362 (1890); *State v. Parish*, 151 N. C. 659, 65 S. E. 762 (1909).

No Substitute for Undertaking or Deposit.—The clerk has no authority to accept any substitute for the undertaking on

appeal, or deposit of money in lieu thereof, provided by the statute. *Eshon v. Board*, 95 N. C. 75 (1886).

Surety Misinformed Concerning Legal Effect of Bond.—One who has signed a bond given to stay execution pending an appeal can not defend on the ground that he was misinformed concerning the legal effect of the bond. *McMinn v. Patton*, 92 N. C. 371 (1885). See *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1 (1888).

Extent of Liability.—An appeal bond given under this section to secure “all costs” means the appellee’s costs. *Morris v. Morris*, 92 N. C. 142 (1885).

When there is judgment in the Supreme Court in favor of the appellant, his sureties are not liable on their undertaking for his costs, when such costs cannot be made out of the appellee, or their principal. *Clerk’s Office v. Huffsteller*, 67 N. C. 449 (1872). See also, *Kenney v. Seaboard Air Line R. Co.*, 166 N. C. 566, 82 S. E. 849 (1914).

Attempt to Cure Defects in Bond.—An uncompleted undertaking on appeal, filed on the last day on which by statute it could be filed, and then immediately withdrawn to be completed by obtaining the signatures of other parties, is ineffectual. *Smith v. Reeves*, 85 N. C. 594 (1881).

Misrecital of Judgment.—A misrecital in the appeal bond of the date of the judgment or order appealed from is not fatal error, if the judgment or order is otherwise correctly and sufficiently described. *Lackey v. Pearson*, 101 N. C. 651, 8 S. E. 121 (1888).

Effect of Failure to Give Undertaking.—In the absence of an affidavit for leave to appeal without bond, an appeal must be dismissed where a party neither gives the appeal bond nor makes a deposit in lieu thereof. *Lunsford v. Alexander*, 162 N. C. 528, 78 S. E. 275 (1913).

Giving bond on appeal or the granting leave to appeal without bond are jurisdictional, and, unless the statute is complied with, the appeal will be dismissed. *Smith v. Reeves*, 85 N. C. 594 (1881); *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762 (1909). See also, *Brown v. Kress & Co.*, 207 N. C. 722, 178 S. E. 248 (1935).

Effect of Failure to File Bond within Statutory Time.—Appeals will be dismissed if the bond on appeal is not given within the time required by law. *Applewhite v. Fort*, 85 N. C. 596 (1881); *McCanless v. Reynolds*, 90 N. C. 648 (1884).

II. TIME OF FILING.

Presumption of Timely Filing.—Where an appeal bond has no date it will be presumed to have been filed on the day it is

justified. *Boyden v. Williams*, 92 N. C. 546 (1885).

Computation of Time.—The ten days within which the undertaking on appeal must be filed are not counted from the day on which the judgment is rendered, but from that on which the court adjourned. *Chamblee v. Baker*, 95 N. C. 98 (1886).

Ten Days after Rendition of Judgment.—The undertaking on appeal must be filed within ten days after the rendition of the judgment. *Wade v. New Bern*, 72 N. C. 498 (1875); *Sever v. McLaughlin*, 82 N. C. 332 (1880); *Boyden v. Williams*, 92 N. C. 546 (1885).

Ten Days after Trial.—Where an undertaking on appeal recited that the judgment appealed from was rendered on the first day of the term (following the fiction that all the business of a term is done on its first day), but it appeared that the trial took place during the second week, and the justification was dated within ten days after the trial, it was held that the bond was filed in time. *Worthy v. Brady*, 91 N. C. 265 (1884).

Day Facts Were Found.—Where the record does not show on what day the judgment appealed from was rendered, it having been rendered out of term by consent, an appeal bond filed on the same day that the facts were found, the case on appeal filed, and the amount of the bond fixed, is given in time. *Gwathney v. Savage*, 101 N. C. 103, 7 S. E. 661 (1888).

Delay in Filing Caused by Clerk.—An undertaking filed within a few days after the time agreed on will be treated as valid where it appears that the appeal was in good faith, that appellant made diligent effort from time to time to give the undertaking, but was prevented by the absence of the clerk, and that the delay was without prejudice to appellee. *Harrison v. Hoff*, 102 N. C. 25, 8 S. E. 887 (1889); *Jones v. Wilson*, 103 N. C. 13, 9 S. E. 580 (1889).

Before Transmission of Record to Appellate Court.—An appeal bond, filed and sent up with the record, is in time, provided it should be given before the record of the case is transmitted to the Supreme Court. *Howerton v. Sexton*, 104 N. C. 75, 10 S. E. 148 (1889); *In re Snow’s Will*, 128 N. C. 100, 38 S. E. 295 (1901).

Reasonable Excuse Must Be Shown.—While the Supreme Court may allow an undertaking on appeal to be filed in that court, the power thus conferred will not be exercised unless the appellant shows a reasonable excuse for his failure to give the undertaking within the time prescribed by this section. *Harrison v. Hoff*, 102 N. C.

25, 8 S. E. 887 (1889); *Jones v. Asheville*, 114 N. C. 620, 19 S. E. 631 (1894).

The same cause that excused failure to perfect the appeal excuses the failure to file appeal bond. *Graves v. Hines*, 106 N. C. 323, 11 S. E. 362 (1890).

Before or after Motion to Dismiss.—The Supreme Court may allow an appellant to substitute a sufficient for an insufficient appeal bond, after a motion by the appellant to dismiss the appeal for such defect. *Robeson v. Lewis*, 64 N. C. 734 (1870).

III. WAIVER.

Waiver as to Costs.—Parties to a suit have no right to waive an appeal bond so far as costs are concerned. *Cape Fear, etc., Nav. Co. v. Costen*, 63 N. C. 264 (1869).

Waiver of Timely Filing.—The necessity of filing the appeal bond within the prescribed time may be waived by agreement. *Wade v. New Bern*, 72 N. C. 498 (1875).

Same—Must Appear of Record.—No agreement of parties waiving the necessity of timely filing of appeal bond will be respected by the appellate court unless it appears on the record. *Wade v. New Bern*, 72 N. C. 498 (1875).

Same—Verbal Agreements Disregarded.—Verbal agreements to waive the statutory requirements will not be regarded. *McCanless v. Reynolds*, 91 N. C. 244 (1884). See also, *Skinner v. Bland*, 91 N. C. 1 (1884).

Same—Delay in Making Objection.—Where the absence of a bond on appeal is not objected to for two years, and in the meantime the cause has been continued, and witnesses summoned, respondent will be deemed to have waived objection to the defect. *Arrington v. Smith*, 26 N. C. 59 (1843).

Same—By Failure to Object.—Where the appellant is in court and the bond is offered and accepted without objection, and this is noted in the record, this is construed to be a sufficient waiver in writing under the statute. *Howerton v. Henderson*, 86 N. C. 718 (1882); *Harshaw v. McDowell*, 89 N. C. 181 (1883).

Same—By Proceeding with Trial.—If the appellee let the cause go to the jury in the appellate court, he thereby waives ob-

jections to defects in the appeal bond, but the court, in its discretion, may require further security. *Ferguson v. M'Carter*, 4 N. C. 544 (1817).

IV. PARTIES.

Obligee.—An undertaking on appeal, though not so expressed, is, by implication, taken to be made with the appellee. *Clerk's Office v. Huffsteller*, 67 N. C. 449 (1872).

Omission of Obligor's Name.—The omission of the name of an obligor in the body of an appeal bond or undertaking is no substantial objection to it. *Chamblee v. Baker*, 95 N. C. 98 (1886).

Operates Favorably to Respondent.—The undertaking for costs and damages on appeal, operates in favor of the respondent, although he is not required to be named in it as a party. *Clerk's Office v. Huffsteller*, 67 N. C. 449 (1872).

Made Payable to State.—An appeal bond made payable to the State is void. The State will not become a trustee for a citizen in the pursuit of his personal rights, except in cases specially provided by law—as guardian bonds, etc. *Dorsey v. Raleigh, etc., R. Co.*, 91 N. C. 201 (1884).

Necessity for Obligor's Signature.—The signature of the appellant is not essential to a bond or undertaking on appeal or error. *Cohoon v. Morton*, 49 N. C. 256 (1857); *Walker v. Williams*, 88 N. C. 7 (1883).

Party Acting as Surety.—An undertaking on appeal may be good although signed by one of the parties defendant as surety, if the record shows that he is not affected by the appeal. *Syme v. Badger*, 91 N. C. 272 (1884).

Opposite Party.—A plaintiff can not be principal obligor on a bond where an appeal is taken by defendant. *Speed v. Harris*, 4 N. C. 317 (1816).

Signature by Mark.—An appeal bond may be executed by the surety making his mark. *State v. Byrd*, 93 N. C. 624 (1885).

Name Signed by Magistrate.—A magistrate, who has rendered a judgment on a warrant, is not a fit person to sign the name of another as obligor on the appeal bond. *Weaver v. Parish*, 8 N. C. 319 (1821).

§ 1-286. **Justification of sureties.**—The undertaking on appeal must be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. The respondent may except to the sufficiency of the sureties within ten days after the notice of appeal; and unless they or other sureties justify within ten days thereafter, the appeal shall be regarded as if no undertaking had been given. The justification must be upon a notice of not less than

five days. (C. C. P., s. 310; Code, s. 560; 1887, c. 121; Rev., s. 594; C. S., s. 647.)

Purpose.—The purpose of this section is to protect the appellee in respect to costs. He has a substantial interest in the undertaking, upon appeal, and it cannot be dispensed with without his consent in writing, unless a sum of money be deposited with the clerk by order of the court in lieu of the undertaking. The language is plain and mandatory, and very little is left to construction. The appellee has the substantial right under the statute to insist upon a substantial compliance with it in all respects. *State v. Wagner*, 91 N. C. 521 (1884).

Necessity of Justification.—An appeal bond is of no effect unless it be accompanied by the affidavit of one of the sureties that he is worth double the amount specified therein. *Greenlee v. McCelvey*, 92 N. C. 530 (1885); *Singer Mfg. Co. v. Barrett*, 94 N. C. 219 (1886).

Dismissal of Appeal.—An appeal will be dismissed when the surety on the undertaking does not justify in double the amount thereof. *McCanless v. Reynolds*, 91 N. C. 244 (1884); *State v. Roper*, 94 N. C. 859 (1886).

Justification Must Be by Surety.—The justification of a surety to an undertaking on appeal, must be made by the surety himself. The affidavit of another as to the pecuniary reputation of the surety will not answer the demands of the law. *Morphew v. Tatem*, 89 N. C. 183 (1883).

Failure to Show Proper Amount.—A justification of two sureties that each is worth the amount of the bond, is not a sufficient compliance with this section. *Anthony v. Carter*, 91 N. C. 229 (1884).

Need Not Mention Liabilities.—The justification of a surety on an appeal bond is sufficient under this section where it states that the surety is worth double the amount therein specified, without stating that it is above his liabilities and home-stead and exemption allowed by law. *Witt v. Long*, 93 N. C. 388 (1885).

Justification Held Insufficient.—Where the approval of an unjustified bond is the act of the clerk, there is no waiver, unless the appellee is present, or afterwards assents. *Gruber v. Washington, etc., R. Co.*, 92 N. C. 1 (1885).

Indorsement of Clerk Not a Substitute for Justification.—An indorsement on the back of an appeal bond by the clerk, "The within bond is good," is not a sufficient compliance within the statutory requirement that the bond must be accompanied

by an affidavit of the sureties showing their justification. *Bryson v. Lucas*, 85 N. C. 397 (1881).

Justification May Be Waived.—While this section seems to require that bond shall be justified in the first instance by at least one of the sureties swearing that he is worth double the amount therein specified, a failure to do this does not necessarily avoid the bond. It is a defect which may be cured by waiver. *McMillan v. Baker*, 92 N. C. 111 (1885); *Becton v. Dunn*, 137 N. C. 559, 50 S. E. 289 (1905).

Necessity of Written Waiver.—Where the record fails to show that appellee in writing waived an appeal bond, the appeal will be dismissed if such bond is not justified. *Lytle v. Lytle*, 90 N. C. 647 (1884).

When Waiver Sufficient.—Where the record stated, "Plaintiff appealed. Notice waived. Bond filed," which was signed by the judge, it is a sufficient waiver in writing of a formal justification of the bond, and the appeal will not be dismissed because the sureties do not justify in double the amount. *Singer Mfg. Co. v. Barrett*, 94 N. C. 219 (1886).

An acceptance by the appellee of the surety tendered on an appeal bond, constitutes a waiver of the justification required by statute. *Greenlee v. McCelvey*, 92 N. C. 530 (1885).

Same — Appellee Present When Bond Taken.—When it appears by the case settled that the appellees were present when the appeal bond was taken, and made no objection to the sufficiency of the sureties, such objection will be deemed waived. *Gruber v. Washington, etc., R. Co.*, 92 N. C. 1 (1885); *Moring v. Little*, 95 N. C. 87 (1886).

Same—Acceptance in Open Court.—The acceptance in court of an appeal bond not justified is a waiver of justification, and a subsequent motion to dismiss the appeal on the ground that the bond is not justified can not be sustained. *Jones v. Potter*, 89 N. C. 220 (1883).

Same—Signing Case on Appeal.—An objection to an appeal bond on the ground that the sureties failed to justify is not waived when the counsel for the adverse party agrees to and signs the statement of the case on appeal. *McMillan v. Nye*, 90 N. C. 11 (1884), distinguishing *Howerton v. Henderson*, 86 N. C. 718 (1882), distinguished in *Gruber v. Washington, etc., R. Co.*, 92 N. C. 1 (1885).

Same—Entry on Record.—An entry on

the record, "bond fixed at \$25; filed and approved," was held a sufficient waiver in writing. *Hancock v. Bramlett*, 85 N. C.

393 (1881). See also, *State v. Wagner*, 91 N. C. 521 (1884).

§ 1-287. Notice of motion to dismiss; new bond or deposit.—Before the appellee is permitted to move to dismiss an appeal, either for any irregularity in the undertaking on appeal or for failure of sureties to justify, he must give written notice to the appellant of such motion at least twenty days before the district from which the cause is sent up is called, and this notice must state the grounds upon which the motion is based. At least five days before the district from which the cause is sent up is called, the appellant may file with the clerk of the Supreme Court a new bond justified according to law and containing a penalty the same in amount as the penalty in the original bond, or he may deposit with the said clerk a sum of money equal to the penalty in the original bond. When a new bond has been thus filed or deposit made the cause stands as if the bond had been duly given or deposit duly made in the court below. (1887, c. 121; Rev., s. 596; C. S., s. 648.)

Cross Reference.—As to the time of the motion to dismiss, see Supreme Court Rule 16.

Section Is Mandatory. — A motion to dismiss because of imperfections in the undertaking on appeal, will not be entertained, unless the provisions of this section are complied with. *Jones v. Slaughter*, 96 N. C. 541, 2 S. E. 681 (1887).

Section Does Not Apply When No Bond Filed.—No notice is required to be given of a motion to dismiss an appeal when no appeal bond has been filed; the twenty days required for a motion to dismiss by the section applies only when there is an irregularity in the bond or in the justification of sureties. *Jones v. Asheville*, 114 N. C. 620, 19 S. E. 631 (1894).

Nor When Not Filed in Time.—A failure to execute and file an undertaking on appeal within the time prescribed by law is not a mere "irregularity," and hence a motion to dismiss the appeal for such failure does not require the twenty days' notice, as provided by this section. *Bowen v. Fox*, 98 N. C. 396, 4 S. E. 200 (1887).

Necessity of Written Notice. — A mo-

tion to dismiss appeal for insufficient bond will not be entertained, unless after written notice, as required by this section. *McGee v. Fox*, 107 N. C. 766, 12 S. E. 369 (1890).

At Hearing of Motion.—Though a void bond has been given on appeal from the county to the superior court, the appeal should not be dismissed where the appellant offers to file a good bond at the hearing of the motion to dismiss. *March v. Griffith*, 53 N. C. 264 (1860).

Failure to File New Bond.—Where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. *Goodman v. Call*, 185 N. C. 607, 116 S. E. 724 (1923).

Effect of Appearance.—The failure to state, from inadvertence, that counsel appeared specially in the court above to move to dismiss the appeal for failure to docket fit in time, should not be deemed a waiver of the grounds of the motion. *Suiter v. Brittle*, 90 N. C. 19 (1884).

§ 1-288. Appeals in forma pauperis; clerk's fees.—When any party to a civil action tried and determined in the superior court at the time of trial desires an appeal from the judgment rendered in the action to the Supreme Court, and is unable, by reason of his poverty, to make the deposit or to give the security required by law for said appeal, it shall be the duty of the judge or clerk of said superior court to make an order allowing said party to appeal from the judgment to the Supreme Court as in other cases of appeal, without giving security therefor. The party desiring to appeal from the judgment shall, during the term at which the judgment was rendered or within ten days from the expiration by law of the term, make affidavit that he is unable by reason of his poverty to give the security required by law, and that he is advised by a practicing attorney that there is error in matter of law in the decision of the superior court in said action. The affidavit must be accompanied by a written statement from a practicing attorney of said superior court that he has examined the affiant's case, and is of opinion that the decision of the superior court, in said action, is contrary to law. The request for ap-

peal shall be passed upon and granted or denied by the clerk within ten days from the expiration by law of said term of court. The clerk of the superior court cannot demand his fees for the transcript of the record for the Supreme Court of a party appealing in forma pauperis, in case such appellant furnishes to the clerk two true and correctly typewritten copies of such records on appeal. Nothing contained in this section deprives the clerk of the superior court of his right to demand his fees for his certificate and seal as now allowed by law in such cases. Provided, that where the judge of the superior court or the clerk of the superior court has made an order allowing the appellant to appeal as a pauper and the appeal has been filed in the Supreme Court, and an error or omission has been made in the affidavit or certificate of counsel, and the error is called to the attention of the court before the hearing of the argument of the case, the court shall permit an amended affidavit or certificate to be filed correcting the error or omission. (1873-4, c. 60; Code, s. 553; 1889, c. 161; Rev., s. 597; 1907, c. 878; C. S., s. 649; 1937, c. 89; 1951, c. 837, s. 7.)

Cross Reference.—As to appeal in forma pauperis in criminal actions, see § 15-181.

Editor's Note. — Appeals in forma pauperis in civil cases were first provided for in ch. 60, Laws 1873-74, under which they could only be allowed by the judge during the term. But in 1889, Laws 1889, ch. 161, this section was amended and appeals in forma pauperis were allowed by the judge either at term or on affidavit filed within five days after court, or the clerk might pass upon and allow such application during term, or within ten days after its expiration.

Formerly the clerk of the superior court was not bound to render his services gratuitously but in 1907, Acts 1907, ch. 878, this section was again amended and the clerk of the superior court is not now allowed to demand his fees for making the transcript in appeals in forma pauperis.

The 1937 amendment added the proviso at the end of this section. As to effect of amendment, see 15 N. C. Law Rev. 332.

The 1951 amendment rewrote the second and fourth sentences.

Supreme Court Rule 22 offers appellants in forma pauperis the option of filing nine typewritten copies of the record, rather than having the same printed.

Purpose of Section.—The statutory provision for appeals in forma pauperis is to preserve the right of appeal to those who, by reason of their poverty, are unable to make a reasonable deposit or give security for the payment of costs incurred on appeal to the Supreme Court. It is not to be used as a subterfuge to escape payment of costs which otherwise might be taxed against the appellant. *Perry v. Perry*, 230 N. C. 515, 53 S. E. (2d) 457 (1949).

Section Mandatory. — Where a party to a civil action which has been tried in the superior court, desires to appeal from a judgment rendered at such trial to this court, without giving security as required

by this section, he must comply strictly with the provisions of this section, which are mandatory. *McIntire v. McIntire*, 203 N. C. 631, 166 S. E. 732 (1932).

Requirements of this section, relating to appeals to Supreme Court from the superior court in a civil action, without making the deposit or giving the security required by law for such appeals, are mandatory and jurisdictional, and unless this section is complied with, the Supreme Court will take no cognizance of the case, except to dismiss it. *Clark v. Clark*, 225 N. C. 687, 36 S. E. (2d) 261 (1945).

The requirements of this section, allowing appeals in forma pauperis, are mandatory, not directory, and a failure to comply with the requirements deprives the Supreme Court of any appellate jurisdiction. *Williams v. Tillman*, 229 N. C. 434, 50 S. E. (2d) 33 (1948).

Necessity of Affidavit. — In pauper appeals it is required by this section that appellant file the statutory affidavit in order to confer jurisdiction on the Supreme Court, and a provision in the judgment allowing plaintiff to appeal in forma pauperis does not relieve plaintiff of the necessity of filing the jurisdictional affidavit or the printed or mimeographed copies of the brief required by Rule 22 of the Supreme Court. *Brown v. Kress & Co.*, 207 N. C. 722, 178 S. E. 248 (1935).

Where the order allowing the appeal in forma pauperis is not supported by the statutory affidavit, there can be no authority for granting the appeal in forma pauperis, and the Supreme Court acquires no jurisdiction and can take no cognizance of the case except to dismiss it from the docket. *Williams v. Tillman*, 229 N. C. 434, 50 S. E. (2d) 33 (1948). See also *Gilmore v. Imperial Life Ins. Co.*, 214 N. C. 674, 200 S. E. 407 (1939).

Statement of Attorney.—On an appeal in

forma pauperis, an affidavit not containing the averment that appellant "is advised by counsel learned in the law that there is error in matter of law in the decision of the superior court," is fatally defective. *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711 (1893); *Honeycutt v. Watkins*, 151 N. C. 652, 65 S. E. 762 (1909). See also, *Hanna v. Timberlake*, 203 N. C. 556, 166 S. E. 733 (1932); *Lupton v. Hawkins*, 210 N. C. 658, 188 S. E. 110 (1936). It should be noted that these cases were decided prior to the 1951 amendment, which substituted the words "a practicing attorney" in lieu of the words "counsel learned in the law" in the above quoted portion of this section.—Ed. Note.

The amendment permitting corrections of errors or omissions in the affidavit or certificate of counsel at any time prior to the hearing of the argument of the case on appeal applies only to this section pertaining to appeals in civil actions. *State v. Mitchell*, 221 N. C. 460, 20 S. E. (2d) 292 (1942).

The proviso at the end of this section does not permit the filing of an affidavit of the party appealing or certificate of counsel when no such certificate or affidavit was filed within the time prescribed by this section. *Clark v. Clark*, 225 N. C. 687, 36 S. E. (2d) 261 (1945).

An affidavit which is defective in that it fails to aver that appellant is advised that there is error of law in the judgment may not be cured by an additional affidavit filed after the expiration of time prescribed by the statute, or one filed after the date for docketing the appeal. *Berwer v. Union Cent. Life Ins. Co.*, 210 N. C. 814, 188 S. E. 618 (1936).

Order Allowing Appeal.—To appeal as a pauper, the statutory leave must be obtained, and the mere leave to sue as a pauper is not sufficient. *Queen v. Snowbird Valley R. Co.*, 161 N. C. 217, 76 S. E. 682 (1912).

Order Must Be Obtained within Statutory Time.—An order allowing an appeal in forma pauperis entered by the clerk after the expiration of the statutory time is beyond the clerk's authority and the Supreme Court is without jurisdiction to entertain the appeal and it will be dismissed, the provisions of this section being mandatory and not directory. *Powell v. Moore*,

204 N. C. 654, 169 S. E. 281 (1933); *Franklin v. Gentry*, 222 N. C. 41, 21 S. E. (2d) 828 (1942).

Applies to Administrators, etc.—Administrators and all other parties to the record, prosecuting or defending, are permitted to appeal to the Supreme Court without giving security therefor. *Mason v. Osgood*, 71 N. C. 212 (1874).

Intention to Appeal Need Not Be Intimated at Trial.—The appellant in such case need not intimate his desire to appeal at the time of trial, his timely compliance with the statute being sufficient indication of his desire at the time of trial. *Russell v. Hearne*, 113 N. C. 361, 18 S. E. 711 (1893).

Other Proceedings Not Stayed.—An order allowing a party to appeal in forma pauperis dispenses with the security for costs, but does not operate to stay further proceedings upon the judgment appealed from. *Leach v. Jones*, 86 N. C. 404 (1882).

Stenographer's Note.—In view of § 1-282, requiring appellant to prepare a concise statement of the case on appeal, it is improper to submit as a prepared case the stenographer's notes in the form of question and answer, though plaintiff sued in forma pauperis. *Skipper v. Kingsdale Lumber Co.*, 158 N. C. 322, 74 S. E. 342 (1912).

Appellant Must Pay for Transcript.—An order granted under this section permitting an appeal without giving bond or making a deposit, does not relieve the appellant in civil actions from the payment of cost of transcript in advance. *Martin v. Chasteen*, 75 N. C. 96 (1876); *Speller v. Speller*, 119 N. C. 356, 26 S. E. 160 (1896).

Right of Party to Appeal in Forma Pauperis.—On the hearing of an order to show cause why defendant should not be attached for contempt for willful failure to comply with an order that he make monthly subsistence payments to his wife, the court entered an order upon its finding that defendant was earning \$300.00 per month, and permitted defendant to appeal from the order in forma pauperis. The cause was remanded to the end that the court may determine whether defendant was in fact entitled to appeal in forma pauperis. *Perry v. Perry*, 230 N. C. 515, 53 S. E. (2d) 457 (1949).

§ 1-289. Undertaking to stay execution on money judgment.—If the appeal is from a judgment directing the payment of money, it does not stay the execution of the judgment unless a written undertaking is executed on the part of the appellant, by one or more sureties, to the effect that if the judgment appealed from, or any part thereof, is affirmed, or the appeal is dismissed, the ap-

pellant will pay the amount directed to be paid by the judgment, or the part of such amount as to which the judgment shall be affirmed, if affirmed only in part, and all damages which shall be awarded against the appellant upon the appeal. Whenever it is satisfactorily made to appear to the court that since the execution of the undertaking the sureties have become insolvent, the court may, by rule or order, require the appellant to execute, file and serve a new undertaking, as above. In case of neglect to execute such undertaking within twenty days after the service of a copy of the rule or order requiring it, the appeal may, on motion to the court, be dismissed with costs. Whenever it is necessary for a party to an action or proceeding to give a bond or an undertaking with surety or sureties, he may, in lieu thereof, deposit with the officer into court money to the amount of the bond or undertaking to be given. The court in which the action or proceeding is pending may direct what disposition shall be made of such money pending the action or proceeding. In a case where, by this section, the money is to be deposited with an officer, a judge of the court, upon the application of either party, may, at any time before the deposit is made, order the money deposited in court instead of with the officer; and a deposit made pursuant to such order is of the same effect as if made with the officer. The perfecting of an appeal by giving the undertaking mentioned in this section stays proceedings in the court below upon the judgment appealed from; except when the sale of perishable property is directed, the court below may order the property to be sold and the proceeds thereof to be deposited or invested, to abide the judgment of the appellate court. (C. C. P., ss. 304, 311; Code, s. 554; Rev., s. 598; C. S., s. 650.)

Undertaking Not Necessary to Appeal.—But security for payment of the judgment, in addition to the security for costs, is not necessary to bring up the appeal if a stay of execution is not desired. *Bledsoe v. Nixon*, 69 N. C. 82 (1873).

No Particular Form Required.—No particular form is required for an undertaking to stay execution upon appeal; and if words are inserted in such undertaking repugnant to its intent, they will be rejected as surplusage. *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1 (1888).

Bond Given to Mortgagee.—This section does not apply to a bond by a mortgagor to the mortgagee stipulating that the mortgagor will not commit waste on the premises, and, if the judgment shall be affirmed, that he will pay for the use and occupation. *Alderman v. Rivenbark*, 96 N. C. 134, 1 S. E. 644 (1887).

Security Operates as Stay.—Upon compliance with this section there will be a stay of execution as to parties appealing from a final judgment. *Bryan v. Hubbs*, 69 N. C. 423 (1873); *Smith v. Miller*, 155 N. C. 247, 71 S. E. 355 (1911).

Where First Bond Insufficient.—The trial court's order that appellant file supersedeas bond with another surety upon its finding that the surety upon the first bond was not sufficient is not error, as such matter rests within the sound discretion of the court. *Love v. Queen City Lines*, 206 N. C. 575, 174 S. E. 514 (1934).

When Surety Bound.—Where the trial judge, upon sufficient findings, has prop-

erly adjudged that the defendant has abandoned his appeal to the Supreme Court, it is not required that the appeal should have been docketed and dismissed in the Supreme Court in order to bind the surety on his bond given to stay execution in accordance with the terms of this section. *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303 (1922).

Judgment against Surety.—Where an undertaking to stay execution on appeal has been given by the defendant against whom judgment has been rendered, and pending appeal he has been adjudicated a bankrupt in the federal court, an order properly entered dismissing the appeal with judgment against the surety on the undertaking rendered in the State court before the bankrupt's discharge, without suggestion of the pendency of the bankrupt proceedings, the judgment against the surety becomes fixed and absolute. *Laffoon v. Kerner*, 138 N. C. 281, 50 S. E. 654 (1905), cited and distinguished, *Murray v. Bass*, 184 N. C. 318, 114 S. E. 303 (1922).

Effect of Appeal.—Where from an order of the superior court requiring plaintiff to pay alimony pendente lite and counsel fees, plaintiff appeals to the Supreme Court and the cause is thereto removed, the superior court is thereafter without jurisdiction to order the sale of plaintiff's land to satisfy the judgment or the execution of a stay bond. *Vaughan v. Vaughan*, 211 N. C. 354, 190 S. E. 492 (1937).

Applied in *Hamilton v. Southern R. Co.*, 203 N. C. 136, 164 S. E. 834 (1932); *Ham-*

ilton v. Southern R. Co., 203 N. C. 468, 166 S. E. 392 (1932).

Cited in *Hinson v. Adrian*, 91 N. C. 372 (1884); *Adams v. Guy*, 106 N. C. 275, 278,

11 S. E. 535 (1890); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934); *Current v. Church*, 207 N. C. 658, 178 S. E. 82 (1935).

§ 1-290. **How judgment for personal property stayed.**—If the judgment appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment is not stayed by appeal, unless the things required to be assigned or delivered are brought into court, or placed in the custody of such officer or receiver as the court appoints, or unless an undertaking be entered into on the part of the appellant, by at least two sureties, and in such amount as the court or a judge thereof directs, to the effect that the appellant will obey the order of the appellate court upon the appeal. (C. C. P., s. 305; Code, s. 555; Rev., s. 599; C. S., s. 651.)

Cited in *Adams v. Guy*, 106 N. C. 275, 11 S. E. 535 (1890); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

§ 1-291. **How judgment directing conveyance stayed.**—If the judgment appealed from directs the execution of a conveyance or other instrument, the execution of the judgment is not stayed by the appeal until the instrument has been executed and deposited with the clerk with whom the judgment is entered, to abide the judgment of the appellate court. (C. C. P., s. 306; Code, s. 556; Rev., s. 600; C. S., s. 652.)

Duty of Clerk. — After the undertaking has been given it is the duty of the clerk to give notice thereof to the sheriff, in order that any execution which may have issued may be superseded. *Bryan v. Hubbs*, 69

N. C. 423 (1873).

Cited in *Hancock v. Bramlett*, 85 N. C. 393 (1881); *Hannon v. Commissioners*, 89 N. C. 123 (1883); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

§ 1-292. **How judgment for real property stayed.**—If the judgment appealed from directs the sale or delivery of possession of real property, the execution is not stayed, unless a bond is executed on the part of the appellant, with one or more sureties, to the effect that, during his possession of such property, he will not commit, or suffer to be committed, any waste thereon, and that if the judgment is affirmed he will pay the value of the use and occupation of the property, from the time of the appeal until the delivery of possession thereof pursuant to the judgment, not exceeding a sum to be fixed by a judge of the court by which judgment was rendered and which must be specified in the undertaking. When the judgment is for the sale of mortgaged premises, and the payment of a deficiency arising upon the sale, the undertaking must also provide for the payment of this deficiency. (C. C. P., s. 307; Code, s. 557; Rev., s. 601; C. S., s. 653.)

Effect on Purchaser at Sale.—Where an appeal is taken from the order of confirmation of a sale under decree of a foreclosure of a deed of trust and an appeal bond is filed to stay execution, under this section and §§ 1-293, 1-294, and the judgment of the lower court is reversed on appeal, the purchaser at the sale may be held liable to

the mortgagor for the former's taking of immediate possession of the property after the confirmation appealed from. *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 683 (1933).

Cited in *Cox v. Hamilton*, 69 N. C. 30 (1873); *Hancock v. Bramlett*, 85 N. C. 393 (1881); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

§ 1-293. **Docket entry of stay.**—When an appeal from a judgment is pending, and the undertaking requisite to stay execution on the judgment has been given, and the appeal perfected, the court in which the judgment was recovered may, on special motion, after notice to the person owning the judgment, on such terms as it sees fit, direct an entry to be made by the clerk on the docket of such judgment, that the same is secured on appeal, and no execution

can issue upon such judgment during the pendency of the appeal. (C. C. P., s. 254; Code, s. 435; 1887, c. 192; Rev., s. 621; C. S., s. 654.)

Cited in *Alderman v. Rivenbark*, 96 N. C. 545, 172 S. E. 407 (1934); *Queen v. 134*, 1 S. E. 644 (1887); *State v. Goff*, 205 DeHart, 209 N. C. 414, 184 S. E. 7 (1936).

§ 1-294. Scope of stay; security limited for fiduciaries.—When an appeal is perfected as provided by this article it stays all further proceedings in the court below upon the judgment appealed from, or upon the matter embraced therein; but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from. The court below may, in its discretion, dispense with or limit the security required, when the appellant is an executor, administrator, trustee, or other person acting in a fiduciary capacity. It may also limit such security to an amount not more than fifty thousand dollars, where it would otherwise exceed that sum. (C. C. P., s. 308; Code, s. 558; Rev., s. 602; C. S., s. 655.)

Cross Reference. — As to effect of stay on judgment, see § 1-296.

Entire Cause Transferred to Appellate Court. — Under the North Carolina practice, an appeal carries the whole cause up to the Supreme Court, equally whether security is given to stay proceedings, or for costs only. *Bledsoe v. Nixon*, 69 N. C. 82 (1873); *Isler v. Brown*, 69 N. C. 125 (1873).

Appeal Must Be Perfected. — An appeal does not take the case beyond the control of the superior court, until it is perfected. *Coates Bros. v. Wilkes*, 94 N. C. 174 (1886).

Authority of Lower Court Terminated. — The perfection of an appeal terminates the authority of the inferior court. *State Bank v. Twitty*, 13 N. C. 386 (1830).

An appeal duly taken and regularly prosecuted operates as a stay of all proceedings in the trial court, relating to the issues included therein, until the matters are determined in the Supreme Court. *Pruett v. Charlotte Power Co.*, 167 N. C. 598, 83 S. E. 830 (1914); *Veazey v. Durham*, 231 N. C. 357, 57 S. E. (2d) 377 (1950).

An appeal from a judgment rendered in the superior court suspends all further proceedings in the cause in that court, pending the appeal. *Harris v. Fairly*, 232 N. C. 555, 61 S. E. (2d) 619 (1950).

Upon appeal from an interlocutory order the lower court has no power to proceed further with the case, and a motion to set aside a restraining order because of newly discovered evidence cannot be entertained. *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186 (1908).

An appeal, docketed within the time and regularly prosecuted, relates back to the time of trial; that is, it operates as a stay of proceedings within the meaning of the statute, and brings the cause within the principle of the cases which hold that the court below is without power to hear and

determine questions involved in an appeal pending in the Supreme Court. *Combes v. Adams*, 150 N. C. 64, 63 S. E. 186 (1908); *Sykes v. Everett*, 167 N. C. 600, 83 S. E. 585 (1914).

Where after appeal from a formal judgment overruling a demurrer the trial court proceeds to hear exceptions to the report of the referee, the Supreme Court, upon affirming the judgment overruling the demurrer, will order the judgment confirming the report of the referee stricken out because the parties were entitled to have the appeal from the judgment overruling the demurrer heard and determined before the exceptions to the referee's report were passed upon. *Griffin v. Bank of Coleridge*, 205 N. C. 253, 171 S. E. 71 (1933).

An appeal from an interlocutory order stays all further proceedings in the lower court in regard to matters relating to the specific order appealed from, but the action remains in the lower court and it may proceed upon any other matter included in the action upon which action was reserved or which was not affected by the judgment appealed from. *Safie Mfg. Co. v. Arnold*, 228 N. C. 375, 45 S. E. (2d) 577 (1947).

When Proceedings Not Stayed by Interlocutory Appeal. — When an appeal is taken from an interlocutory order from which no appeal is allowed by the Code, not upon any matter of law and which affects no substantial right of the parties, it is the duty of the judge to proceed as if no such appeal had been taken. All the inconveniences of unnecessary delay and expense attend the course of suspending proceedings and none attend the other course. Such an appeal is evidently frivolous and dilatory, and can have but one end, to increase the expense and procrastinate a final judgment. *Carleton v. Byers*, 71 N. C. 331 (1874).

When an appeal is taken to the Supreme Court from an interlocutory order of the

superior court which is not subject to appeal, the superior court need not stay proceedings, but may disregard the appeal and proceed to try the action while the appeal on the interlocutory matter is in the Supreme Court. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375 (1950).

A litigant cannot deprive the superior court of jurisdiction to try and determine a case on its merits by taking an appeal to the Supreme Court from a nonappealable interlocutory order of the superior court. *Veazey v. Durham*, 231 N. C. 354, 57 S. E. (2d) 375 (1950).

Subsequent Proceedings in Lower Court.

—Where a cause has been ordered to the Supreme Court, no subsequent action of the court below can affect it. *Murry v. Smith*, 8 N. C. 41 (1820).

Allowing Proceedings by Lower Court.

—Ordinarily an appeal stops all proceedings in the lower court, including proceedings under an order from which, if considered alone, an appeal would be premature. But the Supreme Court may direct that certain matters should not be suspended. *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 551 (1898).

Orders Not Affected by Judgment.

—During the pendency of an appeal, the court below still retains jurisdiction to hear motions and grant orders, not affected by the judgment appealed from. *Herring v. Pugh*, 126 N. C. 852, 36 S. E. 287 (1900).

Disposition of Collateral Matter.—Pending an appeal, the lower court, in its discretion, may refuse to dispose of a collateral matter which the decision on the appeal may render unimportant. *Penniman v. Daniel*, 91 N. C. 431 (1884).

Motion for New Trial.—The fact that an appeal is pending does not prevent a motion in the trial court for a new trial on the ground of newly discovered evidence. *Bledsoe v. Nixon*, 69 N. C. 82 (1873); but see *Skinner v. Bland*, 87 N. C. 168 (1882), where it was held that a judge of the superior court has no power to entertain a motion in a cause, which by ap-

peal is in the Supreme Court. See also, *Isler v. Brown*, 69 N. C. 125 (1873).

On appeal to the Supreme Court the case remains alive in the superior court until the case is certified back and final judgment entered in accordance with the certificate, and the superior court may entertain motion for a new trial for newly discovered evidence at the next term prior to such final judgment. *Allen v. Gooding*, 174 N. C. 271, 93 S. E. 740 (1917).

Second Trial Pending Appeal Unlawful.

—Where the cause has been tried at a previous term of the court, and the judge has set aside the verdict under the appellant's exception, and, pending his due prosecution of his appeal, without laches on his part, the judge has forced him into another trial under his exception that the case was pending on appeal, resulting adversely to him, the action of the judge in overruling the exception and proceeding with the second trial is contrary to this section and a new trial will be ordered on appeal. *Likas v. Lackey*, 186 N. C. 398, 119 S. E. 763 (1923).

Motion to Set Aside Verdict.—An appeal, perfected pending a motion to set aside a verdict, the time for the hearing of which has been extended by consent, does not divest the trial court of jurisdiction to determine the motion. *Myers v. Stafford*, 114 N. C. 231, 19 S. E. 232 (1894).

Order Refusing to Discharge Attachment.—An appeal from an order refusing to discharge an attachment takes the case out of the jurisdiction of the court whose order is appealed from, and an order can not subsequently be made by that court discharging the attachment. *Pasour v. Lineberger*, 90 N. C. 159 (1884).

Appeal Does Not Carry Up Fund.—An appeal from a decree of distribution does not bring up the fund, the court below retaining charge of its safekeeping and investment pending the appeal. *Hinson v. Adrian*, 91 N. C. 372 (1884).

Cited in *Bohannon v. Virginia Trust Co.*, 198 N. C. 702, 153 S. E. 263 (1930).

§ 1-295. Undertaking in one or more instruments; served on appellee.—The undertakings may be in one instrument or several, at the option of the appellant; and a copy, including the names and residences of the sureties, must be served on the adverse party, with the notice of appeal, unless the required deposit is made and notice thereof given. (C. C. P., s. 309; Code, s. 559; Rev., s. 603; C. S., s. 656.)

Cross References.—As to undertaking for costs, see § 1-285. As to undertaking to stay executions, see § 1-289 et seq.

Surety Insolvent.—Where the undertaking on appeal for the costs and the under-

taking to stay execution are in one instrument, the appellee, upon filing the proper proofs of the insolvency of the surety, is entitled to have the appeal dismissed, but where the two undertakings are separate

and distinct, the appellant has a right to have his appeal heard, although the surety to the undertaking to stay execution is insolvent. *Alderman v. Rivenbark*, 96 N. C.

134, 1 S. E. 644 (1887).

Cited in *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

§ 1-296. Judgment not vacated by stay.—The stay of proceedings provided for in this article shall not be construed to vacate the judgment appealed from, but in all cases such judgment remains in full force and effect, and its lien remains unimpaired, notwithstanding the giving of the undertaking or making the deposit required in this chapter, until such judgment is reversed or modified by the Supreme Court. (1887, c. 192; Rev., s. 604; C. S., s. 657.)

Cross Reference.—As to effect of appeal on proceedings in lower court generally, see § 1-294 and annotations thereunder.

Editor's Note.—This section was added by the 1887 amendment.

In *Black v. Black*, 111 N. C. 300, 16 S. E. 412 (1892), it was held that this section required that a motion for a new trial upon newly discovered evidence, made after appeal and final decree in Supreme Court, should be made in the superior court. Pending the appeal the practice remains

the same as it was before this section.

Does Not Annul Judgment.—A judgment is not annulled by an appeal therefrom. *State v. Mizell*, 32 N. C. 279 (1849).

An appeal from an order to vacate a judgment, leaves such judgment, and any execution issued under it, in full force. *Murphy v. Merritt*, 63 N. C. 502 (1869).

Cited in *Dixon v. Smith*, 204 N. C. 480, 168 S. E. 682 (1933); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934).

§ 1-297. Judgment on appeal and on undertakings; restitution.—Upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the judgment or order appealed from, in the respect mentioned in the notice of appeal, and as to any or all of the parties, and may, if necessary or proper, order a new trial. When the judgment is reversed or modified, the appellate court may make complete restitution of all property and rights lost by the erroneous judgment. Undertakings for the prosecution of appeals and on writs of certiorari shall make a part of the record sent up to the Supreme Court on which judgment may be entered against the appellant or person prosecuting the writ of certiorari and his sureties, in all cases where judgment is rendered against the appellant or person prosecuting the writ. (1785, c. 233, s. 2, P. R.; 1810, c. 793, P. R.; 1831, c. 46, s. 2; R. C., c. 4, s. 10; C. C. P., s. 314; Code, s. 563; Rev., s. 605; C. S., s. 658.)

Cross References.—As to jurisdiction of Supreme Court to review issues of fact, see § 7-11. As to jurisdiction of Supreme Court on appeal, see § 7-10 and Const. Art. IV, § 8.

Whole Case Taken Up.—Under the provisions of this section an appeal on the trial and determination of the cause in the inferior court carries the whole case to the Supreme Court for review, and such court has plenary jurisdiction to reverse, affirm, or modify the judgment. *Hudson v. Charleston, etc.*, R. Co., 55 F. 252 (1893).

Power to Direct Judgment in Lower Court.—A party litigant has a substantial right in a verdict obtained in his favor, and where one has been rendered on issues which are determinative, and is set aside as matter of law, and such ruling is held to be erroneous on appeal, the Supreme Court will direct that judgment be entered on the verdict as rendered. *Wilson v. Rankin*, 129 N. C. 447, 40 S. E. 310 (1901);

Ferrall v. Ferrall, 153 N. C. 174, 69 S. E. 60 (1910).

Judgment on Compromise.—As the Supreme Court may enter final judgment if proper, a judgment so entered on a compromise by parties pending appeal will be treated as a final judgment by consent. *Chavis v. Brown*, 174 N. C. 122, 93 S. E. 471 (1917).

Where the parties' respective counsel on appeal agreed to modification and amendment of the judgment, the cause will be remanded to the trial court, with directions to carry out the agreement. *Stokes-Grimes Grocery Co. v. Hill*, 176 N. C. 697, 97 S. E. 468 (1918).

Any Relief Consistent with Pleadings.—On appeal a case is heard on the facts alleged in the pleadings, and where the plaintiffs have set forth such facts as entitled them to relief they will not be restricted to that demanded in their prayer for judgment, but may have any additional relief not inconsistent with the pleadings

and the facts proved. *Voorhees v. Porter*, 134 N. C. 591, 47 S. E. 31 (1904).

Separate Judgments for Separate Parties.

—Where two parties have been joined as parties defendant in an action, and issues have been submitted as to each, and adverse verdict rendered as to each, under this section the action may be dismissed as to one party and affirmed as to the other. *Kimbrough v. Hines*, 182 N. C. 234, 109 S. E. 11 (1921).

Setting Aside of Erroneous Part Only.

Where a judgment appealed from consists of independent matters, so that the erroneous part thereof can be segregated, the court will only set aside the erroneous part. *Newberry v. Seaboard, etc., R. Co.*, 160 N. C. 156, 76 S. E. 238 (1912).

Parties Not Appealing.—Where but one of a number of judgment defendants appeal from the judgment of the superior court, the Supreme Court, in affirming the judgment, will remand the case, that the judgment of affirmance may be enforced against all such defendants. *Baxter v. Wilson*, 95 N. C. 137 (1886).

But the Supreme Court will not determine the rights of persons represented in the trial but who do not appeal. *Van Dyke v. Aetna Life Ins. Co.*, 173 N. C. 700, 91 S. E. 600 (1917).

Same—Determining Interest in Land.

In this action the verdict of the jury established certain interests in defendant's favor in the lands in controversy which were not adjudicated in the judgment rendered; and, as the plaintiff did not appeal, the judgment is accordingly modified and affirmed. *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057 (1914).

When Judgment Reversed.—When, upon the inspection of the whole record, it appears that the judgment was unwarranted upon the facts, the Supreme Court will, ex mero motu, reverse it. *Everett v. Raby*, 104 N. C. 479, 10 S. E. 526 (1889).

Reversal as to Certain Issues.—Ordinarily, for error in the charge, or the reception or rejection of evidence, the verdict is set aside entirely, but it may be set aside in part, and as to certain issues only, when it plainly appears that the erroneous ruling would not and did not affect the findings upon the other issues. *Burton v. Wilmington, etc., R. Co.*, 84 N. C. 193 (1881).

Judgment Reversed for Substantial Cause Only.—Courts will not order reversals upon grounds which do not affect real merits and where no substantial prejudice will result. *Ball-Thrash Co. v. McCormack*, 172 N. C. 677, 90 S. E. 916 (1916).

Where appellant has had a fair submission of the real issues, the substantial benefit of all prayers for instructions, and determinative facts have been found against him, a reversal will not be granted for technical errors. *Smith v. Hancock*, 172 N. C. 150, 90 S. E. 127 (1916).

Modifying Provisions of Judgment.

Where defendants were joint tortfeasors, error in submitting to the jury the issue as to which was primarily liable, and rendering a judgment based on a finding of primary liability by one, does not require a reversal, but the judgment can be modified to impose a joint and several liability. *Hodgin v. North Carolina Public Service Corp.*, 179 N. C. 449, 102 S. E. 748 (1920).

Same—Omission of Parties.—In suit to foreclose deed of trust, executed by husband and wife, securing note executed by husband, against trustee and wife, where there was doubt whether personal representative of deceased husband was necessary party, Supreme Court will modify judgment dismissing action for failure to join him, and direct that plaintiff executors may bring him in. *Geitner v. Jones*, 173 N. C. 591, 92 S. E. 493 (1917).

Modification as to Amount of Recovery.

—Although on appeal an issue involving several items can not be amended where one item is erroneous, and appeal is on that item, the court can allow appellee to deduct that much, or stand a new trial. *Ragland v. Lassiter-Ragland*, 174 N. C. 579, 94 S. E. 100 (1917).

Where judgment has been rendered, in an action upon the note and mortgage, subjecting the collateral in part to the payment for the supplies for the preceding year, and error has been committed as shown by the facts and figures ascertained, the judgment appealed from will be reformed accordingly. *Planters Stores Co. v. Bullock*, 180 N. C. 656, 104 S. E. 65 (1920).

Judgment Affirmed.—The Supreme Court may affirm the judgment of the trial court. *Wilson v. Jones*, 176 N. C. 205, 97 S. E. 18 (1918); *Selwyn Hotel Co. v. Griffin*, 182 N. C. 539, 109 S. E. 371 (1921).

New Trial May Be Granted.—The Supreme Court has power to grant a new trial. *Hall v. Hall*, 131 N. C. 185, 42 S. E. 562 (1902); *Hawk v. Pine Lumber Co.*, 149 N. C. 10, 62 S. E. 752 (1908).

The Supreme Court may order a new trial and direct further proceedings in lower court. *Williams v. Kearney*, 177 N. C. 531, 98 S. E. 705 (1919).

Same—For Newly Discovered Evidence.

—The Supreme Court may, in its discre-

tion order a new trial for newly discovered evidence, on motion in that court. *Clark v. Riddle*, 118 N. C. 692, 24 S. E. 492 (1896).

The Supreme Court, in its discretion, may refuse to grant a new trial for newly discovered evidence. *Brown v. Mitchell*, 102 N. C. 347, 9 S. E. 702 (1889); *Sledge v. Elliott*, 116 N. C. 712, 21 S. E. 797 (1895).

Same—To Introduce New Evidence.—After appeal, the cause may be remanded to the court below, upon petition of the plaintiff, to enable him to take further proofs, upon terms. *Springs v. Wilson*, 17 N. C. 385 (1833).

Same—When Necessary Party Absent.—Where it appears that a necessary party is missing from the case, or that the issues are not determinative of the cause of action, the court, on its own motion, may remand the cause, with orders for a new trial. *Vaughan v. Davenport*, 159 N. C. 369, 74 S. E. 967 (1912), modifying opinion, 157 N. C. 156, 72 S. E. 842.

When New Trial Granted.—When the judgment is not supported by the record (as where the record shows that there was no verdict), or is rendered upon an inconsistent or unsatisfactory verdict, a new trial must be awarded. *McCanless v. Flinchum*, 98 N. C. 358, 4 S. E. 359 (1887).

Ordering New Trial of Certain Issues Only.—The court on appeal, upon ordering a new trial, may confine the issues to those which it deems necessary to a proper determination of the cause. *Davis v. Southern R. Co.*, 176 N. C. 186, 96 S. E. 945 (1918), denying motion to recall mandate, 175 N. C. 648, 96 S. E. 41.

On appeal, it is in the discretion of the court whether to restrict a new trial to the issues affected by the error; wherever the error is confined to one or more issues separable from others, and it appears to the court that no prejudice will result from such course, a new trial as restricted to such issues is usually granted. *Huffman v. Ingold*, 181 N. C. 426, 107 S. E. 453 (1921).

All Issues.—When the Supreme Court grants a new trial generally without further disposition, the new trial is upon all of the issues, though it has power to grant either a general or partial new trial. *Table Rock Lumber Co. v. Branch*, 158 N. C. 251, 73 S. E. 164 (1911).

Technical, Formal, or Trivial Defects.—The Supreme Court will not grant a new trial except to subserve the real ends of

substantial justice, and unless there is a prospect of ultimate benefit to the appellant. *Cauble v. Southern Exp. Co.*, 182 N. C. 448, 109 S. E. 267 (1921).

To Amend Verdict, Findings or Judgment.—The Supreme Court has power to remand a cause, so that there may be fuller finding of facts by the trial judge, in order that the appeal may be more intelligently considered. *Gulf Refin. Co. v. McKernan*, 178 N. C. 82, 100 S. E. 121 (1919).

Findings as to Costs.—On appeal, a cause may be remanded for a special finding as to the right to costs. *Smith v. Smith*, 108 N. C. 365, 12 S. E. 1045, 13 S. E. 113 (1891).

To Find Additional Facts.—Where the pleadings and affidavits in an injunction suit are conflicting, and there is no finding of facts, the case will be remanded, that the facts may be found by the trial court or by a jury upon proper issues submitted to it. *Kitchen v. Troy*, 72 N. C. 50 (1875).

In a proceeding before a township board of supervisors to lay out a cartway, where an appeal was taken to the county board of commissioners and from there to the superior court, and the superior court exceeded its jurisdiction and amended the petition to one for the laying out of a public road, the Supreme Court on appeal will not dismiss the case, but will direct the superior court to strike out the void order and proceedings thereunder and to proceed according to law. *Holmes v. Bullock*, 178 N. C. 376, 100 S. E. 530 (1919).

A necessary finding in an action to recover money from an express company, alleged to have been lost from a valise which had been intrusted to the defendant for shipment, in that the money was taken while the valise was in the defendant's care or control, and such finding being omitted from an agreed case submitted to the superior court, it is remanded so that the omission may be supplied. *Sedbury v. Southern Exp. Co.*, 164 N. C. 363, 79 S. E. 286 (1913).

Plaintiff Entitled to Judgment against Sureties on Undertaking.—Upon the affirmation by the Supreme Court of a judgment of the superior court, in favor of the plaintiff, he is entitled, upon motion, to judgment against the sureties upon an undertaking to stay execution pending appeal, and such affirmation is conclusive of the liability of the sureties. *Oakley v. Van Noppen*, 100 N. C. 287, 5 S. E. 1 (1888).

§ 1-298. Procedure after determination of appeal.—In civil cases, at

the first term of the superior court after a certificate of the determination of an appeal is received, if the judgment is affirmed the court below shall direct the execution thereof to proceed, and if the judgment is modified, shall direct its modification and performance. If a new trial is ordered the cause stands in its regular order on the docket for trial at such first term after the receipt of the certificate from the Supreme Court. (1887, c. 192, s. 2; Rev., s. 1526; C. S., s. 659.)

Jurisdiction of Appellate Court after Remand.—The Supreme Court, having certified its opinion and remanded the case to the court below, is without jurisdiction to make any orders therein. *Seaboard Air Line R. Co. v. Horton*, 176 N. C. 115, 96 S. E. 954 (1918); *Davis v. Southern R. Co.*, 176 N. C. 186, 96 S. E. 945 (1918).

Jurisdiction of Lower Court after Affirmation.—After a judgment of a subordinate court imposing a punishment for contempt for disobedience of its order has been affirmed by the Supreme Court it becomes final, and the court below has no power to remit or modify it. *In re Griffin*, 98 N. C. 225, 3 S. E. 515 (1887).

Final Assessment Invalid before Opinion Certified.—In *Atlantic Coast Line R. Co. v. Sanford*, 188 N. C. 218, 124 S. E. 308 (1924), the court said: "The defendants seem to have proceeded upon the assumption that it was not necessary to await the certification of the opinion rendered on appeal, but in this respect they were in error. They had no legal right to make a final assessment against the plaintiff's property before the opinion had been certified to the superior court and while the questions presented on the appeal were yet in fieri."

Proceedings in Trial Court, after Affirmation, Simply Formal.—When a judgment of the superior court was affirmed on appeal, an entry on the docket of the superior court, "Judgment as per transcript filed from the Supreme Court," was sufficient and a termination of the action. The former judgment having been merely sus-

pending, and not vacated by the appeal, the affirmation by the Supreme Court ended the suspension, and the office of the last judgment was simply formal, to direct the execution to proceed and to carry the costs subsequently accrued. *Bond v. Wool*, 113 N. C. 20, 18 S. E. 77 (1893).

Effect in Lower Court of Decision of Appellate Court.—Where a judgment has been affirmed or reversed, but no final judgment entered by the Supreme Court, the case is a live one until judgment has been entered in the court below in conformity with the certificate from the Supreme Court. *Lancaster v. Bland*, 168 N. C. 377, 84 S. E. 529 (1915).

Procedure When Lower Court Contravenes Judgment of Supreme Court.—A judgment in appellant's favor taxing the costs of action at variance with the decision of the Supreme Court rendered on appeal, signed upon appellant's motion in the superior court, after examination had been afforded to the appellee's attorney, is not irregular, and when not thus taken through mistake, inadvertence, surprise or excusable neglect, the procedure is by exception and appeal, and not by motion in the cause at a subsequent term of the trial court. *Phillips v. Ray*, 190 N. C. 152, 129 S. E. 177 (1925).

Pro Forma Order.—An order "that execution of said judgment do proceed" was pro forma under this section. *North Carolina R. Co. v. Story*, 193 N. C. 362, 137 S. E. 166 (1927).

Applied in *Hamilton v. Southern R. Co.*, 203 N. C. 136, 164 S. E. 834 (1932).

§ 1-299. Appeal from justice heard de novo; judgment by default; appeal dismissed.—When an appeal is taken from the judgment of a justice of the peace to a superior court, it shall be therein reheard, on the original papers, and no copy thereof need be furnished for the use of the appellate court. An issue shall be made up and tried by a jury at the first term to which the case is returned, unless continued, and judgment shall be given against the party cast and his sureties. When the defendant defaults, the plaintiff in actions instituted on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, shall have judgment, and in other cases may have his inquiry of damages executed forthwith by a jury. If the appellant fails to have his appeal docketed as required by law, the appellee may, at the term of court next succeeding the term to which the appeal is taken, have the case placed upon the docket, and upon motion the judgment of the justice shall be affirmed and judgment rendered against the appellant, and for the costs of appeal

and against his sureties upon the undertaking, if there are any, according to the conditions thereof. Nothing herein prevents the granting the writ of recordari in cases now allowed by law. (1777, c. 115, s. 63, P. R.; 1794, c. 414, P. R.; R. C., c. 31, s. 105; C. C. P., s. 540; Code, ss. 565, 881; 1889, c. 443; Rev., ss. 607, 609; C. S., s. 660.)

Local Modification.—Transylvania: 1935, c. 32.

I. General Consideration.

II. When Appeal Lies.

III. Power of Superior Court on Appeal.

IV. Dismissal for Failure to Docket—Recordari.

Cross References.

As to manner of taking appeal, see § 7-179. As to effect of appeal, see § 7-178.

I. GENERAL CONSIDERATION.

Jurisdiction Dependent on Jurisdiction of Lower Court.—The jurisdiction of the superior court on appeal from justice court is entirely derivative, and, if the justice had no jurisdiction of the action, the superior court acquires none by the appeal. *Lower Creek Drainage Com'rs v. Sparks*, 179 N. C. 581, 103 S. E. 142 (1920).

The appellate jurisdiction of the superior court being entirely derivative, if the justice had no jurisdiction in an action the superior court can derive none by amendment. *Stacey Cheese Co. v. Pipkin*, 155 N. C. 394, 71 S. E. 442 (1911); *McLaurin v. McIntyre*, 167 N. C. 350, 83 S. E. 627 (1914).

Where the justice did not have jurisdiction of a party, the superior court can not obtain it on appeal from the justice court, by ordering a summons to issue to bring the party before it. *Durham Fertilizer Co. v. Marshburn*, 122 N. C. 411, 29 S. E. 411, 65 Am. St. Rep. 408 (1898).

Jurisdiction Can Not Be Conferred by Consent.—Where the superior court acquired no jurisdiction of a case on appeal from justice's court without jurisdiction, the parties can not by consent waive the want of jurisdiction. *Love v. Huffines*, 151 N. C. 378, 66 S. E. 304 (1909).

Plaintiff Must Prove Case.—As on appeal from a justice the whole case must be tried de novo in the superior court, the mere absence of the defendant, who has answered, and raised a material issue, does not relieve plaintiff from the necessity of establishing his cause of action, and it is error, because of such absence, to dismiss the appeal. *Barnes v. Southern R. Co.*, 133 N. C. 130, 45 S. E. 531 (1903).

Appeal Waives Objections to Proceedings before Justice.—Where a party appealed from the judgment of a magistrate to the county court, and a trial was had by jury, the matter being gone through

with de novo, the defects in the proceedings before the magistrate are not material, as they are vacated by the appeal. *Kearney v. Jeffreys*, 30 N. C. 96 (1847).

Where it did not appear in the summons, and there was no complaint that the amount sued for was over the jurisdictional amount limited to justice courts, the objection as to the court's jurisdiction can not be raised for the first time on appeal to the superior court. *Cromer Bros. v. Marsha*, 122 N. C. 563, 29 S. E. 836 (1898).

Trial De Novo.—On appeal from a judgment of a justice of the peace to the superior court, the judgment appealed from is vacated, and a trial de novo had in the superior court. *Carolina Bagging Co. v. United States Railroad Administration*, 184 N. C. 73, 113 S. E. 595 (1922); *State v. Goff*, 205 N. C. 545, 172 S. E. 407 (1934); *Pridgen v. Lynch*, 215 N. C. 672, 2 S. E. (2d) 849 (1939); *Brake v. Brake*, 228 N. C. 609, 46 S. E. (2d) 643 (1948).

All litigated matters in the action are to be tried de novo. *Falkner v. Pilcher*, 137 N. C. 449, 49 S. E. 945 (1905).

On appeal from a justice of the peace, defendants are entitled to a trial de novo, even when they are called and fail to appear. *Globe Poster Corp. v. Davidson*, 223 N. C. 212, 25 S. E. (2d) 557 (1943).

Trial upon Original Papers.—The appeal takes the whole action into the superior court, where it is to be tried de novo, not upon a transcript of the record in the justice's court, but upon the original papers, which must be sent up with the appeal. *Phelps v. Worthington*, 92 N. C. 270 (1885).

Can Not Change Nature of Action.—Defendant, on appeal from a justice of the peace in an action for rent, can not amend so as to change the nature of the action, and make it one of which a justice's court has no jurisdiction. *Shell v. West*, 130 N. C. 171, 41 S. E. 65 (1902).

Right to Remit Claim.—Where plaintiff brought suit in the court of a justice of the peace claiming a debt, and also possession of a horse and wagon, under mortgage, on appeal from the justice's judgment to the superior court, he had a right to remit his claim for the personal property and declare only for the debt. *Jones v. Palmer*, 83 N. C. 303 (1880).

Party Cannot Answer and Demur.—In an action in justice's court where defend-

ant pleaded to the merits and went to trial, and was cast and appealed, his answer, not withdrawn, waived his demurrer subsequently filed in the superior court. *Rosenbacher & Bros. v. Martin*, 170 N. C. 236, 86 S. E. 785 (1915).

Cited in *Sneed v. State Highway Commission*, 194 N. C. 46, 138 S. E. 350 (1927); *Drafts v. Summey*, 198 N. C. 69, 150 S. E. 631 (1929); *Whiteheart v. Grubbs*, 232 N. C. 236, 60 S. E. (2d) 101 (1950).

II. WHEN APPEAL LIES.

Judgment Must Put an End to Action.—This section implies a final judgment—that is, one that in some way puts an end to the action. *Phelps v. Worthington*, 92 N. C. 270 (1885).

No Appeal from Interlocutory Judgment.—Appeals cannot be taken from justices of the peace to the superior courts from interlocutory judgments; therefore, where a justice dismissed a warrant of attachment, the judgment of the superior court on appeal dismissing the plaintiff's action on the ground that no service of process had ever been made was erroneous, as no appeal lay from the order of the justice and the superior court should only have dismissed the appeal. *Phelps v. Worthington*, 92 N. C. 270 (1885).

Appeal from County Commissioner.—An appeal from the board of county commissioners in establishing a public road should be taken in accordance with this section. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

Taxing Prosecutor with Costs of Criminal Prosecution.—An appeal lies from the judgment of a justice of the peace taxing the prosecutor with costs, such taxing being in the nature of a civil judgment. *State v. Morgan*, 120 N. C. 563, 26 S. E. 634 (1897); *State v. Cole*, 180 N. C. 682, 104 S. E. 136 (1920).

Motion to Set Aside Judgment.—If a motion to set aside a judgment in the court of a justice of the peace should be allowed or denied improperly, the complaining party may appeal to the superior court. *Whitehurst v. Merchants, etc., Transp. Co.*, 109 N. C. 342, 13 S. E. 937 (1891).

Waiver of Right of Appeal.—A defendant by voluntarily paying a judgment taken against him before a justice of the peace waives his right of appeal. *Cowell v. Gregory*, 130 N. C. 80, 40 S. E. 849 (1902).

Appeal and Not Motion to Set Aside Judgment Proper Remedy.—Where a defendant relied on the assurance of a justice of the peace, that his cause would not be tried, after which the justice rendered a judgment against him in his absence, the

remedy is by an appeal or a recordari as a substitute therefor, and not by a motion to set aside the judgment. *Navassa Guano Co. v. Bridgers*, 93 N. C. 439 (1885).

III. POWER OF SUPERIOR COURT ON APPEAL.

Limiting Trial to Particular Issues.—The superior court may limit the trial on appeal to particular issues, where there is no evidence to support those excluded. *Smith v. Newberry*, 140 N. C. 385, 53 S. E. 234 (1906).

Incidental Questions.—An appeal from a court of a justice of the peace comprehends in its scope a new trial of the whole subject matter of the action, and any determination by the magistrate of an incidental question involved therein, though not directly appealed from, is, when relevant and necessary, to be considered and determined by the appellate court. *White v. American Peanut Co.*, 165 N. C. 132, 81 S. E. 131 (1914).

Amount Claimed Limited to Jurisdictional Amount of Justice's Court.—Where the superior court acquires jurisdiction on appeal from justice's court upon law and fact, the trial proceeds de novo, the appellate court cannot allow an amendment of the complaint increasing the amount of plaintiff's claim beyond that to which the jurisdiction of the justice is limited. *Meneely & Co. v. Craven*, 86 N. C. 364 (1882). See, as to applicability of section, *Cowles v. Hayes*, 67 N. C. 128 (1872).

May Disregard Finding of Facts.—On appeal to the superior court from an order of a justice denying a motion to open a default judgment the court may disregard the justice's finding of fact, and proceed to hear the matter anew. *Finlayson v. Amercian Acci. Co.*, 109 N. C. 196, 13 S. E. 739 (1891); *Turner v. Threshing Mach. Co.*, 133 N. C. 381, 45 S. E. 781 (1903).

Same—But Not in Summary Proceedings.—Where on a trial in summary proceedings before a justice, there is evidence to establish equitable title in defendant, and the court finds from such evidence in favor of defendant, and dismisses the action, his judgment cannot be reviewed; but, where there is no evidence, his decision becomes a question of law, and reviewable. *McDonald v. Ingram*, 124 N. C. 272, 32 S. E. 677 (1899).

Power to Allow New or Amended Pleadings.—Upon an appeal in a civil action from the court of a justice of the peace to the superior court, the latter has power to amend the pleadings and allow new pleas or matters of defense to be set

up. *Moore v. Garner*, 109 N. C. 157, 13 S. E. 768 (1891).

Same—Discretion of Court.—The trial on appeal in the superior court from a justice's judgment is *de novo*, and the judge may, in his discretion, allow pleadings to be filed. *Teal v. Templeton*, 149 N. C. 32, 62 S. E. 737 (1908).

Same—Plea of Statute of Limitations.—The plea of the statute of limitations, not relied on before a justice, cannot be set up on appeal in the superior court without leave. Amendment of pleadings in such case is matter of discretion. *Poston v. Rose*, 87 N. C. 279 (1882).

Same—Error in Amount of Summons.—Where a summons issued by a justice failed to show the amount claimed, the insertion of such amount was properly permitted upon appeal to the superior court, and such amendment was retroactive. *McPhail Bros. v. Johnson*, 115 N. C. 298, 20 S. E. 373 (1894).

Same—Error in Initials of Party.—Error in one of the initials of defendant's name in a justice's summons, if the right man is served, and is not misled, does not vitiate judgment by default, and may be amended on an appeal. *Clawson v. Wolfe*, 77 N. C. 100 (1877).

May Allow Counterclaim.—The superior court may on appeal from justice court allow the defendant to set up a counterclaim not urged in justice court. *Norfolk, etc., R. Co. v. Dill*, 171 N. C. 176, 88 S. E. 144 (1916). See, also, *Thomas v. Simpson*, 80 N. C. 4 (1879).

Same—Refusal to Allow Counterclaim.—Where it appeared that a defendant made no defense to the action, but suffered judgment to be entered against him in a justice's court and appealed to the superior court, but failed to answer or ask for leave to do so until the trial three years later, the court properly refused to allow a plea of counterclaim then to be set up. *Johnson v. Rowland*, 80 N. C. 1 (1879).

Court Cannot Set Aside Judgment and Docket Case.—Where a judgment was obtained before a justice of the peace and docketed in the office of the superior court clerk, the court has no power upon motion to set aside said judgment and enter the cause upon the civil issue docket. *Ledbetter v. Osborne*, 66 N. C. 379 (1872).

May Make Additional Parties.—Under this section the superior court, on appeal from justice's judgment is authorized to bring in an additional defendant, though less than \$200 might be recoverable against such defendant. *Sellers Hosiery Mills v. Southern R. Co.*, 174 N. C. 449, 93 S. E. 952 (1917). But not where the presence

of the co-defendant is unnecessary. *Morgan v. Royal Ben. Soc.*, 167 N. C. 262, 83 S. E. 479 (1914).

IV. DISMISSAL FOR FAILURE TO DOCKET—RECORDARI.

Effect of Failure to Docket in Time.—An appeal from justice court not docketed at the first term to which it was returnable is properly dismissed. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978 (1911); *Tedder v. Deaton*, 167 N. C. 479, 83 S. E. 616 (1914).

If appellant fails to docket his appeal by the next succeeding term of the superior court, the appellee may have the case placed on docket, and have the judgment affirmed. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353 (1921).

Under this section the judgment of affirmance is, in substance, equivalent to a judgment dismissing the action, and the appellate court is not required to look into the record for the purpose of passing upon the merits of the exceptions. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

Failure to Pay Clerk's Fees.—When the justice of the peace was paid for transcript of appeal, made it out the day of the trial and handed it to the clerk of the superior court, but the appellant neither tendered nor paid the clerk his fees nor requested that it be docketed, a motion to dismiss the appeal will be granted. *Ballard v. Gay*, 108 N. C. 544, 13 S. E. 207 (1891); *Lentz v. Hinson*, 146 N. C. 31, 59 S. E. 144 (1907).

Dismissal for Failure to Docket Not Reviewable.—The action of the lower court is not reviewable in allowing the motion of the appellee, from a judgment rendered in a court of the justice of the peace, to docket and dismiss an appeal when the appellant had neither paid the clerk's fees nor requested him to docket the appeal. *McClintock v. Life Ins. Co.*, 149 N. C. 35, 62 S. E. 775 (1908).

When Appeal Not Dismissed.—Where an appellant pays the fees for the return and docketing of an appeal from a justice of the peace, the appeal will not be dismissed for the failure of the clerk of the superior court to docket the same. *Johnson v. Andrews*, 132 N. C. 376, 43 S. E. 926 (1903).

Where, on appeal from a justice of the peace, the case was not docketed, because the fees for this service were not tendered or paid to the clerk, but the clerk did not demand his fees or notify the appellant that the appeal would not be docketed unless they were paid, it was no error for the judge to allow the appeal to be docketed two terms after the regular time, and

as soon as the appellant was notified that this had not been done. *West v. Reynolds*, 94 N. C. 333 (1886).

The statute relating to the Greensboro Municipal-County Court prescribed that appeals therefrom should be governed by the rules governing appeals from justices of the peace. Through no fault of appellant, its appeal was not filed within ten days after notice of appeal in open court, but was filed during the next succeeding term of the superior court. If it had been filed within the ten-day period, it would not have been on the superior court docket for ten days prior to the beginning of the term. It was held that appellee is not entitled to dismissal of the appeal at such term of the superior court notwithstanding appellant's failure to apply for recordari. *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848 (1948).

Waiver of Right to Object to Failure to Docket in Time.—Where defendant failed to see that his appeal from judgment of a justice of the peace was docketed at next term of superior court, but appeal was on docket 1½ years without notice from plaintiff that he intended to take advantage of irregularity, it was held that plaintiff waived his right to object. *Rawls, etc., Co. v. Norfolk Southern R. Co.*, 172 N. C. 211, 90 S. E. 116 (1916).

Same — Agreement of Attorneys as Waiving Requirement.—Where the opposing attorneys agree that plaintiff's attorney shall make up the transcript of appeal with the justice of the peace, and submit it to defendant's attorney, and plaintiff's attorney failed to conform to the agreement, the appeal will not be dismissed at his instance on the ground that the case was not docketed at the term next ensuing after the appeal was taken. *Jerman v. Gullede*, 129 N. C. 242, 39 S. E. 835 (1901).

Same — Agreement That Defendant Should Hold the Property.—An agreement made after judgment by a justice for plaintiff that defendant should hold the property until the cases should be determined by the higher court did not waive plaintiff's right to have the appeal dismissed because not docketed in time. *Jones v. Fowler*, 161 N. C. 354, 77 S. E. 415 (1913).

Effect of Not Moving to Dismiss for Failure to Docket in Time.—Upon appellant's failure to docket appeal from justice of the peace to superior court at the next term, appellee can move to dismiss at such term, but his failure to do so does not estop him from asserting appellant's failure to docket appeal at the next term as a bar to the trial of the case in the superior

court. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919). See, also, *Love v. Huffines*, 151 N. C. 378, 66 S. E. 304 (1909).

Privilege of Appellee Only.—The power given by this section to the appellee to docket a case at the first term of the superior court, if the appellant does not, and to have the judgment affirmed, is a privilege granted to the appellee only, and the appellant can draw no argument against appellee from his failure to use it. *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78 (1893).

Laches in Applying for Recordari.—When an appeal from a justice's court has not been docketed within the time prescribed by § 1-300, the appellant should move for a recordari, at the first ensuing term of the superior court, that the appeal should be docketed; and though appeal had been prayed in open court and the fee of the justice paid, the failure to move for a recordari and to make proper inquiry of the clerk of the superior court as to whether the case has been docketed is such laches as will, in the absence of agreement of the parties, entitle the appellee to have the case dismissed upon his motion; and the fact that appellant has employed an attorney to look after the appeal will not excuse him. *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978 (1911).

Appeal Lost through Default of Appellant.—The provisions of this section, as to the writ of recordari, have no application where an appeal from the justice's court has been lost through the default of the appellant, and the failure of the appellee to docket and dismiss is no waiver of the appellee's rights upon appellant's motion for a recordari. *Pickens v. Whitton*, 182 N. C. 779, 109 S. E. 836 (1921). See, also, *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473 (1916).

No Recordari after Removal.—A plaintiff who appealed from the judgment of a justice for less than \$25, in his favor, he claiming more, and the judge having affirmed the judgment on the papers sent up to him, under this section, is not entitled to a recordari to the justice, as the case has already been removed from his court. *Cowles v. Hayes*, 67 N. C. 128 (1872).

Liability of Justice for Negligent Failure to Docket Appeal.—A justice who is paid the appeal fee and the fee for docketing the appeal, and yet who negligently fails to docket the appeal, so that the right of appeal is thereby lost, is not liable therefor in a civil suit. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353 (1921). See 1 N. C. Law Rev. 55.

§ 1-300. **Appeal from justice docketed for trial de novo.**—When the return is made from the justice's court the clerk of the appellate court shall docket the case on his trial docket for a new trial of the whole matter at the ensuing term of said court. (C. C. P., s. 539; 1876-7, c. 251, s. 8; Code, s. 880; Rev., s. 608; C. S., s. 661.)

Cross Reference.—As to notice of appeal, see §§ 7-179, 7-180.

Docketed at Next Ensuing Term.—An appeal from the court of a justice of the peace should be docketed at the next ensuing term of the superior court if the judgment appealed from has been rendered more than ten days before that term, without the discretion of the trial judge to grant indulgence or extension of time. *Southern Pants Co. v. Smith*, 125 N. C. 588, 34 S. E. 552 (1899); *Peltz v. Bailey*, 157 N. C. 166, 72 S. E. 978 (1911).

Same—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be docketed at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473 (1916); *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919). Formerly the rule was different. See *West v. Reynolds*, 94 N. C. 333 (1886).

Term to Which Appeal Is Taken.—An appeal must be taken to the next term of the appellate court; and it is therefore error to proceed in a case on appeal from a justice's court taken after that time, in the absence of notice to the appellee, that he may show cause against it. *Hahn v. Guilford*, 87 N. C. 172 (1882). See *State v. Edwards*, 110 N. C. 511, 14 S. E. 741 (1892).

The "next term" of the court means that term which shall begin next after the expiration of the ten days allowed for service of notice of appeal. *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514 (1892).

Same—Whether Civil or Criminal.—The phrase "next term," within rule requiring appeals from justice's judgments to be docketed at the next term, means any term, whether civil or criminal, that begins next after the expiration of the ten days allowed for service of notice of appeal. *Jerman v. Gullledge*, 129 N. C. 242, 39 S. E. 835 (1901); *Johnson v. Andrews*, 132 N. C. 376, 43 S. E. 926 (1903); *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919).

An appeal from the action of the county commissioners in altering a public road should be taken to the next term of the superior court, though it was a criminal term. *Blair v. Coakley*, 136 N. C. 405, 48 S. E. 804 (1904).

Same—Judge Cannot Allow Docketing Later.—Under this section an appeal from justice court must be tried at that term of the superior court which begins more than ten days after judgment in justice court, and the superior court has no right to dispense with such requirement. *Helsabeck v. Grubbs*, 171 N. C. 337, 88 S. E. 473 (1916); *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919). Formerly the rule was different. See *West v. Reynolds*, 94 N. C. 333 (1886).

Subsequent Term.—When the term of the appellate court begins within ten days allowed by § 7-179 to perfect an appeal, the appeal is taken to the next term. *Gregory v. Hobbs*, 92 N. C. 39 (1885); *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514 (1892).

When Judge Does Not Attend Next Term.—When the judge does not attend the next term of court at which an appeal from a judgment of a justice of the peace should have been docketed, the appellant should see that the appeal is docketed in time, all matters then pending being carried over in the same plight and condition, to the subsequent term. *Barnes v. Saleeby*, 177 N. C. 256, 98 S. E. 708 (1919).

Duty of Appellant to See Case Properly Docketed.—One appealing to the superior court from a judgment of a justice of the peace must see that the case is properly docketed, or he loses his appeal. *Abell v. Thornton Light, etc., Co.*, 159 N. C. 348, 74 S. E. 881 (1912).

Failure of Appellant to Docket Appeal in Apt Time.—Under this section it is appellant's duty to docket his appeal in the superior court in time, and his failure to have done so by the next succeeding term of the superior court, wherein the motion of appellee to dismiss has been properly allowed, or to apply for a recordari, in apt time, is his own laches, which will prevent his recovering damages of the justice of the peace for his failure to send up the case according to his promise, after having accepted his fee therefor, in the absence of a fraudulent intent. *Simonds v. Carson*, 182 N. C. 82, 108 S. E. 353 (1921).

Docketing at Subsequent Term as Entitling Appellant to Nonsuit.—Under this section a docketing at a subsequent term is a nullity, and does not entitle the plaintiff appellant to take a nonsuit. *Davenport v. Grissom*, 113 N. C. 38, 18 S. E. 78 (1893).

Finality of Judgment.—Where a justice of the peace has taken a case under advisement and later renders judgment against the defendant without notice to him, and the defendant does all that the law requires of him, after he had notice of the judgment, to perfect his appeal to the superior court within the time required by statute, and later has recordari issued from the latter court, the judgment appealed from will not be held as final. *Blacker v. Bullard*, 196 N. C. 696, 146 S. E. 807 (1929).

Plea of Limitations.—An appeal from a court of a justice of the peace is tried de novo in the superior court, under this section, and when the account sued on is ad-

mitted in the former court, it is discretionary with the trial judge to permit the plea of the statute of limitations which is necessary to defendant's right to set it up. *Fochtman v. Greer*, 194 N. C. 674, 140 S. E. 442 (1927).

Effect of Dismissal.—The dismissal of an appeal from a court of a justice of the peace, when not docketed by the appellant at the term of the superior court prescribed by this section, has the same effect as an affirmation of a judgment thereof under § 1-299. *McClintock v. Life Ins. Co.*, 149 N. C. 35, 62 S. E. 775 (1908).

Cited in *Starr Elec. Co. v. Lipe Motor Lines*, 229 N. C. 86, 47 S. E. (2d) 848 (1948).

§ 1-301. Plaintiff's cost bond on appeal from justice.—When a defendant appeals from the judgment of a justice of the peace to the superior court, or when the judgment of the justice is removed by the defendant, by recordari or otherwise, to a superior court, the court having cognizance of the appeal or recordari may, upon sufficient cause shown by affidavit, compel the plaintiff to give an undertaking, with sufficient surety, for payment of the costs of the suit, in the event of his failing to prosecute the same with effect. (1831, c. 29; R. C., c. 31, s. 104; Code, s. 564; Rev., s. 606; C. S., s. 662.)

Cross References.—As to costs on appeal, see § 6-33 and annotations thereunder. As to undertaking to stay execution, see § 7-175.

Necessity for Surety.—The Code requires no surety on an appeal from a justice's judgment. *Steadman v. Jones*, 65 N. C. 388 (1871).

Discretion of Judge as to Requiring of

Security.—In an appeal by a defendant to the superior court from a judgment of a justice of the peace, it lies within the discretion of the presiding judge to require the plaintiff to give security for the further prosecution of the suit, or not. *Smith v. Richmond, etc., R. Co.*, 72 N. C. 62 (1875).

SUBCHAPTER X. EXECUTION.

ARTICLE 28.

Execution.

§ 1-302. Judgment enforced by execution.—Where a judgment requires the payment of money or the delivery of real or personal property it may be enforced in those respects by execution, as provided in this article. Where it requires the performance of any other act a certified copy of the judgment may be served upon the party against whom it is given, or upon the person or officer who is required thereby or by law to obey the same, and his obedience thereto enforced. If he refuses, he may be punished by the court as for contempt. (C. C. P., s. 257; Code, s. 441; Rev., s. 615; C. S., s. 663.)

Cross Reference.—As to provisions for punishment for contempt generally, see §§ 5-1 through 5-9.

In General.—An execution is a writ, issuing from a court, and is an authority to the sheriff or other officer to do what it commands. *Wayman v. Southard*, 10 Wheat. (23 U. S.) 1, 6 L. Ed. 253 (1825).

Every execution presupposes a judgment, and the right to issue the one implies the existence of the other. *Sheppard v. Bland*, 87 N. C. 163 (1882). The general

rule is that the power to issue an execution is a necessary consequence to the power to render judgment. *Bank v. Halstead*, 10 Wheat. (23 U. S.) 51, 6 L. Ed. 264 (1825).

A judgment creditor is entitled to have his judgment satisfied, if need be, by a sale of his debtor's property, except such parts thereof as may be exempt from execution. The ordinary process to enforce such a judgment is that of execution against the property of the debtor, and

this process the creditor may have from time to time while the judgment continues in force, until it shall be discharged. *Vege-lahn v. Smith*, 95 N. C. 254 (1886).

Where the land of a judgment debtor is subjected to a specific lien for its payment, the judgment creditor may proceed against the debtor in personam, may compel payment by proceeding in rem, or pursue both remedies at the same time. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

Purpose of Execution.—An execution is the end and life of the law, and is indispensably necessary to the beneficial exercise of the jurisdiction of a court. *Bank v. Halstead*, 10 Wheat. (23 U. S.) 51, 6 L. Ed. 264 (1825). The purpose of an execution is to give effect to the judgment on which issued. *Harshman v. Knox County*, 122 U. S. 306, 7 S. Ct. 1171, 30 L. Ed. 1152 (1887).

The issuance of an execution does not prolong the life of a lien, nor stop the running of the statute of limitation. *Cheshire v. Drake*, 223 N. C. 577, 27 S. E. (2d) 627 (1943).

Property Subject to Execution.—The property need not be the subject of sale. It is the title of the defendant, and not the property itself, which is subject to execution. *Turner v. Fendall*, 1 Cranch (5 U. S.) 117, 2 L. Ed. 53 (1801); *The Moses Taylor*, 4 Wall. (71 U. S.) 411, 18 L. Ed. 397 (1866).

What Law Governs.—Liability of property to be subjected to execution is in the case of real estate, to be determined by the law of the jurisdiction of the situs. *Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884).

Liability in the case of personal property is determined by the law of the state where the property actually is, regardless of the domicile of the owner. *Hervey v. R. I. Locomotive Works*, 93 U. S. 664, 23 L. Ed. 1003 (1876).

And in the case of choses in action and trusts, liability is determined by the place where created or found. *Spindle v. Shreve*, 111 U. S. 542, 4 S. Ct. 522, 28 L. Ed. 512 (1884).

Debtor's Funds in Hands of Third Per-

son.—Where it appears, in proceedings supplementary to execution, that a third person has funds of the defendant available for the judgment debt, etc., an order may be made by the court forbidding such third persons to dispose of the funds. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

An order taxing the cost of action against a party, is in effect a judgment, upon which an execution may be issued under the provisions of this section. *Shepard v. Bland*, 87 N. C. 163 (1882).

After Death of Defendant.—But an execution issued on a judgment after the death of the defendant is void. *Sawyers v. Sawyers*, 93 N. C. 321 (1885); *Williams v. Weaver*, 94 N. C. 34 (1886). For new execution against the property after defendant dies in execution, see § 1-312.

Execution against Counties Not Authorized.—A plaintiff who has obtained a judgment against a county is not entitled to an execution against it. His remedy is by a writ of mandamus against the board of commissioners of the county to compel them to levy a tax for the satisfaction of the judgment. *Gooch v. Gregory*, 65 N. C. 142 (1871).

Remedy for Refusal of Clerk to Issue Execution.—Should the clerk refuse to issue the execution to which the plaintiff is entitled on his judgment, he has two remedies for enforcing his rights: (1) he may obtain a rule on the clerk as an officer of the court to compel him to perform his duty, or be subject to an attachment for a contempt; or (2) he may sue the clerk on his official bond. He is not entitled to a writ of mandamus against the clerk. *Gooch v. Gregory*, 65 N. C. 142 (1871); *Electric Co. v. Engineering Co.*, 128 N. C. 199, 38 S. E. 831 (1901).

Justice's Judgments Enforceable by Execution.—For the purposes of its enforcement by execution the judgment of a justice's court is given the same effect and force as the judgments of the superior courts. *Broyles v. Young*, 81 N. C. 315 (1879).

Cited in *Lupton v. Edmundson*, 220 N. C. 188, 16 S. E. (2d) 840 (1941).

§ 1-303. Kinds of; signed by clerk; when sealed.—There are three kinds of execution: one against the property of the judgment debtor, another against his person, and the third for the delivery of the possession of real or personal property, or such delivery with damages for withholding the same. They shall be deemed the process of the court, and shall be subscribed by the clerk, and when to run out of his county, must be sealed with the seal of his court. (C. C. P., s. 258; Code, s. 442; Rev., s. 616; C. S., s. 664.)

Cross References.—As to forms of executions, see § 1-313; for execution against the person, see §§ 1-311 and 1-313.

Sealing Execution Issued to Another

County.—Sealing is necessary to the validity of all executions issuing to another county; and a sheriff, by acting under an unsealed writ, does not render it valid. *Shackelford v. M'Rea*, 10 N. C. 226 (1824); *Seawell v. Bank*, 14 N. C. 279 (1831); *Finley v. Smith*, 15 N. C. 95 (1833); *Free-*

man v. Lewis, 27 N. C. 91 (1844); *Taylor v. Taylor*, 83 N. C. 116 (1880).

Without a seal it confers no power on the sheriff, and his acting under it cannot give it validity. *Shackelford v. M'Rea*, 10 N. C. 226 (1824); *Shepherd v. Lane*, 13 N. C. 148 (1828).

§ 1-304. Against married woman.—An execution may issue against a married woman, and it must direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise. (C. C. P., s. 259; Code, s. 443; Rev., s. 617; C. S., s. 665.)

Effect of the Restriction.—The provision of this section that the execution shall be levied only upon her separate property can give no effect other than to exempt what she holds *ex jure mariti*, i. e., her contingent right of dower. There is nothing else to which the restriction could possibly apply. *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644 (1903). See *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129 (1898).

Execution on All Separate Property except Exemptions.—Under this section execution can be levied on all the separate property owned by a married woman, with the same exceptions allowed to men or a feme sole. *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644 (1903).

Claiming Exemptions.—In an action on a note to charge the separate estate of a married woman, she cannot set up her personal property exemptions against the action, but may claim the same upon issuance of execution. *Harvey v. Johnson*, 133 N. C. 352, 45 S. E. 644 (1903).

§ 1-305. Clerk to issue, in six weeks; penalty.—The clerks of the superior court shall issue executions on all judgments rendered in their respective courts, unless otherwise directed by the plaintiff, within six weeks of the rendition of the judgment, and must endorse upon the record the date of such issue. If the executions issued are not returned satisfied to the courts to which they are made returnable, the clerks must issue alias executions, within six weeks thereafter, unless otherwise instructed as aforesaid. Every clerk who fails to comply with the requirements of this section is liable to be amerced in the sum of one hundred dollars for the benefit of the party aggrieved, under the same rules that are provided by law for amercing sheriffs, and is further liable to the party injured by suit upon his bond. (1850, c. 17, ss. 1, 2, 3; R. C., c. 45, s. 29; Code, s. 470; Rev., s. 618; C. S., s. 666.)

Clerk to Issue.—The clerk of the superior court, not the judge, is the proper officer to issue execution. *McKethan v. McNeill*, 74 N. C. 663 (1876).

It is the duty of a clerk, as a ministerial officer of the court, to issue execution. *Gooch v. Gregory*, 65 N. C. 142 (1871). See also, *Spencer v. Hawkins*, 39 N. C. 288 (1846).

A deputy clerk has power to issue execution in the name of the clerk. *Miller v. Miller*, 89 N. C. 402 (1883).

Suspension of Statute by Ordinance of

Application of Restriction as to Property Charged with Debt.—This section does not restrict the issue of execution against "the property she had charged with the debt." The words, "her separate property," evidently mean that an execution against her cannot be collected, as formerly, out of the husband, though he is still a necessary party defendant with her. *McLeod v. Williams*, 122 N. C. 451, 30 S. E. 129 (1898); *Lipinsky v. Revell*, 167 N. C. 508, 83 S. E. 820 (1914); *Thrash v. Ould*, 172 N. C. 730, 90 S. E. 915 (1916).

Requisites Should Appear on Record.—The mandate of this section that whenever an execution may issue against a married woman it shall direct the levy and collection of the amount of the judgment against her from her separate property, and not otherwise, presupposes that all these requisites appear of record, and that the existence of such separate property is fixed by the judgment. *Dougherty v. Sprinkle*, 88 N. C. 300 (1883).

1866.—See *Badham v. Jones*, 64 N. C. 655 (1870); *McIntyre v. Merritt*, 65 N. C. 558 (1871); *Richardson v. Wicken*, 80 N. C. 172 (1879); *Williamson v. Kerr*, 88 N. C. 11 (1883).

What Constitutes "Issuing" of Execution.—A writ of execution is not issued, within the meaning of this section, until the clerk hands it to the sheriff, or to the party or his agent. The mere filing and retaining it, where it does not leave the office of the clerk, is not sufficient. *State v. McLeod*, 50 N. C. 318 (1858).

It is necessary for the issuance of an execution that it be actually or constructively delivered to the sheriff, and when it is made out, but not sent out of or issued from the clerk's office, and memorandum of "execution" is entered on the docket, it is not sufficient, under this section, and does not prevent the judgment from becoming dormant. *McKeithen v. Blue*, 149 N. C. 95, 62 S. E. 769 (1908).

The signature of the clerk is an absolute necessity to the validity of the writ and this is all the more so since the legislature dispensed with the other indicium of the writ's authenticity, that is, a seal when the writ was to be executed within the county in which it issued. *Shepherd v. Lane*, 13 N. C. 148 (1828).

The signature of a justice is absolutely necessary to an alias, as well as to an original execution on a justice's judgment. Hence an entry of "execution renewed" without the signature of a justice, at the foot of a dormant justice's execution, gives no authority to the acts of an officer under it. *Huggins v. Ketchum*, 20 N. C. 550 (1839).

A writ signed by an attorney under a verbal deputation of the clerk to all the members of the bar is a nullity, and the sheriff is not liable for not acting under it. *Shepherd v. Lane*, 13 N. C. 148 (1828).

Endorsement on Execution Docket.—The requirement to "endorse on the record the date of the issuing" means that the entry should be made on an "execution docket," and is not complied with by an entry on the execution. *Bank v. Stafford*, 47 N. C. 98 (1854).

Option to Issue to One of Two Counties—Amercement.—An allegation that the

clerk failed to issue an execution to one county when he had an option to issue to one of two counties will not justify an amercement under this section. *Bank v. Stafford*, 47 N. C. 98 (1854).

Liability in Damages of Clerk for Failure to Issue.—Under this section a clerk and master, who failed to issue an execution based upon a decree obtained when the defendant had become insolvent, were held liable in damages for whatever sum the plaintiff can show he has sustained by such nonfeasance. *McIntyre v. Merritt*, 65 N. C. 558 (1871).

Payment of Fees Condition to Clerk's Liability.—This section and § 138-2, providing that the clerk shall not be compelled to perform any services unless his fees be paid or tendered, must be construed together. It follows that clerks of the superior court will not incur the penalty prescribed by this section for failure to issue execution within six weeks, unless the plaintiff pays or tenders him his fees for that service. *Bank v. Bobbitt*, 111 N. C. 194, 16 S. E. 169 (1892). See *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. (2d) 44 (1947).

Penalty to Whose Benefit.—This section gives the penalty to the party aggrieved; hence the plaintiff must show himself to be the party aggrieved by the default of the clerk. *Simpson v. Simpson*, 63 N. C. 534 (1869).

Remedy for Refusal of Clerk to Issue.—See *Gooch v. Gregory*, 65 N. C. 142 (1871), in annotations to § 1-302.

Applied in Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67 (1934).

§ 1-306. Enforcement as of course.—The party in whose favor judgment is given, and in case of his death, his personal representatives duly appointed, may at any time after the entry of judgment proceed to enforce it by execution, as provided in this article; Provided, however, that no execution upon any judgment which requires the payment of money or the recovery of personal property may be issued at any time after ten years from the date of the rendition thereof; but this proviso shall not apply to any execution issued solely for the purpose of enforcing the lien of a judgment upon any homestead, which has or shall hereafter be allotted within the ten years from the date of rendition of judgment, or any judgment directing the payment of alimony. (C. C. P., s. 255; Code, s. 437; Rev., s. 619; C. S., s. 667; 1927, c. 24; 1935, c. 98.)

Editor's Note.—The amendment of 1935 added the proviso.

Preserving Vitality of Judgment by Successive Executions.—Where under this section the vitality of the judgment has been preserved by the issuance of executions within each successive period of three years (that being the limitation prior to 1927 amendment) after its rendition, the statu-

tory bar of ten years which is the time prescribed for bringing actions on judgments, does not prevent an execution from being issued, and the seizure and sale of personal property thereunder, after the expiration of the limited period. *Williams v. Mullis*, 87 N. C. 159 (1882).

Homestead.—The allotment of homestead suspends the running of the statute

of limitations. *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567 (1942).

Sale Must Be Completed within Ten Years.—This section and § 1-234 clearly manifest the legislative intent that the process to enforce the judgment lien and to render it effectual must be completed by a sale within the prescribed time. Hence, it follows that the lien upon lands of a docketed judgment is lost by the lapse of ten years from the date of the docketing, and this notwithstanding execution was begun, but not completed, before the expiration of the ten years. The only office of an execution is to enforce the lien of the judgment by a sale of the lands, and this must be done before the lien is lost. The execution adds nothing by way of prolongation to the life of the lien. *McCullen v. Durham*, 229 N. C. 418, 50 S. E. (2d) 511 (1948).

§ 1-307. Issued from and returned to court of rendition.—Executions and other process for the enforcement of judgments can issue only from the court in which the judgment for the enforcement of the execution or other final process was rendered; and the returns of executions or other final process shall be made to the court of the county from which it issued. In all cases prior to the first day of March, one thousand nine hundred and forty-five, where a judgment has been rendered in the superior court of one county and the transcript thereof has been docketed in the office of the clerk of the superior court of some other county or counties, all executions heretofore issued on such docketed transcript of judgment and all homestead proceedings, execution sales, judicial sales and assignments related thereto and based thereon are hereby declared to be lawful, legal and binding upon all purchasers, judgment debtors, judgment creditors, assignors and assignees, and on all parties to the original action and on all parties to or affected by any proceedings related to or based upon such execution, and all such sales, purchases, proceedings and assignments are hereby validated. (1871-2, c. 74; 1881, c. 75; Code, s. 444; Rev., s. 623; C. S., s. 669; 1945, c. 773.)

Cross Reference. — As to penalty for false return by sheriff, see § 162-14.

Editor's Note. — The 1945 amendment added the second sentence.

Return to Another County Not Authorized.—Since the passage of the act of 1870-'71, ch. 42, the clerk of the superior court of one county cannot issue a summons returnable in the superior court of another. *Howerton v. Tate*, 66 N. C. 431 (1872).

May Issue Only from Court Rendering Judgment. — Under the original Code, executions might be issued from any

Expiration of Lien of Judgment.—Where a judgment rendered in another county is docketed in the county in which the judgment debtor owns realty, the lien of the judgment expires at the end of ten years from the date of the rendition of the judgment and not the date of docketing. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

Execution Sale Held Less than Ten Days before Expiration of Ten Years.—See notes to § 1-234.

Effect of Enjoining Execution.—A party may not enjoin execution on a judgment until the statute of limitations has run and then plead the bar of the statute against the judgment. *Holden v. Totten*, 228 N. C. 204, 44 S. E. (2d) 874 (1947).

Cited in *Exum v. Carolina R. Co.*, 222 N. C. 222, 22 S. E. (2d) 424 (1942).

county where the judgments had been docketed, and were returnable to the court from which they issued; but since the act of 1871-'72, chap. 74, § 1, executions shall issue only from the court in which the judgment was rendered. *Hasty v. Simpson*, 77 N. C. 69 (1877).

This section and § 1-352 must be construed in pari materia with other statutes relating to the same matter. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936). See §§ 1-493, 1-499, 1-501 and 7-286.

§ 1-308. To what counties issued.—When the execution is against the property of the judgment debtor it may be issued to the sheriff of any county where the judgment is docketed. No execution may issue from the superior court of any county upon a judgment until it is docketed in that county. When it requires the delivery of real or personal property it must be issued to the sheriff of the county where the property, or some part thereof, is situated. Executions may be issued at the same time to different counties. (C. C. P., s. 259; 1871-2, c. 74; 1881, c. 75; Code, s. 443; 1905, c. 412; Rev., s. 622; C. S., s. 670.)

Editor's Note. — Formerly this section the issuance of the execution that the judgment be already docketed in such other

county at the time the execution was issued. The execution and the transcript of judgment for docketing were allowed to be sent to such other county at the same time, and the execution was nonetheless valid. *Bernhardt v. Brown*, 122 N. C. 587, 29 S. E. 884 (1898). This rule was changed by the insertion, in 1905, of the second sentence of the section. It was held in *Cox v. Boyden*, 153 N. C. 522, 69 S. E. 504 (1910), that this amendment was not retroactive

and did not apply to executions issued prior to its passage.

Several Defendants.—A writ was issued against three defendants, two of whom were in one county and the other in another county, in which the judgment was rendered. Held, that in the absence of special instructions, the clerk might issue an execution to either county. *Bank v. Stafford*, 47 N. C. 98 (1854).

§ 1-309. Sale of land under execution.—Real property adjudged to be sold must be sold in the county where it lies, by the sheriff of the county or by a referee appointed by the court for that purpose; and thereupon the sheriff or referee must execute a conveyance to the purchaser, which conveyance shall be effectual to pass the rights and interests of the parties adjudged to be sold. (C. C. P., s. 259; Code, s. 443; Rev., s. 622; C. S., s. 671.)

Foreclosure Sales Not Affected.—The provisions of this section relative to judicial sales are intended to apply to proceedings in the nature of execution sales of property in the hands of others charged with the payment of the judgment, and have no application to foreclosure proceedings, which are left to be governed by the old equity practice. *Kidder v. McIlhenny*, 81 N. C. 123 (1879).

Sale by Successor in Office.—Where a fi. fa. was levied by one sheriff before his death, his successor had no authority to sell the property under a venditioni exponas, since an execution is an entire thing, and must be completed by the hand which commenced it. *Sanderson v. Rogers*, 14 N. C. 38 (1831).

A writ directed to the sheriff for the sale of land levied on by a sheriff who had gone out of office will not authorize a sale of land by the late sheriff. *Tarkinton v. Alexander*, 19 N. C. 87 (1836).

§ 1-310. When dated and returnable.—Executions shall be dated as of the day on which they were issued, and shall be returnable to the court from which they were issued not less than forty nor more than ninety days from said date, and no executions against property shall issue until the end of the term during which judgment was rendered. (1870-1, c. 42, s. 7; 1873-4, c. 7; Code, s. 449; 1903, c. 544; Rev., s. 624; C. S., s. 672; 1927, c. 110; 1931, c. 172.)

Editor's Note.—The 1927 amendment materially changed the provisions of this section. Formerly, in lieu of the present provision relative to the dating of the execution, the section had provided for the attestation thereof as of the term next before the day on which it was issued. Then the execution was returnable to the next term of the court beginning not less than forty days after the issuance thereof.

The 1931 amendment substituted ninety days for sixty days, and inserted the words "to the court from which they were

Where a sheriff has levied on lands and goods, and gone out of office, a general venditioni may issue to the new sheriff, where the goods have been delivered over to him. *Tarkinton v. Alexander*, 19 N. C. 87 (1836), explaining and reconciling the cases of *Holliday v. Eastwood*, 12 N. C. 157 (1827), and *Sanderson v. Rogers*, 14 N. C. 38 (1831), with those of *Barden v. M'Kinne*, 11 N. C. 279 (1826), and *Seawell v. Bank*, 14 N. C. 279 (1831), and approving them all.

Upset Bid—Setting Aside Sale.—An execution sale, when closed, was not subject to an upset bid prior to Public Laws 1933, c. 482, and, when regularly made, such sale was not to be set aside, except for some trick, artifice, fraud, oppression or undue advantage, which was required to be alleged and proved, with each case to be judged by its own facts. *Weir v. Weir*, 196 N. C. 268, 145 S. E. 281 (1928).

issued".

By this statute the legislature has fixed the life of an execution. It begins on the day of the issuance of the execution, and by limitation terminates ninety days from the date of it. It may not be returned in less than forty days but must be returned in ninety days. Hence, under this statute an execution should be made returnable "not less than forty nor more than ninety days" from its date. And while failure to follow the statute makes an execution irregular, the life of it as fixed by the statute

is not affected. *Gardner v. McDonald*, 223 N. C. 555, 27 S. E. (2d) 522 (1943).

Computation of First and Last Day.—In computing the number of days within which the writ of execution must be returned, the day of the issuance of execution must be included and the day of its return must be excluded. This is by analogy to the rule applied to the return of a process. *Taylor v. Harris*, 82 N. C. 25 (1880).

Attestation and Dating Directory.—This section which formerly required the attestation of the execution is merely directory, and the omission of such attestation does not vitiate the process. *Bryan v. Hubbs*, 69 N. C. 423 (1873); *Williams v. Weaver*, 94 N. C. 134 (1886). This rule would now be equally applicable to the provision re-

quiring the dating of the execution.—Ed. Note.

The Return Day Formerly.—Formerly, when the section required that the execution be returned to the next term of the court, it was held that the sheriff was not compelled to make his return of an execution on the first day of the term, though it was more regular, and for many reasons desirable that he should do so, and that it was sufficient if he make the return during the term, unless ruled to make it on an earlier day of the term. *Boyd v. Teague*, 111 N. C. 246, 16 S. E. 338 (1892).

Applied in State Board of Education v. Gallop, 227 N. C. 599, 44 S. E. (2d) 44 (1947); *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

§ 1-311. Against the person.—If the action is one in which the defendant might have been arrested, an execution against the person of the judgment debtor may be issued to any county within the State, after the return of an execution against his property wholly or partly unsatisfied. But no execution shall issue against the person of a judgment debtor, unless an order of arrest has been served, as provided in the article Arrest and Bail, or unless the complaint contains a statement of facts showing one or more of the causes of arrest required by law, whether such statement of facts is necessary to the cause of action or not. Provided, that where the facts are found by a jury, the verdict shall contain a finding of facts establishing the right to execution against the person; and where jury trial is waived and the court finds the facts, the court shall find facts establishing the right to execution against the person. (C. C. P., s. 260; Code, s. 447; 1891, c. 541, s. 2; Rev., s. 625; C. S., s. 673; 1947, c. 781.)

Cross Reference.—As to provisional remedies by arrest and bail, see §§ 1-409 et seq.

Editor's Note. — The 1947 amendment added the proviso at the end of this section. The amendment is apparently simply a recognition of existing case law. 25 N. C. Law Rev. 390.

General Doctrine.—Where the complaint alleges a cause of arrest, whether the same be necessary to the cause of action or not, an execution against the person of the debtor may issue upon a finding of the cause, after an unsatisfied execution under a judgment against his property has been returned. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906); *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913).

Three Classes of Cases Contemplated.—This section providing for execution against the person of the defendant, taken in connection with § 1-411, contemplates three classes of cases: (1) Where the cause of arrest is not set forth in the complaint; (2) where the cause is set forth in the complaint, but only collateral and extrinsic to the plaintiff's cause of action; (3) where the cause set forth in the complaint is essential to the plaintiff's claim. *State ex rel.*

Peebles v. Foote, 83 N. C. 102 (1880).

Same—The First Class.—In cases within the first class, the defendant can only be arrested by an order founded upon a sufficient affidavit setting forth the sources of information, when it is based upon information and belief. And in such cases no execution can be issued against the person without such order previously had and served. *State ex rel. Peebles v. Foote*, 83 N. C. 102 (1880).

Same—The Second Class.—In cases of the second class, the statement of the cause of arrest in the complaint will answer in place of an affidavit, but the statement must be as explicit as if set forth in an affidavit and properly verified. In such cases there must be an order of arrest before execution against the person of the debtor. *State ex rel. Peebles v. Foote*, 83 N. C. 102 (1880).

Same—The Third Class. — In the last class of cases, where the facts stated in the complaint as causes of arrest are essential to or constitute plaintiff's cause of action, no affidavit for the order of arrest is needed, and no such order is required before execution may be issued against the person of the defendant, provided the com-

plaint has been duly verified. But a verification on information and belief will not answer, unless it gives the sources of information, etc. *State ex rel. Peebles v. Foote*, 83 N. C. 102 (1880).

Upon Docketed Judgment of Justice.—An execution against the person can only issue upon a docketed judgment of a justice of the peace when it is authorized by this section, or when it appears to the clerk that the defendant had been arrested before judgment. *McAden v. Banister*, 63 N. C. 479 (1869).

Necessity of Recovery of Judgment.—No execution can issue against the person of the defendant, even though the complaint alleges facts to justify an arrest, unless the plaintiff has recovered a judgment against the defendant. Thus in *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18 (1897), the court expounding this doctrine, said: It will not do to carry the doctrine of *State ex rel. Peebles v. Foote*, under this section, to the extent contended for in the argument for plaintiff—that, because there is an allegation in the complaint, this fact entitles the plaintiff to an execution against the body of the defendant, whether the plaintiff recovered a judgment against the defendant or not. To sustain this position would be in effect to nullify the Constitution.

Two Alternative Conditions Prerequisite.—There are two alternative essential conditions upon which depends the issuance of an execution against the person of the defendant. They are: (a) a lawful arrest before judgment, or (b) a complaint averring such facts as would have justified an order for an arrest. *Houston v. Walsh*, 79 N. C. 36 (1878).

Facts Must Enter into Judgment.—An execution against the person can issue only when the facts alleged entitling the plaintiff thereto have been passed upon and entered into the judgment. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915).

Facts Pleaded and Proved and Issue Determined.—In order to issue an execution against the person of the defendant in cases where it is permissible, the cause of arrest must be pleaded and proved, the issue affirmatively determined by the jury and judgment rendered. *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913).

In the Absence of Order for Arrest, or Complaint.—Where there is no order of arrest before judgment nor any complaint filed averring such facts as would have justified such order, a defendant cannot be arrested after judgment under an execution against the person under this section. *Houston v. Walsh*, 79 N. C. 36 (1878).

It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43 (1887).

Motion before the Clerk—Appeal to Superior Court.—Where a personal execution against a debtor is allowed by the statute, it must be by motion before the clerk after an unsatisfied return of the execution against his property, and from any adverse ruling his decision is subject to review on appeal to the superior court; and if a judgment in the superior court may permit an execution against the person of the debtor, should the execution against his property thereafter be returned unsatisfied, the court is not required to order in the judgment that execution issue against the person of the debtor in anticipation of such a return on the execution. *Turlington v. Aman*, 163 N. C. 555, 79 S. E. 1102 (1913).

Execution for Conversion.—Under this section and § 1-410, providing that a defendant may be arrested when the action is for wrongfully taking, detaining or converting personal property, where the defendant, cotenant of a race horse, converted it by selling the horse while in his (defendant's) possession, such defendant was subject to execution against the person. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915).

Under this section an affirmative answer to an issue establishing that defendant had retained and converted to his own use, in violation of the terms of the contract of assignment with plaintiff, property belonging to plaintiff, is sufficient to support a judgment that execution against the person of defendant issue upon application of plaintiff upon return of execution against the property unsatisfied, intent of defendant in doing the acts constituting a breach of trust being immaterial, and a specific finding of fraud being unnecessary. *East Coast Fertilizer Co. v. Hardee*, 211 N. C. 653, 191 S. E. 725 (1937).

For Injury Committed to Plaintiff's Person — Stay of Execution.—Where judgment was rendered by a court of competent jurisdiction against the defendant in a certain sum for an injury committed to the person of the plaintiff who appealed without giving bond to stay execution, it was held, (1) upon the return of execution against defendant's property unsatisfied an execution upon the person may issue; (2) filing an inventory of his property, etc., will not exempt the defendant from arrest; (3) the execution can only be stayed by giving a bond securing the judg-

ment. *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207 (1911).

Injury Wilfully Inflicted.—Where the pleadings, evidence, and verdict are that an injury was wilfully inflicted, an order for execution against the person of the defendant upon the return of execution against his property unsatisfied is proper under this section and § 1-410. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36 (1929).

Allegations and evidence tending to show that the defendant, while drunk, drove his automobile on the wrong side of a street of a city where traffic was heavy at a rate of forty-five or fifty miles an hour, under circumstances which should have convinced him, as a man of ordinary prudence, that he incurred the risk of imminent peril to human life, and that the plaintiff was injured thereby: Held, sufficient to sustain the jury's verdict that the injury was inflicted wilfully and wantonly, and an order for execution against the person of defendant upon return of execution against his property unsatisfied was proper under such sections. *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36 (1929).

Liability in Damages for Malicious Prosecution.—Where a trial court of competent jurisdiction has regularly determined that the plaintiff in the action had the right to arrest the defendant on personal execution, and accordingly the defendant has been taken into custody under

this section, the plaintiff in said action is not liable in damages in defendant's subsequent action for malicious prosecution, though the verdict and finding of the jury or finding for plaintiff in the former suit is thereafter set aside or reversed on appeal or other ruling in the orderly progress of the cause. *Overton v. Combs*, 182 N. C. 4, 108 S. E. 357 (1921).

Allegation of Malice.—In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N. C. 340, 1 S. E. (2d) 870 (1939).

Discharge of Person under Execution.—The person arrested may be discharged, after judgment and without payment, only by surrendering all of his property in excess of \$50. *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894). The effect of an execution against the person of the judgment debtor, therefore, is to deprive the defendant in the execution of his homestead exemption and of any personal property exemption over and above \$50.

Allegation and Proof.—Where plaintiff suggests fraud in defendant's affidavit of insolvency he must sufficiently allege and prove fraud or proceeding will be dismissed. *Hayes v. Lancaster*, 202 N. C. 515, 163 S. E. 602 (1932).

Cited in *Foster v. Hyman*, 197 N. C. 189, 148 S. E. 36 (1929).

§ 1-312. Rights against property of defendant dying in execution.—Parties at whose suit the body of a person is taken in execution for a judgment recovered, their executors or administrators, may, after the death of the person so taken and dying in execution, have the same rights against the property of the person deceased, as they might have had if that person had never been in execution. (21 James I, s. 24; R. C., c. 45, s. 28; Code, s. 469; Rev., s. 626; C. S., s. 674.)

Cross Reference.—As to payment of judgments in settlement of a decedent's estate, see § 28-105.

§ 1-313. Form of execution.—The execution must be directed to the sheriff, or coroner when the sheriff is a party or interested, subscribed by the clerk of the court, and must intelligibly refer to the judgment, stating the county where the judgment roll or transcript is filed, the names of the parties, the amount of the judgment, if it is for money, the amount actually due thereon, and the time of docketing in the county to which the execution is issued, and shall require the officer substantially as follows:

Cross Reference.—As to subscribing and sealing the execution by the clerk, see § 1-303 and note.

1. Against Property—No Lien on Personal Property until Levy. — If it is against the property of the judgment debtor, it shall require the officer to satisfy the judgment out of his personal property; and if sufficient personal property cannot be found, out of the real property belonging to him on the day when the judgment was docketed in the county, or at any time thereafter; but no execution

against the property of a judgment debtor is a lien on his personal property, as against any bona fide purchaser from him for value, or as against any other execution, except from the levy thereof.

Refusal to Produce Personalty Warrants Sale of Realty.—The provision requiring that the officer satisfy the judgment first out of the personalty, is solely for the debtor's benefit, and if he refuses to produce his personalty his lands may be sold. *McCoy v. Beard*, 9 N. C. 377 (1823).

The judgment debtor waives or forfeits his right to have his personal property taken in preference to his land for the satisfaction of a judgment by requesting the sheriff to levy upon the land in the first instance, or by failing to disclose his personal property when the sheriff is about to make a levy. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

And No One Else Can Object if Sheriff Sells Land First. — The provisions that the personal property of a judgment debtor is to be exhausted before recourse is had to his realty for the satisfaction of a judgment is intended solely for the benefit of the judgment debtor and nobody else can object if the sheriff levies on and sells land without first exhausting the judgment debtor's personalty. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

Presumption That Sheriff Levied on Realty.—Where it is not made to appear that the judgment debtors possessed per-

sonalty, attack on the sale on the ground that the sheriff failed to satisfy the judgment out of the personalty is untenable, since it will be presumed that the sheriff levied on realty because he could not find any personalty. *North Carolina Joint Stock Land Bank v. Bland*, 231 N. C. 26, 56 S. E. (2d) 30 (1949).

Lien as of What Time against Purchasers.—Under this section the lien of execution against the personal property of the defendant, as against bona fide purchasers, does not date from the date of such execution, but from the time of levy thereunder. *Weinsensfield v. McLean*, 96 N. C. 248, 2 S. E. 56 (1887).

The lien of an execution against the realty dates from the time of the rendition of judgment, provided it is docketed. See § 1-234.

Sale of Realty without Levy.—A sale of real estate under an execution issued on a judgment, which is a lien thereon, is valid without a levy. All that is essential to a valid sale of real estate under execution is that the requirements of the law be observed and that it be fully made known at the sale what property is being sold. *Farrior v. Houston*, 100 N. C. 369, 6 S. E. 72 (1888).

Cited in *Southern Dairies v. Banks*, 92 F. (2d) 282 (1937).

2. Against Property in Hands of Personal Representative.—If it is against real or personal property in the hands of personal representatives, heirs, devisees, legatees, tenants of real property or trustees it shall require the officer to satisfy the judgment out of such property.

3. Against the Person.—If it is against the person of the judgment debtor, it shall require the officer to arrest him, and commit him to the jail of the county until he pays the judgment or is discharged according to law.

When Irregular.—An execution is irregular if it does not run in the name of the State and convey its authority to the officers to arrest the defendant. *Houston v. Walsh*, 79 N. C. 36 (1878).

Should Command the Sheriff. — Executions issued under this section should com-

mand the sheriff to arrest the defendant and commit him to the jail of the county from which it issued, until he shall pay the judgment or be discharged according to law. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43 (1887).

4. For Delivery of Specific Property.—If it is for the delivery of the possession of real or personal property, it shall require the officer to deliver the possession of the same, particularly describing it, to the party entitled thereto, and may at the same time require the officer to satisfy any costs, damages, rents, or profits recovered by the same judgment, out of the personal property of the party against whom it was rendered, and the value of the property for which the judgment was recovered, to be specified therein, if a delivery cannot be had; and if sufficient personal property cannot be found, then out of the real property belonging to him on the day when the judgment was docketed, or at

any time thereafter, and in that respect is deemed an execution against property.

5. For Purchase Money of Land.—If the answer in an action for recovery of a debt contracted for the purchase of land does not deny, or if the jury finds, that the debt was so contracted, it is the duty of the court to have embodied in the judgment that the debt sued on was contracted for the purchase money of the land, describing it briefly; and it is also the duty of the clerk to set forth in the execution that the said debt was contracted for the purchase of the land, the description of which must be set out briefly as in the complaint. (C. C. P., s. 261; 1868-9, c. 148; 1879, c. 217; Code, ss. 234-236, 448; Rev., s. 627; C. S., s. 675.)

Recital in Judgment Conclusive.—If the judgment of the court recites the fact that the debt was contracted for the purchase of land, as prescribed by this clause of this section, such recital is conclusive as between the parties to the record. *Durham v. Wilson*, 104 N. C. 595, 10 S. E. 683 (1889).

Reason of Recital as to Homestead Interest.—The homestead interest of a defendant is subject to execution issued upon a judgment recovered for the purchase money of the land sold. Hence the requirement that it shall be set forth in the judgment and execution that the debt sued

on was contracted for the purchase money of land, so that the sheriff may sell the land without regard to the homestead. *Toms v. Fite*, 93 N. C. 274 (1885).

Same—Sale Not Void.—Land purchased but not yet paid for is not exempt from execution as a homestead under a judgment for the purchase money of such land. And the execution sale under which it is sold is valid even though there was no evidence of record that the judgment was for the purchase money of the land. *Durham v. Bostick*, 72 N. C. 353 (1875).

§ 1-314. **Variance between judgment and execution.**—When property has been sold by an officer by virtue of an execution or other process commanding sale, no variance between the execution and the judgment whereon it was issued, in the sum due, in the manner in which it is due, or in the time when it is due, invalidates or affects the title of the purchaser of such property. (1848, c. 53; R. C., c. 44, s. 13; Code, s. 1347; Rev., s. 628; C. S., s. 676.)

Liberal Construction.—This section is to be liberally construed. *Wilson v. Taylor*, 98 N. C. 275, 3 S. E. 492 (1887).

Execution for Less Amount than Judgment.—The fact that the execution varied from the judgment in being for a less amount is expressly cured by this section. *Maynard v. Moore*, 76 N. C. 158 (1877).

Execution for Larger Amount than Judgment.—In the case of *Hinton v. Roach*, 95 N. C. 106 (1886), the docket showed a judgment in favor of Hinton against Roach for \$28, while the execution recited also other judgments and called for

a larger sum than \$28. It was held that the irregularity was cured by this section.

Technical Variance Immaterial.—Where a judgment was rendered against H for \$182.20 and against other defendants, separately mentioned, for various amounts and an execution was issued reciting only the judgment against H for \$182.20, and commanding the sheriff to satisfy it out of H's property, it was held, that the execution sufficiently conformed to the judgment and the variance was technical and immaterial. *Marshburn v. Lashlie*, 122 N. C. 237, 29 S. E. 371 (1898).

§ 1-315. **Property liable to sale under execution.**—The property of the judgment debtor, not exempted from sale under the Constitution and laws of this State, may be levied on and sold under execution as hereinafter prescribed:

1. Goods, chattels, and real property belonging to him.

As to historical development of legislation by which the lands of debtors became subject to execution, thus changing the common-law rule, see *Jones v. Edmonds*, 7 N. C. 43 (1819).

Public Property and Institutions.—Property held for necessary public uses and purposes, such as court-houses, jails, schoolhouses, etc., can not be sold under

execution. *Gooch v. Gregory*, 65 N. C. 142 (1871); *Vaughan v. Commissioners*, 118 N. C. 636, 24 S. E. 425 (1896); *Morganton Hardware Co. v. Morganton Graded Schools*, 151 N. C. 507, 66 S. E. 583 (1909).

Life Estate.—Where a life estate is devised to the testator's son and changed by codicil to appoint a trustee to hold the title and to give him the full rights of enjoy-

ment of a life tenant in the event a creditor should bring action against him for a debt: Held, the condition upon which the title is to be held in trust is void and his title as tenant for life will continue for the duration of his life, and under this section may be sold under execution on a judgment against him. *Mizell v. Bazemore*, 194 N. C. 324, 139 S. E. 453 (1927).

Vested Remainders. — The vested remainder of a devisee in lands is subject to sale under execution during the term of the life tenant. *Ellwood v. Plummer*, 78 N. C. 392 (1878); *Bristol v. Hallyburton*, 93 N.

C. 384 (1885).

Contingent remainders are not subject to execution while they remain contingent. *Watson v. Dodd*, 68 N. C. 528 (1873), affirmed on rehearing, 72 N. C. 240. See also, *Watson v. Watson*, 56 N. C. 400 (1857); *Bristol v. Hallyburton*, 93 N. C. 384 (1885).

Reversions.—A reversion in fee is liable to be taken and sold under execution. *Murrell v. Roberts*, 33 N. C. 424 (1850).

Standing matured crops are subject to execution. *Shannon v. Jones*, 34 N. C. 206 (1851). See last paragraph of this section.

2. All leasehold estates of three years duration or more, owned by him.

3. Equitable and legal rights of redemption in personal and real property pledged or mortgaged by him. But when the equity of redemption in personal property is sold under execution, notice of the time and place of said sale shall be given the mortgagee.

At common law an equity of redemption in land was not subject to levy and sale under execution, and was first made so in this State by Acts of 1812, ch. 4, § 2, and this was true also as to the trusts mentioned in Acts of 1812, ch. 4, § 1, which changed the law in this respect (see subsection 4). *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13 (1917).

General Doctrine. — An equity of redemption whether created by a mortgage deed made to the creditor or to the third person, with or without power of sale, may be sold under execution according to this subsection. *Whitesides v. Williams*, 22 N. C. 153 (1838); *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905).

Mortgagee Subjecting Mortgagor's Equity of Redemption.—A sale of the equity of redemption under an execution at law, at the instance of the mortgagee, for his mortgage debt, is not sanctioned by this section. The words of the section are general, but this exception arises necessarily out of the subject and the spirit of the sec-

tion. *Camp v. Cox*, 18 N. C. 52 (1834), in which *Ruffin, C. J.*, points out with great clearness the reasons upon which this exception to this section is based. *McPeters v. English*, 141 N. C. 491, 54 S. E. 417 (1906).

The interest of a vendee, who holds a bond for the title to land, cannot be subjected to sale under execution upon a judgment rendered for the purchase money. *McPeters v. English*, 141 N. C. 491, 54 S. E. 417 (1906).

Interest of Cestui Que Trust. — Under this subsection and the one immediately following an execution will not lie against the interest of a cestui que trust in real property held by trustee in active trust. *Patrick v. Beatty*, 202 N. C. 454, 163 S. E. 572 (1932).

Rule Prior to Statute. — In *Allison v. Gregory & Sons*, 5 N. C. 333 (1809), the court held that an equity of redemption in real property was not liable to be sold on execution. This was prior to the Act of 1812.

4. Real property or goods and chattels of which any person is seized or possessed in trust for him.

But no execution shall be levied on growing crops until they are matured. (5 Geo. II, c. 7, s. 4; 1777, c. 115, s. 29, P. R.; 1812, c. 830, ss. 1, 2, P. R.; 1822, c. 1172, P. R.; 1844, c. 35; R. C., c. 45, ss. 1-5, 11; Code, ss. 450, 453; Rev., ss. 629, 632; 1919, c. 30; C. S., s. 677.)

At Common Law. — An equitable right in land can not be levied upon and sold under an execution at common law. *Payne v. Hubbard*, 4 N. C. 195 (1815).

Must Be Equitable Estate and Not Mere Right.—By this section an equitable estate but not a mere right is subject to execution. *Nelson v. Hughes*, 55 N. C. 33 (1854). But see *Deaton v. Gaines*, 4 N. C.

424 (1816).

"A right" to have one declared a trustee is not subject to execution. *Nelson v. Hughes*, 55 N. C. 33 (1854).

Purpose of Subsection—Did Not Change Nature of Trusts.—This subsection did not mean to change the nature of trusts, the relation between the trustee and cestui que trust, or the rights of the latter against the

former. The sole purpose of it was to render the interest of the cestui que trust liable at law, as it was before in equity, for the debts of the cestui que trust in certain cases by transferring by a sale on execution against the cestui que trust the legal estate of the trustee, as well as the trust estate of the debtor. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13 (1917).

Nature of Trustee's Interest as Affecting Salability under Execution.—When land is conveyed to a trustee upon a declaration of trust (and there is no clause of defeasance in the deed) to sell for the payment of a debt or to discharge any other duty, in which persons other than the judgment debtor have an interest, or when for any other reason the judgment debtor may not call for an immediate transfer of the legal title, the interest, estate, or right of the judgment debtor, although subject to the lien of the docketed judgment, cannot be sold under execution. The lien can be enforced only by judgment rendered in a civil action. *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905). In other words the subsection does not apply when the trustee holds under a mixed trust, as where the instrument is existent and the debt it secures remains unpaid; but only where the naked title is outstanding with the right of the cestui que trust to demand it as a matter

of right under the Statute of Uses. It is a passive instead of an active trust, in which the trustee has nothing to do, or no duty to perform except to hold the legal title as already stated. It, therefore, excludes an equity of redemption, and a contract to convey land, where anything remains due upon the debt, because the trust is a mixed one in these cases, as the mortgagee in the one case and the vendor in the other holds in trust for the purpose of securing the money due, but when this is paid he holds nothing but the naked legal title. *Rowland Hardware, etc., Co. v. Lewis*, 173 N. C. 290, 92 S. E. 13 (1917).

Residue of Property Conveyed in Trust for Payment of Debt.—Where real estate is conveyed in trust for the payment of certain debts of the grantor, the interest of the grantor, after the payment of such debts, is subject to sale under execution against him. *Harrison v. Battle*, 16 N. C. 537 (1830); *Pool v. Glover*, 24 N. C. 129 (1841).

Prior to 1884 and at common law, growing crops were the subject of levy and sale under execution as personal property, but now under this section, they are not subject to levy till matured. *Shannon v. Jones*, 34 N. C. 206 (1851); *Kesler v. Cornelison*, 98 N. C. 383, 3 S. E. 839 (1887).

§ 1-316. Sale of trust estates; purchaser's title.—Upon the sale under execution of trust estates whereof the judgment debtor is beneficiary the sheriff shall execute a deed to the purchaser, and the purchaser thereof shall hold and enjoy the same freed and discharged from all encumbrances of the trustee. (1812, c. 830, P. R.; R. C., c. 45, s. 4; Code, s. 452; Rev., s. 630; C. S., s. 678.)

Application to Certain Trusts Only.—This section, as has been repeatedly decided, comprehends those cases only where the whole beneficial estate is in the debtor, and nothing remains in the trustee but a

naked legal estate. *Deaver v. Parker*, 37 N. C. 40 (1841). See also, *Mayo v. Staton*, 137 N. C. 670, 50 S. E. 331 (1905); *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

§ 1-317. Sheriff's deed on sale of equity of redemption.—The sheriff selling equitable and legal rights of redemption shall set forth in the deed to the purchaser thereof that the said estates were under mortgage at the time of judgment, or levy in the case of personal property and sale. (1812, c. 830, s. 2, P. R.; 1822, c. 1172, P. R.; R. C., c. 45, s. 5; Code, s. 451; Rev., s. 631; C. S., s. 679.)

Provisions Not Mandatory.—The provisions of this section are not mandatory.

Mayo v. Staton, 137 N. C. 670, 50 S. E. 331 (1905).

§ 1-318. Forthcoming bond for personal property.—If a sheriff or other officer who has levied an execution or other process upon personal property permits it to remain with the possessor, the officer may take a bond, attested by a credible witness, for the forthcoming thereof to answer the execution or process; but the officer remains, nevertheless, in all respects liable as hereto-

fore to the plaintiff's claim. (1807, c. 731, s. 3, P. R.; 1828, c. 12, s. 2; R. C., c. 45, s. 21; Code, s. 463; Rev., s. 633; C. S., s. 680.)

Definition.—A forthcoming and delivery bond is a bond given for the security of an officer, conditioned to produce the property levied on when required. Bouvier's Law Dict., vol. 1, p. 834.

Jurisdiction.—It has been held, that a motion upon a forthcoming bond given to secure possession of property taken under an execution, will not be allowed other than in the same court from which the execution issued. *Stuart v. Laird*, 1 Cranch (5 U. S.) 299, 2 L. Ed. 115 (1803).

Nature and Purpose.—The forthcoming bond is regarded as part of the process of execution; but it cannot be considered as a substitute for the property, as a condition requires its return to the sheriff. *Hagan v. Lucas*, 10 Pet. (35 U. S.) 400, 9 L. Ed. 470 (1836); *Amis v. Smith*, 16 Pet. (41 U. S.) 303, 10 L. Ed. 973 (1842).

On the giving of a forthcoming bond, the property is placed in the possession of the claimant; his custody is substituted for

the custody of the sheriff, but the property is not withdrawn from the custody of the law. The property in the hands of the claimant, under the bond for its delivery, is as free from the reach of other process as it would be in the hands of the sheriff. *Hagan v. Lucas*, 10 Pet. (35 U. S.) 400, 9 L. Ed. 470 (1836).

The obligation of a bond for the forthcoming of property is only that the property shall be delivered to the officer at the time designated, and not that the execution shall be satisfied. *Gray v. Bowls*, 18 N. C. 437 (1836).

Peaceable Production, etc., of the Property.—Where a forthcoming bond is given for the delivery of property levied on by a constable, it is the duty of the obligors to put the officer in the quiet and peaceable possession of the property at the time and place specified—otherwise their bond will be forfeited. *Poteet v. Bryson*, 29 N. C. 337 (1847).

§ 1-319. **Procedure on giving bond; subsequent levies.**—When the forthcoming bond is taken the officer must specify therein the property levied upon and furnish to the surety a list of the property in writing under his hand, attested by at least one credible witness, and stating therein the day of sale. The property levied upon is deemed in the custody of the surety, as the bailee of the officer. All other executions thereafter levied on this property create a lien on the same from and after the respective levies, and shall be satisfied accordingly out of the proceeds of the sale of the property; but the officer thereafter levying shall not take the property out of the custody of the surety. But in all such cases sales of chattels shall take place within thirty days after the first levy; and if sale is not made within that time any other officer who has levied upon the property may seize and sell it. (1844, c. 34; 1846, c. 50; R. C., c. 45, s. 22; Code, s. 464; Rev., s. 634; C. S., s. 682.)

§ 1-320. **Summary remedy on forthcoming bond.**—If the condition of such bond be broken, the sheriff or other officer, on giving ten days' previous notice in writing to any obligor therein, may on motion have judgment against him in a summary manner, before the superior court or before a justice of the peace, as the case may be, of the county in which the officer resides, for all damages which the officer has sustained, or may be adjudged liable to sustain, not exceeding the penalty of the bond, to be ascertained by a jury, under the direction of the court or justice. (1822, c. 1141, P. R.; R. C., c. 45, s. 23; Code, s. 465; Rev., s. 635; C. S., s. 681.)

§ 1-321. **Entry of returns on judgment docket; penalty.**—When an execution is returned, the return of the sheriff or other officer must be noted by the clerk on the judgment docket: and when it is returned wholly or partially satisfied, it is the duty of the clerk of the court to which it is returned to send a copy of such last mentioned return, under his hand, to the clerk of the superior court of each county in which such judgment is docketed, who must note such copy in his judgment docket, opposite the judgment, and file the copy with the transcript of the docket of the judgment in his office. A clerk failing to send a copy of the payments on the execution or judgment to the clerks of the superior

court of the counties wherein a transcript of the judgment has been docketed, and a clerk failing to note said payment on the judgment docket of his court, shall, on motion, be fined one hundred dollars nisi, and the judgment shall be made absolute upon notice to show cause at the succeeding term of the superior court of his county. (1871-2, c. 74, s. 2; 1881, c. 75; Code, s. 445; Rev., s. 636; C. S., s. 683.)

Execution Returned Becomes Part of Record.—An execution returned into court with an entry of satisfaction endorsed, in whole or in part, extinguishes so much of the debt and becomes a part of the record

in the case. *Walters v. Moore*, 90 N. C. 41 (1884).

Applied in *State Board of Education v. Gallop*, 227 N. C. 599, 44 S. E. (2d) 44 (1947).

§ 1-322. Cost of keeping livestock; officer's account.—The court or justice shall make a reasonable allowance to officers for keeping and maintaining horses, cattle, hogs, or sheep, and all other property taken into their custody under legal process, the keeping of which is chargeable to them; and this allowance may be retained by the officers out of the sales of the property, in preference to the satisfaction of the process under which the property was seized or sold. The officer must make out his account and, if required, give the debtor or his agent a copy of it, signed by his own hand, and must return the account with the execution or other process, under which the property has been seized or sold, to the justice or court to whom the execution or process is returnable, and shall swear to the correctness of the several items set forth; otherwise he shall not be permitted to retain the allowance. (1807, c. 731, P. R.; R. C., c. 45, ss. 25, 26; Code, ss. 466, 467; Rev., ss. 637, 638; C. S., s. 684.)

§ 1-323. Purchaser of defective title; remedy against defendant.—Where real or personal property is sold on any execution or decree, by any officer authorized to make the sale, and the sale is made legally and in good faith, and the property did not belong to the person against whose estate the execution or decree was issued, by reason of which the purchaser has been deprived of the property, or been compelled to pay damages in lieu thereof to the owner, the purchaser, his executors or administrators, may sue the person against whom such execution or decree was issued, or the person legally representing him, in a civil action, and recover such sum as he may have paid for the property, with interest from the time of payment; but the property, if personal, must be present at the sale and actually delivered to the purchaser. (1807, c. 723, P. R.; R. C., c. 45, s. 27; Code, s. 468; Rev., s. 639; C. S., s. 685.)

Editor's Note.—The remedy provided by this section is available only in cases where the judgment debtor, whose property is sold under the execution, has no title at all to the property sold. If the judgment debtor has any title at all, though it be a bare legal title, the equitable title being in some other person, or a defective title, the purchaser at the execution sale acquires the title of the judgment debtor, and has no relief against such debtor in case he suffers loss by reason of a defect in the title. See *Lewis v. McDowell*, 88 N. C. 261 (1883).

Judgment Satisfied — Purchaser's Remedy against Execution Debtor.—The judgment of an execution creditor, purchasing at the execution sale property which did not belong to the judgment debtor and which is recovered from him by its own real owner, is nonetheless satisfied, and the

remedy of the creditor is under this section not upon the judgment, but against the judgment debtor for reimbursement. *Halcombe v. Loudermilk*, 48 N. C. 491 (1856); *Wall v. Fairley*, 77 N. C. 105 (1877).

Tantamount to Implied Warranty of Title.—This section authorizes a remedy upon an implied warranty of title to property sold under execution as belonging to a debtor, and whose debt has been thereby discharged or reduced against such debtor, and authorizes a recovery of an equal amount from him for the reimbursement of the purchaser for such sums as he may have paid. *Holliday v. McMillan*, 83 N. C. 270 (1880).

Nature of Claim.—The claim which a purchaser at a sheriff's sale has against the defendant in an execution, on account of lack of title, is but a simple contract debt. *Laws v. Thompson*, 49 N. C. 104 (1856).

Substitution or Subrogation to the Rights of Execution Creditor. — See *Pemberton v. McRae*, 75 N. C. 497 (1876).

And see *Laws v. Thompson*, 49 N. C. 104 (1856).

§ 1-324: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the repealing act made it effective Jan. 1, 1950. The

repealed section had been amended by chapter 781 of 1947 Session Laws.

ARTICLE 29.

Execution and Judicial Sales.

§§ 1-325 to 1-328: Repealed by Session Laws 1949, c. 719, s. 2.

Editor's Note.—Section 6 of the act repealing or transferring the sections of this article made the act effective Jan. 1, 1950.

§ 1-329: Transferred to § 1-339.72 by Session Laws 1949, c. 719, s. 3.

§ 1-330: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-331: Transferred to § 1-339.73 by Session Laws 1949, c. 719, s. 3.

§ 1-332: Transferred to § 1-339.74 by Session Laws 1949, c. 719, s. 3.

§§ 1-333, 1-334: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-335: Transferred to § 1-339.75 by Session Laws 1949, c. 719, s. 3.

§ 1-336: Repealed by Session Laws 1949, c. 719, s. 2.

§ 1-337: Transferred to § 1-339.49 by Session Laws 1949, c. 719, s. 2.

§ 1-338: Transferred to § 1-339.50 by Session Laws 1949, c. 719, s. 2.

§ 1-339: Repealed by Session Laws 1949, c. 719, s. 2.

ARTICLE 29A.

Judicial Sales.

Part 1. General Provisions.

§ 1-339.1. **Definitions.** — (a) A judicial sale is a sale of property made pursuant to an order of a judge or clerk in an action or proceeding in the superior court, including a sale pursuant to an order made in an action in court to foreclose a mortgage or deed of trust, but is not

(1) A sale made pursuant to a power of sale

a. Contained in a mortgage, deed of trust, or conditional sale contract, or

b. Granted by statute with respect to a mortgage, deed of trust, or conditional sale contract, or

(2) A resale ordered with respect to any sale described in subsection (a) (1), where such original sale was not held under a court order, or

(3) An execution sale, or

(4) A sale ordered in a criminal action, or

(5) A tax foreclosure sale, or

(6) A sale made pursuant to article 4 of chapter 35 of the General Statutes, relating to sales of estates held by the entireties when one or both spouses are mentally incompetent, or

(7) A sale made in the course of liquidation of a bank pursuant to G. S. § 53-20, or

(8) A sale made in the course of liquidation of an insurance company pursuant to article 17A of chapter 58 of the General Statutes, or

(9) Any other sale the procedure for which is specially provided by any statute other than this article.

(b) As hereafter used in this article, "sale" means a judicial sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article made it effective Jan. 1, 1950. Section 4 of the act provided that it should not apply to any judicial sale when the original order of sale had been issued prior to such effective date, and §

5 provided that the former law should remain in effect for the completion of judicial sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.2. **Application of Part 1.**—The provisions of Part 1 of this article apply to both public and private sales except where otherwise indicated. (1949, c. 719, s. 1.)

§ 1-339.3. **Application of article to sale ordered by clerk; by judge; authority to fix procedural details.**—(a) The procedure prescribed by this article applies to all sales ordered by a clerk of the superior court.

(b) The procedure prescribed by this article applies to all sales ordered by a judge of the superior court, except that the judge having jurisdiction may, upon a finding and a recital in the order of sale of the necessity or advisability thereof, vary the procedure from that herein prescribed, but not inconsistently with G. S. § 1-339.6 restricting the place of sale of real property, and not inconsistently with G. S. § 1-339.27 (a) and G. S. § 1-339.36 requiring that a resale be ordered when an upset bid is submitted.

(c) The judge or clerk of the superior court having jurisdiction has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.4. **Who may hold sale.**—An order of sale may authorize the persons designated below to hold the sale:

(1) In any proceeding, a commissioner specially appointed therefor; or

(2) In a proceeding to sell property of a decedent, the administrator, executor or collector of such decedent's estate;

(3) In a proceeding to sell property of a minor, the guardian of such minor's estate;

(4) In a proceeding to sell property of an incompetent, the guardian or trustee of such incompetent's estate;

(5) In a proceeding to sell property of an absent or missing person, the administrator, collector, conservator, or guardian of the estate of such absent or missing person;

(6) In a proceeding to foreclose a deed of trust, the trustee named in the deed of trust;

(7) In a receivership proceeding, the receiver. (1949, c. 719, s. 1.)

Sale an Official Act.—When an officer of the court, designated either by his official or individual name in the order, is commissioned to make sale of real or personal estate, he acts in his official capacity

and his sureties undertake for the fidelity of his conduct. *Kerr v. Brandon*, 84 N. C. 128 (1881), decided under the former statute relating to partition.

§ 1-339.5. **Days on which sale may be held.**—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

§ 1-339.6. **Place of public sale.**—(a) Every public sale of real property shall be held in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A public sale of a single tract of real property situated in two or more counties may be held in any one of the counties in which any part of the tract is

situated. For the purposes of this section, a “single tract” means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons, or whether it may have been subdivided into separate units or lots or whether it is sold as a whole or in parts.

(c) A public sale of personal property may be held at any place in the State, designated in the order. (1949, c. 719, s. 1.)

§ 1-339.7. Presence of personal property at public sale required.—The person holding a public sale of personal property shall have the property present at the place of sale unless the order of sale provides otherwise as authorized by G. S. § 1-339.13 (c). (1949, c. 719, s. 1.)

§ 1-339.8. Public sale of separate tracts in different counties.—(a) When an order of public sale directs the sales of separate tracts of real property situated in different counties, exclusive jurisdiction over such sale remains in the superior court of the county where the proceeding, in which the order of sale was issued, is pending, but there shall be a separate advertisement, sale and report of sale with respect to the property in each county. In any such sale proceeding, the clerk of the superior court of the county where the original order of sale was issued, has jurisdiction with respect to the resale of separate tracts of property situated in other counties as well as in the clerk’s own county, and an upset bid may be filed only with such clerk, except in those cases where the judge retains resale jurisdiction pursuant to G. S. § 1-339.27.

(b) The report of sale with respect to all sales of separate tracts situated in different counties shall be filed with the clerk of the superior court of the county in which the order of sale was issued, and is not required to be filed in any other county.

(c) The sale, and each subsequent resale, of each such separate tract shall be subject to a separate upset bid; and to the extent deemed necessary by the judge or clerk of the superior court of the county where the original order of sale was issued, the sale of each tract, after an upset bid thereon, shall be treated as a separate sale for the purpose of determining the procedure applicable thereto.

(d) When real property is sold in a county other than the county where the proceeding, in which the sale was ordered, is pending, the person authorized to hold the sale shall cause a certified copy of the order of sale to be recorded in the office of the register of deeds of the county where such property is situated. (1949, c. 719, s. 1.)

§ 1-339.9. Sale as a whole or in parts.—(a) When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the judge or clerk of the superior court having jurisdiction may direct specifically

(1) That it be sold as a whole, or

(2) That it be sold in designated parts, or

(3) That it be offered for sale by each method, and then sold by the method which produces the highest price.

(b) When real property to be sold has not been subdivided but is of such nature that it may be advantageously subdivided for sale, the judge or clerk having jurisdiction may authorize the subdivision thereof and the dedication to the public of such portions thereof as are necessary or advisable for public highways, streets, alleys, or other public purposes.

(c) When an order of sale of such real or personal property as is described in subsection (a) of this section makes no specific provision for the sale of the property as a whole or in parts, the person authorized to make the sale has authority in his discretion to sell the property by whichever method described in subsection (a) of this section he deems most advantageous. (1949, c. 719, s. 1.)

§ 1-339.10. Bond of person holding sale.—(a) Whenever a commissioner specially appointed or a trustee in a deed of trust is ordered to sell property, the judge or clerk of the superior court having jurisdiction

(1) May in any case require the commissioner or trustee, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, and

(2) Shall require the commissioner or trustee to furnish such bond when the commissioner or trustee is to hold the proceeds of the sale other than for immediate disbursement upon confirmation of the sale.

(b) Whenever any administrator or collector of a decedent's estate, or guardian or trustee of a minor's or incompetent's estate, or administrator, collector, conservator or guardian of an absent or missing person's estate, is ordered to sell property, the judge or clerk having jurisdiction shall require such fiduciary, before receiving the proceeds of the sale, to furnish bond or to increase his then existing bond, to cover such proceeds.

(c) Whenever an executor is ordered to sell real property, the judge or clerk having jurisdiction shall require such executor, before receiving the proceeds of the sale, to furnish bond to cover such proceeds, unless the will provides otherwise, in which case the judge or clerk may require such bond.

(d) Whenever a receiver is ordered to sell real property, the judge having jurisdiction may, when he deems it advisable, require the receiver to furnish bond, or to increase his then existing bond, to cover such proceeds.

(e) The bond required by this section need not be furnished when the property is to be sold by a duly authorized trust company acting as commissioner or fiduciary.

(f) The bond shall be executed by one or more sureties and shall be subject to the approval of the judge or clerk having jurisdiction.

(g) If the bond is to be executed by personal sureties, the amount of the bond shall be double the amount of the proceeds of the sale to be received by the commissioner or fiduciary, if such amount can be determined in advance, and, if not, such amount as the judge or clerk may determine to be approximately double the amount of the proceeds to be received. If the bond is to be executed by a duly authorized surety company, the amount of the bond shall be one and one-fourth times the amount of the proceeds determined as set out in this subsection.

(h) The bonds shall be payable to the State of North Carolina for the use of the parties in interest. A bond furnished by a commissioner or by a trustee in a deed of trust shall be conditioned that the principal in the bond shall comply with the orders of the court made in the proceeding with respect to the funds received and shall properly account for the proceeds of the sale received by him. A bond furnished by any other fiduciary shall be conditioned as required by law for the original bond required, or which might have been required, of such fiduciary at the time of his qualification.

(i) The premium on any bond furnished pursuant to this section is a part of the costs of the proceeding, to be paid out of the proceeds of the sale. (1949, c. 719, s. 1.)

§ 1-339.11. Compensation of person holding sale.—(a) If the person holding a sale is a commissioner specially appointed or a trustee in a deed of trust, the judge or clerk of the superior court having jurisdiction shall fix the amount of his compensation and order the payment thereof out of the proceeds of the sale.

(b) If the person holding a sale is any other person, the judge or clerk may, but is not required to, fix his compensation and order the payment thereof out of the proceeds of the sale; when compensation is not fixed in this manner, compensation may be fixed and paid in the usual manner provided with respect to such fiduciary for receiving and disbursing funds. (1949, c. 719, s. 1.)

§ 1-339.12. Clerk's authority to compel report or accounting; contempt proceeding.—Whenever any person fails to file any report or account, as provided by this article, or files an incorrect or incomplete report or account, the clerk of the superior court, having jurisdiction, on his own motion or on motion of any interested party, may issue an order directing such person to file a correct and complete report or account within twenty days after service of the order on him. If such person fails to comply with the order, the clerk may issue an attachment against him for contempt, and may commit him to jail until he files such correct and complete report or account. (1949, c. 719, s. 1.)

Part 2. Procedure for Public Sales of Real and Personal Property.

§ 1-339.13. Public sale; order of sale.—(a) Whenever a public sale is ordered, the order of sale shall

- (1) Designate the person authorized to hold the sale;
 - (2) Direct that the property be sold at public auction to the highest bidder;
 - (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
 - (4) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity;
 - (5) Designate, consistently with G. S. § 1-339.6, the county and the place therein at which the sale is to be held; and
 - (6) Prescribe the terms of sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale.
- (b) The order of public sale may also, but is not required to
- (1) State the method by which the property shall be sold, pursuant to G. S. § 1-339.9;
 - (2) Direct any posting of the notice of sale or any advertisement of the sale, in addition to that required by G. S. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, which the judge or clerk of the superior court deems advantageous.
- (c) The order of public sale may provide that personal property need not be present at the place of sale when the nature, condition or use of the property is such that the judge or clerk ordering the sale deems it impractical or inadvisable to require the presence of the property at the sale. In such event, the order shall provide that reasonable opportunity be afforded prospective bidders to inspect the property prior to the sale, and that notice as to the time and place for inspection shall be set out in the notice of sale. (1949, c. 719, s. 1.)

§ 1-339.14. Public sale; judge's approval of clerk's order of sale.—An order of public sale of personal property in which a minor or incompetent has an interest, which is made by a clerk of the superior court, shall not be effective, except in the case of perishable property as provided by G. S. § 1-339.19, unless and until such order is approved by the resident judge or the judge regularly holding the courts of the district. (1949, c. 719, s. 1.)

§ 1-339.15. Public sale; contents of notice of sale.—The notice of public sale shall

- (1) Refer to the order authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property;
- (5) State the terms of the sale, specifying the amount of the cash deposit, if any, to be made by the highest bidder at the sale; and

(6) Include any other provisions required by the order of sale to be included therein. (1949, c. 719, s. 1.)

§ 1-339.16. Public sale; time for beginning advertisement.—An order of sale may provide for the beginning of the advertisement of sale at any time after the order is issued. If the order does not specify such time, the advertisement may be begun at any time after the order is issued. (1949, c. 719, s. 1.)

§ 1-339.17. Public sale; posting and publishing notice of sale of real property.—(a) The notice of public sale of real property shall

(1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,

(2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks, but

b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.

(b) When the notice of public sale is published in a newspaper,

(1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

(2) The date of the last publication shall not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated.

(d) In addition to the foregoing, the notice of public sale shall be otherwise posted or the sale shall be otherwise advertised as may be required by the judge or clerk pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

Mandatory or Directory Character of Requirements.—The statement in *Palmer v. Latham*, 173 N. C. 60, 91 S. E. 525 (1917), that requirements as to advertising are directory only, was not necessary to the decision of the case as the question involved was as to the place of sale, and is in conflict with the decision in *Eubanks v.*

Becton, 158 N. C. 230, 73 S. E. 1009 (1912), and therefore is overruled except so far as applicable to execution sales (*Shaffer v. Bledsoe*, 118 N. C. 279, 23 S. E. 1000 (1896)). *Hogan v. Utter*, 175 N. C. 332, 95 S. E. 565 (1918), decided under former § 1-325, relating to advertisement of judicial and execution sales.

§ 1-339.18. Public sale; posting notice of sale of personal property.—(a) The notice of public sale of personal property, except in the case of perishable property as provided by G. S. § 1-339.19, shall be posted, at the courthouse door, in the county in which the sale is to be held, for ten days immediately preceding the date of sale.

(b) In addition to the foregoing, the notice of public sale shall be otherwise advertised as may be required by the judge or clerk of the superior court pursuant to the provisions of G. S. § 1-339.13 (b) (2). (1949, c. 719, s. 1.)

§ 1-339.19. Public sale; exception; perishable property.—If personal property to be sold at public sale is determined by the judge or clerk of the superior court having jurisdiction to be perishable property because subject to rapid deterioration, he may order the sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. The order of sale of such perishable property of a minor or incompetent when made by the clerk need not be approved by the judge. Con-

firmation of any sale of such perishable property is not necessary unless required by the order of sale. (1949, c. 719, s. 1.)

§ 1-339.20. Public sale; postponement of sale.—(a) A person authorized to hold a public sale may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale

- (1) When there are no bidders, or
- (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
- (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
- (4) When he is unable to hold the sale because of illness or for other good reason, or
- (5) When other good cause exists.

(b) Upon postponement of public sale the person authorized to hold the sale shall personally, or through his agent or attorney

- (1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
- (2) On the same day, attach to or enter on the original notice of sale or a copy thereof posted at the courthouse door, as provided by G. S. § 1-339.17 in the case of real property or G. S. § 1-339.18 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

- (1) State that the sale is postponed,
- (2) State the hour and date to which the sale is postponed,
- (3) State the reason for the postponement, and
- (4) Be signed by the person authorized to hold the sale, or by his agent or attorney.

(d) If a public sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the person authorized to make the sale shall report the facts with respect thereto to the judge or clerk of the superior court having jurisdiction, who shall thereupon make an order for the public sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.21. Public sale; time of sale.—(a) A public sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No public sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No public sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than 5000 inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

§ 1-339.22. Public sale; continuance of uncompleted sale.—A public sale commenced but not completed within the time allowed by G. S. § 1-339.21 shall be continued by the person holding the sale to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the person holding the sale shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.23. Public sale; when confirmation of sale of personal prop-

erty necessary; delivery of property; bill of sale.—(a) When any person interested as a creditor, legatee, distributee, or otherwise, in the proceeds of a public sale of personal property, objects at the sale to the completion of the sale of any article of property on account of the insufficiency of the amount bid, title to such property shall not pass and possession of the property shall not be delivered until the sale of such property is reported and is confirmed by the judge or clerk of the superior court having jurisdiction; but such objection to the completion of the sale of any article of property shall not prevent the completion of the sale of articles of property to which no objection is made where the same have been separately sold. When a judge or clerk having jurisdiction fails or refuses to confirm a sale of property which has thus been objected to, the procedure for a new sale of such property, including a new order of sale, shall be the same as if no such attempted sale has been held. This subsection shall not apply to perishable property sold pursuant to G. S. § 1-339.19.

(b) Except as provided in subsection (a), the person holding a public sale of personal property shall deliver the property to the purchaser immediately upon compliance by the purchaser with the terms of the sale.

(c) The person holding a public sale may execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the judge or clerk of the superior court having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.24. Public sale; report of sale; when final as to personal property.—(a) The person holding a public sale shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed by the person authorized to hold the sale, or by his agent or attorney and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the person making the sale acted;
- (3) The date, hour and place of the sale;
- (4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold; and
- (5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (6) The names of the purchasers;
- (7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
- (8) The date of the report.

(c) The report of sale of personal property, when confirmation of the sale is not required, may include such additional information as is required by G. S. § 1-339.31 or G. S. § 1-339.32, whichever is applicable, and when such additional information is included, the report shall constitute the final report of sale of personal property. If the report does not include the additional information required by G. S. § 1-339.31 or G. S. § 1-339.32, the final report required by those sections shall be subsequently filed. (1949, c. 719, s. 1.)

§ 1-339.25. Public sale; upset bid on real property; compliance bond.—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first \$1000 thereof plus five per cent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication

to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions of subsection (b).

(b) The clerk of the superior court may require a person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate, but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1.)

Under former § 46-32, governing partition sales, it was held that while it had been in accord with the practice in this State to refuse to confirm a judicial sale unless there had been an advanced bid from a responsible bidder, this was but to afford evidence as to the inadequacy of the price, which the court, in the exercise

of its discretion to confirm or set aside the sale, might regard or disregard; and while a bid of 10 per cent would customarily be considered, so might, also, an advanced bid in a less sum, when the amount was large. *Upchurch v. Upchurch*, 173 N. C. 88, 91 S. E. 702 (1917).

§ 1-339.26. Public sale; separate upset bids when real property sold in parts; subsequent procedure.—When real property is sold at public sale in parts, as provided by G. S. § 1-339.9, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and, to the extent the judge or clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.27. Public sale; resale of real property; jurisdiction; procedure.—(a) When an upset bid is submitted to the clerk of the superior court, together with a compliance bond if one is required, a resale shall be ordered.

(b) In any case in which a judge has jurisdiction of the original sale, he may provide by order that jurisdiction is retained for resale purposes, and in such case when an upset bid is submitted, the judge having jurisdiction shall make the order of resale. In all cases where the judge does not retain jurisdiction of a sale for resale purposes, and in all cases where a sale is originally ordered by a clerk, the clerk shall make the order of resale and shall have jurisdiction of the proceeding for resale purposes. Whenever the original order of sale is made by the judge, the terms of any resale ordered by the clerk shall be consistent with terms of the original order, and the final order of confirmation shall be made by the judge having jurisdiction of the proceeding.

(c) Notice of any resale to be held because of an upset bid shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,
- (2) And in addition thereto,
 - a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least two successive weeks, but
 - b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

(d) When the notice of resale is published in a newspaper,

- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and
- (2) The date of the last publication shall not be more than seven days preceding the date of sale.

(e) When the real property to be resold is situated in more than one county, the provisions of subsection (c) of this section shall be complied with in each county in which any part of the property is situated.

(f) The person making a resale shall report the resale in the same manner as required by G. S. § 1-339.24.

(g) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(h) Resales may be had as often as upset bids are submitted in compliance with this article.

(i) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resales. (1949, c. 719, s. 1.)

Authority of Court to Order Resale under Former Statutes.—Under the former statute relating to partition sales, it was held that, where lands were ordered to be sold for partition by a court of equity, the court had authority to set aside an inchoate sale and reopen the biddings, and this authority applied as well to cases where all the parties were adults as where some of them, or all, were infants. *Ex parte Post*, 56 N. C. 482 (1857).

But, in a suit for partition under the former statute, it was held that the court did not abuse its discretion in refusing to grant a resale upon an offer of an advanced bid on motion of the officer in which none of the parties joined. *Taylor v. Carrow*, 156 N. C. 6, 72 S. E. 76 (1911); *Thompson*

v. Rospigliosi, 162 N. C. 145, 77 S. E. 113 (1913).

Under § 1-218, before the 1949 amendment thereto, where a commissioner, appointed to hold a foreclosure sale, advertised and sold the property in conformity with the order, but reported that the last and highest bid was less than the value of the property and recommended a resale, and the clerk ordered a resale, the judge of the superior court, upon the appeal of one of the trustees from the order of the clerk, had jurisdiction to hear and determine the matter and order a resale at chambers while holding a criminal term of court in the county. *Harriss v. Hughes*, 220 N. C. 473, 17 S. E. (2d) 679 (1941).

§ 1-339.28. Public sale; confirmation of sale.—(a) No public sale of real property may be consummated until confirmed

(1) By the resident judge of the district or the judge regularly holding the courts of the district, in those cases in which the sale was originally ordered by a judge, or

(2) By the clerk of the superior court in those cases in which the sale was originally ordered by the clerk.

(b) No public sale of real property of a minor or incompetent originally ordered by a clerk may be consummated until confirmed both by the clerk and by the resident judge of the district or the judge regularly holding the courts of the district.

(c) No public sale of real property may be confirmed until the time for submitting an upset bid, pursuant to G. S. § 1-339.25, has expired.

(d) Confirmation of the public sale of personal property is necessary only in the case set out in G. S. § 1-339.23 (a), or when the order of sale provides for such confirmation. (1949, c. 719, s. 1.)

Effect of Confirmation under Former Statutes.—Under the former statute relating to sale of lands of decedents' estates, it was held that confirmation of the sale was a condition precedent to the exercise of the executor's right to convey title.

Joyner v. Futrell, 136 N. C. 301, 47 S. E. 649 (1904). Confirmation was also necessary to divest the title out of the party applying for the order of sale, and to validate the commissioner's deed to the purchaser. *Foushee v. Durham*, 84 N. C. 56

(1881). And the purchaser acquired no rights under such sale until confirmation—until then he being considered as a mere proposer. The bid might be rejected in the sound discretion of the court at any time before confirmation. *Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232 (1906).

After the confirmation of the sale of a decedent's lands, however, the jurisdiction of the court was at an end, and the bid-dings under such sale might not be opened. *Thompson v. Cox*, 53 N. C. 311 (1860). Nor could the order to collect and make title be revoked. *Evans v. Singletary*, 63 N. C. 205 (1869). Nor could the decree be collaterally attacked after confirmation of the sale; for it then became final and could only be assailed, in the absence of substantial irregularity, in a direct and independent proceeding. *McLaurin v. McLaurin*, 106 N. C. 331, 10 S. E. 1056 (1890); *Coffin v. Cook*, 106 N. C. 376, 11 S. E. 371 (1890). See *Smith v. Gray*, 116 N. C. 311, 21 S. E. 200 (1895). And a decree and confirmation of sale would not be set aside as against bona fide purchasers, at the instance of infant heirs not served with process, if not made within a reasonable time, and in the absence of a valid defense to the sale. *Glisson v. Glisson*, 153 N. C. 185, 69 S. E. 55 (1910).

Under the former statute governing partition sales, it was held that an intending purchaser was a mere preferred proposer, and not a purchaser, until after the sale had been confirmed. *Patillo v. Lytle*, 158 N. C. 92, 73 S. E. 200 (1911). But after confirmation by the court, the purchaser was regarded as the equitable owner, and the sale, as it affected his in-

terest, could only be set aside for "mistake, fraud, or collusion," established on petition regularly filed in the cause. *Upchurch v. Upchurch*, 173 N. C. 88, 91 S. E. 702 (1917).

When land was sold and the sale confirmed, in proceedings for partition of lands under the former statute, and the record therein was regular in form, and on its face it appeared that plaintiffs were parties, the proceedings could not be collaterally attacked, as the remedy was by petition in the cause. *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520 (1908).

Advanced Bid.—Under former § 46-36, governing partition sales, before a partition sale had been confirmed, if an advanced bid of 10 per cent was offered, the court might, in its discretion, order a resale. *Trull v. Rice*, 92 N. C. 572 (1885). But where no increase bid was received within twenty days and the purchaser moved promptly for confirmation, an increased bid received thereafter would not prevent confirmation. *Ex parte Garrett*, 174 N. C. 343, 93 S. E. 838 (1917).

Inadequacy of the bid or its being for the benefit of the administrator, warranted the exercise of the court's discretion to reject the bid, under the former statute relating to sale of lands belonging to decedents' estates. *Shearin v. Hunter*, 72 N. C. 493 (1875); *Harrell v. Blythe*, 140 N. C. 415, 53 S. E. 232 (1906).

As to exceptions filed to commissioner's report under former § 46-32, dealing with confirmation of partition sales, see *McCormick v. Patterson*, 194 N. C. 216, 139 S. E. 225 (1927).

§ 1-339.29. Public sale; real property; deed; order for possession.

—(a) Upon confirmation of a public sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of sale, shall deliver the deed to the purchaser.

(b) A person executing a deed to real property being conveyed pursuant to a public sale may recite in the deed, in addition to the usual provisions, substantially as follows

- (1) The authority for making the sale,
- (2) The title of the action or proceeding in which the sale was had,
- (3) The name of the person authorized to make the sale,
- (4) The fact that the sale was duly advertised,
- (5) The date of the sale,
- (6) The name of the highest bidder and the price bid,
- (7) That the sale has been confirmed,
- (8) That the terms of the sale have been complied with, and
- (9) That the person executing the deed has been authorized to execute it.

(c) The judge or clerk of the superior court having jurisdiction of the proceeding in which the property is sold may grant an order for possession of real prop-

erty so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

When Title Passes.—Where, under a petition of tenants in common, lands were sold for division, under the provisions of former § 46-30, relating to partition sales, title to the lands held in common would not pass to the purchaser until the purchase price had been paid, and a deed executed to the purchaser by the one appointed to sell under the order of the court. *Crocker v. Vann*, 192 N. C. 422, 135 S. E. 127 (1926).

Purchaser Need Not Look beyond Decree.—A purchaser at a judicial sale, if not a party to the proceeding, is not bound to look beyond the decree if the facts necessary to give jurisdiction appear on the face of the proceedings. If there has been an irregularity, or the jurisdiction has been improvidently exercised, it will not be corrected at his expense. *Herbin v. Wagoner*, 118 N. C. 656, 24 S. E. 490 (1896), decided under the former statute relating to partition sales.

Estoppel of Persons Parties to Sale.—One who was a party to ex parte partition proceedings under the former statute, was present at the sale, and received her share of the purchase money could not thereafter have the judgment and sale set aside for division as to her. *Hargrove v. Wilson*, 148 N. C. 439, 62 S. E. 520 (1908); *In re Wilson*, 161 N. C. 211, 75 S. E. 1086 (1912).

Recital of Authority in Deed.—Under the former statute governing sale of lands belonging to decedents' estates, it was held that when the representative exercised the power of sale conferred under an order of the court, but failed to recite in the deed the source of his authority, the implication was that he exercised the power so conferred. *Coffin v. Cook*, 106 N. C. 376, 11 S. E. 371 (1890).

Formal Direction to Make Title Unnecessary.—Under the former statute govern-

ing partition sales, it was held that a formal direction to make title was not necessary when the order of sale reserved the title as an additional security for the purchase money, and the money had been paid. *Latta v. Vickers*, 82 N. C. 501 (1880).

When Purchaser Entitled to Order of Possession.—Under the former statute relating to sale of lands belonging to decedents' estates, it was held that the purchaser was not entitled to an order for possession if the defendants were not in possession when the order of sale was made. *Marcom v. Wyatt*, 117 N. C. 129, 23 S. E. 169 (1895).

Liens against Interest of Tenant in Common.—"The purchaser at a judicial sale takes the property subject to whatever liens and encumbrances exist thereon . . . and cannot have the proceeds of sale applied to discharge such liens." *Jordan v. Faulkner*, 168 N. C. 466, 84 S. E. 764 (1915), decided under the former statute relating to partition sales.

When Judgment Creditor Not Made Party.—Where judgment creditors of a tenant in common were not made parties to a partition proceeding under the former statute, the purchaser bought subject to their liens. *Holley v. White*, 172 N. C. 77, 89 S. E. 1061 (1916).

Deed Erroneously Made to Husband and Wife.—Where, in a suit for partition under the former statute, the wife alone was entitled to a deed in the severance of her interest as a tenant in common of lands sold for division, and in proceedings thereunder it was erroneously adjudged by the court that the deed be made to her and her husband by entireties, the title would inure only to her under a resulting trust, and the husband could not acquire by survivorship. *Crocker v. Vann*, 192 N. C. 422, 135 S. E. 127 (1926).

§ 1-339.30. Public sale; failure of bidder to make cash deposit or to comply with bid; resale.—(a) If an order of public sale requires the highest bidder to make a cash deposit at the sale, and he fails to make such required deposit, the person holding the sale shall at the same time and place again offer the property for sale.

(b) When the highest bidder at a public sale of personal property not required to be confirmed fails to make the cash payment, if any, required by the terms of the sale, the person holding the sale shall at the same time and place again offer the property for sale. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(c) When the highest bidder at a public sale of personal property required to be confirmed fails to comply with his bid within ten days after notice given

by the person holding the sale or after a bona fide attempt to give such notice that the sale has been confirmed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original public sale of personal property.

(d) When the highest bidder at a public sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the judge or clerk having jurisdiction may order a resale. The procedure for such resale of real property is the same in every respect as is provided by this article in the case of an original public sale of real property except that the provisions of G. S. § 1-339.27 (c), (d) and (e) apply with respect to the posting and publishing of the notice of such resale.

(e) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(f) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

Enforcement of Bid under Former Statute Relating to Partition Sales.—Upon acceptance by court's commissioner of a bid, whether at public or private sale, for land involved in partition proceedings under the former statute, the court had jurisdiction over the purchaser to enforce the bid. *Wooten v. Cunningham*, 171 N. C. 123, 88 S. E. 1 (1916).

Where a purchaser of land under decree of court fails to pay the price, the title will not be made even though there be a confirmation of the sale. And if the land in such case be sold under an execution against said purchaser, the purchaser thereof takes subject to the equities against the defendant in the execution. *Burgin v. Burgin*, 82 N. C. 197 (1880), decided under the former statute relating to partition sales.

The purchaser of land at a judicial sale

for partition under the former statute could be required by summary proceedings to pay into court the amount of his bid which remained unpaid after the confirmation of the sale and delivery of the deed, such proceedings not being unconstitutional as depriving the purchaser of his right to a jury trial. *Lyman v. Southern Coal Co.*, 183 N. C. 581, 112 S. E. 242 (1922).

Under the former statute governing sale of lands of decedents' estates before a purchaser could be held to his bid, the sale must be confirmed by the court, and then in the same proceedings a rule issued to show cause why he should not be compelled to comply with his bid. An independent action for damages would not lie against him. *Hudson v. Coble*, 97 N. C. 260, 1 S. E. 688 (1887).

§ 1-339.31. Public sale; report of commissioner or trustee in deed of trust.—(a) A commissioner or a trustee in a deed of trust, authorized pursuant to G. S. § 1-339.4 to hold a public sale of property, shall, in addition to all other reports required by this article, file with the clerk of the superior court an account of his receipts and disbursements as follows:

- (1) When the sale is for cash, a final report shall be filed within thirty days after receipt of the proceeds of the sale;
- (2) When the sale is wholly or partly on time and the commissioner or trustee is not required to collect deferred payments, a final report shall be filed within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price;
- (3) When the commissioner or trustee is required to collect deferred payments,
 - a. He shall file a preliminary report within thirty days after receipt of the cash payment, if any is required, and the receipt of all securities for the purchase price, and
 - b. If the period of time during which he is required to collect deferred payments extends over more than one year, he shall

file an annual report of his receipts and disbursements, and
c. After collecting all deferred payments, he shall file a final report.

(b) The clerk shall audit and record the reports and accounts required to be filed pursuant to this section. (1949, c. 719, s. 1.)

Effect of Failure to File Report.—Upon the commissioner's failure to file a report and final account with the clerk, as provided by former § 46-32, relating to partition sales, the demand upon the commissioner or his administrator, for the

disbursement of the funds, would be considered to have been made as a matter of law, and limitations upon an action to recover the funds began to run at that time. *Peal v. Martin*, 207 N. C. 106, 176 S. E. 282 (1934).

§ 1-339.32. Public sale; final report of person, other than commissioner or trustee in deed of trust.—An administrator, executor or collector of a decedent's estate, or a receiver, or a guardian or trustee of a minor's or incompetent's estate, or an administrator, collector, conservator or guardian of an absent or missing person's estate, is not required to file a special account of his receipts and disbursements for property sold at public sale pursuant to this article unless so directed by the judge or clerk of the superior court having jurisdiction of the sale proceeding, but shall include in his next following account or report, either annual or final, an account of such receipts and disbursements. (1949, c. 719, s. 1.)

Part 3. Procedure for Private Sales of Real and Personal Property.

§ 1-339.33. Private sale; order of sale.—Whenever a private sale is ordered, the order of sale shall

- (1) Designate the person authorized to make the sale;
- (2) Describe real property to be sold, by reference or otherwise, sufficiently to identify it;
- (3) Describe personal property to be sold, by reference or otherwise, sufficiently to indicate its nature and quantity; and
- (4) Prescribe such terms of sale as the judge or clerk of the superior court ordering the sale deems advisable. (1949, c. 719, s. 1.)

Discretion of Court under Former Statute to Order Public or Private Sale.—Under the former statute governing partition sales, the superior court might, in the exercise of its discretion, order a sale of lands in proceedings for partitions, where minors were interested and represented by guardian ad litem, either to be publicly or privately made. *Ryder v. Oates*, 173 N. C. 569, 92 S. E. 508 (1917). And where no abuse of this discretion was shown on

appeal, the action of the lower court would not be reviewed. *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113 (1913).

Under the former statute relating to partition proceedings, the court might authorize its commissioner in a proceeding for sale for partition to receive and report to it a private offer or bid for the land. *Wooten v. Cunningham*, 171 N. C. 123, 88 S. E. 1 (1916).

§ 1-339.34. Private sale; exception; certain personal property.—(a) Notwithstanding any provisions of this article, property described below may be sold at private sale at the current market price after first obtaining an order of sale:

- (1) Property consisting of stocks, bonds or other securities the current market value of which is established by sales on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, or
- (2) Property consisting of stocks, bonds or other securities which are not sold on any stock or securities exchange supervised or regulated by the United States government or any other of its agencies or departments, but which are found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value, or

(3) Property consisting of cattle, hogs, or other livestock, or cotton, corn, tobacco, peanuts or other farm commodities or produce, found by the judge or clerk having jurisdiction to have a known or readily ascertainable market value.

(b) Property determined by the judge or clerk having jurisdiction to be perishable property because subject to rapid deterioration may be sold at private sale after first obtaining an order of sale.

(c) Any sale made pursuant to this section is not subject to an upset bid, and is not required to be confirmed, but such sale is final. (1949, c. 719, s. 1.)

§ 1-339.35. Private sale; report of sale.—(a) The person holding a private sale shall, within five days after the date of the sale, file a report with the clerk of the superior court of the county where the proceeding for the sale is pending.

(b) The report shall be signed and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the person making the sale acted;
- (3) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (4) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (5) The name or names of the person or persons to whom the property was sold;
- (6) The price at which the property, or each part thereof, was sold, and the terms of the sale; and
- (7) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.36. Private sale; upset bid; subsequent procedure.—(a) Every private sale of real or personal property, except a sale of personal property as provided by G. S. § 1-339.34, is subject to an upset bid on the same conditions and in the same manner as is provided by G. S. § 1-339.25.

(b) When an upset bid is made for property sold at private sale, subsequent procedure with respect thereto shall be the same as for the public sale of real property for which an upset bid has been submitted, except that the notice of resale of personal property need not be published in a newspaper, but shall be posted as provided by G. S. § 1-339.17. (1949, c. 719, s. 1.)

§ 1-339.37. Private sale; confirmation.—If no upset bid for property sold at private sale is submitted within ten days after the report of sale is filed, the sale may then be confirmed, and the provisions of G. S. § 1-339.28 (a) and (b) are applicable to such confirmation whether the property sold is real or personal. Unless otherwise provided in the order of sale, no confirmation is required or any sale held as provided by G. S. § 1-339.34. (1949, c. 719, s. 1.)

Editor's Note.—The word "or" in the last line of the section was no doubt inadvertently used and was intended to read "of".

Jurisdiction under Former Statute.—The superior court in a partition action under the former statute, having general juris-

diction in law and equity, had power to order and confirm a private as well as a public sale. *McAfee v. Green*, 143 N. C. 411, 55 S. E. 828 (1906); *Thompson v. Rospigliosi*, 162 N. C. 145, 77 S. E. 113 (1913).

§ 1-339.38. Private sale; real property; deed; order for possession.—(a) Upon confirmation of a private sale of real property, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) The judge or clerk of the superior court having jurisdiction of the pro-

ceeding in which the property is sold may grant an order for possession of real property so sold and conveyed, as against all persons in possession who are parties to the proceeding. (1949, c. 719, s. 1.)

§ 1-339.39. Private sale; personal property; delivery; bill of sale.—Upon compliance by the purchaser with the terms of a private sale of personal property, and upon confirmation of the sale when confirmation is required by G. S. § 1-339.37, the person authorized to hold the sale, or such other person as may be designated by the judge or clerk of the superior court having jurisdiction, shall deliver the property to the purchaser, and may execute and deliver a bill of sale or other muniment of title, and, upon application of the purchaser, shall do so when required by the judge or clerk having jurisdiction. (1949, c. 719, s. 1.)

§ 1-339.40. Private sale; final report.—(a) A commissioner or a trustee in a deed of trust authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.31.

(b) Any other person authorized pursuant to G. S. § 1-339.4 to hold a private sale of property shall make such a final report as is specified in G. S. § 1-339.32. (1949, c. 719, s. 1.)

ARTICLE 29B.

Execution Sales.

Part 1. General Provisions.

§ 1-339.41. Definitions.—(a) An execution sale is a sale of property by a sheriff or other officer made pursuant to an execution.

(b) As used in this article,

(1) "Sale" means an execution sale;

(2) "Sheriff" means a sheriff or any officer authorized to hold an execution sale. (1949, c. 719, s. 1.)

Editor's Note.—Section 6 of the act inserting this article made it effective as of Jan. 1, 1950. Section 4 of the act provided that it should not apply to any execution sale held pursuant to any execution issued prior to such effective date, and §

5 provided that the former law should remain in effect for the completion of execution sales to which the act, under § 4, does not apply.

For a brief discussion of this article, see 27 N. C. Law Rev. 479.

§ 1-339.42. Clerk's authority to fix procedural details.—The clerk of the superior court who issues an execution has authority to fix and determine all necessary procedural details with respect to sales in all instances in which this article fails to make definite provisions as to such procedure. (1949, c. 719, s. 1.)

§ 1-339.43. Days on which sale may be held.—A sale may be held on any day except Sunday. (1949, c. 719, s. 1.)

Validity of Sale Not Made at Time and Place Provided by Statute.—The question whether a sale, not effected in strict compliance with the time and place at which a statute requires that it should be effected, is void, so as to render the title of the purchaser invalid, has at various times given great difficulty to the court, which has resulted in conflicting decisions. Thus in *Mayers v. Carter*, 87 N. C. 146 (1882), it was held that an execution sale made at an improper time and place is void. To the same effect, see *State v. Rivers*, 27 N. C. 297 (1844). The abstract principle of law announced by these cases is that the non-

observance, by the officer making the sale, of those provisions of law which are directory merely and relate to matters in pais, in the absence of notice on the part of the purchaser, will not affect the title acquired under an execution sale. Thus it is stated in the last cited case that third persons need not show affirmatively the observance on the part of the sheriff of all legal prerequisites for the sale, nor are they charged to take notice of all the irregularities. But we can find no case which dares to answer in definite terms the specific question whether requirements as to time and place of the sale are manda-

tory with the necessary result of avoiding the purchaser's title, or merely directory, the disregard of which will merely subject the sheriff to an action for damages. The decision reached in *Mayers v. Carter*, supra, tends to indicate that they are mandatory and yet the case cites with approval *Mordecai v. Speight*, 14 N. C. 428 (1832), *Brooks v. Ratcliff*, 33 N. C. 321 (1850), in which it was held that a sale made on Tuesday and Wednesday of the week, in violation of the statute in effect at the time, would pass title, and the case of *Wade v. Saunders*, 70 N. C. 270 (1874), to the same effect.

In action to foreclose land for delinquent taxes, order was issued appointing a commissioner to sell the lands and directing the sale might be had "on any day except Sunday." The commissioner sold the land on a Tuesday of a week during which there

was no term of the superior court in the county. It was held that the sale was void as a matter of law since, by virtue of the statute then in effect, sales of land could only be made on any Monday or during the first three days of any term of the superior court. *Bladen County v. Breece*, 214 N. C. 544, 200 S. E. 13 (1938), followed in *Caswell County v. Scott*, 215 N. C. 185, 1 S. E. (2d) 364 (1939). See also, the validating sections, §§ 1-339.72 to 1-339.76.

Assent of Debtor Validates Sale.—The debtor may waive the benefit of the law which requires that the sale be made at a certain place and time, and assent to the sale at a place and time other than that prescribed by law, in which case the sale will be valid. *Biggs & Co. v. Brickell*, 68 N. C. 239 (1873); *Mayers v. Carter*, 87 N. C. 146 (1882).

§ 1-339.44. **Place of sale.**—(a) Every sale of real property shall be held at the courthouse door in the county where the property is situated unless the property consists of a single tract situated in two or more counties.

(b) A sale of a single tract of real property situated in two or more counties may be held at the courthouse door in any one of the counties in which any part of the tract is situated, but no sheriff shall hold any sale outside his own county. As used in this section, a "single tract" means any tract which has a continuous boundary, regardless of whether parts thereof may have been acquired at different times or from different persons or whether it may have been subdivided into other units or lots, or whether it is sold as a whole or in parts.

(c) A sale of personal property may be held at any place in his county designated by the sheriff in the notice of sale. (1949, c. 719, s. 1.)

Cross Reference.—As to validity of sale not made at place required by statute, see note to § 1-339.43.

§ 1-339.45. **Presence of personal property at sale required.**—A sheriff holding a sale of personal property shall have the property present at the place of sale. (1949, c. 719, s. 1.)

§ 1-339.46. **Sale as a whole or in parts.**—When real property to be sold consists of separate lots or other units or when personal property consists of more than one article, the sheriff may sell such real or personal property as a whole or in designated parts, or may offer the property for sale by each method, and then sell the property by the method which produces the highest price; but regardless of which method is followed, the sheriff shall not sell more property than is reasonably necessary to satisfy the judgment together with the costs of the execution and the sale. (1949, c. 719, s. 1.)

§ 1-339.47. **Sale to be made for cash.**—Every sale shall be made for cash. (1949, c. 719, s. 1.)

§ 1-339.48. **Life of execution.**—If an execution is issued on a judgment, within the time provided by G. S. § 1-306, and a sale, by authority of that execution, is commenced within the time provided by G. S. § 1-310, the sale, including any resale, may be had and completed even though such sales, resales or other procedure are had after the time when the execution is required to be returned by G. S. § 1-310, or after the time within which an execution could be issued with respect to such judgment pursuant to the provisions of G. S. § 1-306. For

the purpose of this section, a sale is commenced when the notice of sale is first published in the case of real property as required by G. S. § 1-339.52, or first posted in the case of personal property as required by G. S. § 1-339.53. (1949, c. 719, s. 1.)

§ 1-339.49. Penalty for selling contrary to law.—A sheriff or other officer who makes any sale contrary to the true intent and meaning of this article shall forfeit two hundred dollars to any person suing for it, one-half for his own use and the other half to the use of the county where the offense is committed. (1820, c. 1066, s. 2, P. R.; 1822, c. 1153, s. 3, P. R.; R. C., c. 45, s. 18; Code, s. 461; Rev., s. 649; C. S., s. 696; 1949, c. 719, s. 2.)

Cross Reference.—As to liability on Jan. 1, 1950, transferred this section from sheriff's bond, see §§ 162-8, 162-18. § 1-337.

Editor's Note.—The 1949 act, effective

§ 1-339.50. Officer's return of no sale for want of bidders; penalty.—When a sheriff or other officer returns upon an execution that he has made no sale for want of bidders, he must state in his return the several places he has advertised and offered for sale the property levied on; and an officer failing to make such statement is on motion subject to a fine of forty dollars; and every constable, for a like omission of duty, is subject to a fine of ten dollars, for the use and benefit of the plaintiff in the execution; for which, on motion of the plaintiff, judgment shall be granted by the court to which, or by justice to whom, the execution shall be returned. Nothing in, nor any recovery under, this section is a bar to any action for a false return against the sheriff or other officer. (1815, c. 887, P. R.; R. C., c. 45, s. 19; Code, s. 462; Rev., s. 650; C. S., s. 697; 1949, c. 719, s. 2.)

Cross Reference.—As to penalty for Jan. 1, 1950, transferred this section from false return, see § 162-14. § 1-338.

Editor's Note.—The 1949 act, effective

Part 2. Procedure for Sale.

§ 1-339.51. Contents of notice of sale.—The notice of sale shall

- (1) Refer to the execution authorizing the sale;
- (2) Designate the date, hour and place of sale;
- (3) Describe real property to be sold, by reference or otherwise, sufficiently to identify it, and may add such further description as will acquaint bidders with the nature and location of the property;
- (4) Describe personal property to be sold sufficiently to indicate its nature and quantity, and may add such further description as will acquaint bidders with the nature of the property; and
- (5) State that the sale will be made to the highest bidder for cash. (1949, c. 719, s. 1.)

§ 1-339.52. Posting and publishing notice of sale of real property.—(a) The notice of sale of real property shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for thirty days immediately preceding the sale,
- (2) And in addition thereto,
 - a. If a newspaper qualified for legal advertising is published in the county, the notice shall be published in such a newspaper once a week for at least four successive weeks; but
 - b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for thirty days immediately preceding the sale.
- (b) When the notice of sale is published in a newspaper,
 - (1) The period from the date of the first publication to the date of

the last publication, both dates inclusive, shall not be less than twenty-two days, including Sundays, and

- (2) The date of the last publication shall not be more than seven days preceding the date of sale.

(c) When the real property to be sold is situated in more than one county, the provisions of subsections (a) and (b) shall be complied with in each county in which any part of the property is situated. (1949, c. 719, s. 1.)

Requirements of Former Statute Held Directory.—The requirements of former § 1-325 relating to advertisement of execution sales were held to be only directory. It is well settled, as a general rule, that a purchaser at an execution sale is not bound to look further than to see that he is an officer who sells, and that he is empowered to do so by an execution issued from a court of competent jurisdiction, and he is not affected by any irregularities in the conduct of the sheriff. *Mordecai v. Speight*, 14 N. C. 428 (1832); *McEntire v. Durham*,

29 N. C. 151 (1846). It follows from this, that a purchaser may as a general rule get a good title at a sheriff's sale when there has been no advertisement of the sale. But when at such sale the plaintiff in the execution, or his attorney or agent, or any other person affected with notice of such irregularity, purchases, the sale may be set aside at the instance of the defendant in the execution by a direct proceeding for that purpose. *Burton v. Spiers*, 92 N. C. 503 (1885).

§ 1-339.53. **Posting notice of sale of personal property.**—The notice of sale of personal property, except in the case of perishable property as specified in G. S. § 1-339.56, shall be posted, at the courthouse door in the county in which the sale is to be held, for ten days immediately preceding the date of sale. (1949, c. 719, s. 1.)

Purchaser with Notice of Lack of Advertisement.—A purchaser at an execution sale of personalty, who had full knowledge of such irregularities as absence of advertisement, etc., as required by former § 1-336, relating to advertisement of sales of personal property, was held not an innocent purchaser, and the rule that a purchaser

at a sheriff's sale is not bound to look further than to see that he is an officer who sells, empowered to do so by a valid execution, was held not applicable to his case, for the rule presupposes that the purchaser is a bona fide purchaser. *Phillips v. Hyatt*, 167 N. C. 570, 83 S. E. 804 (1914).

§ 1-339.54. **Notice to judgment debtor of sale of real property.**—In addition to complying with G. S. § 1-339.52, relating to posting and publishing the notice of sale, the sheriff shall, at least ten days before the sale of real property,

- (1) If the judgment debtor is found in the county, serve a copy of the notice of sale on him personally, or
- (2) If the judgment debtor is not found in the county,
 - a. Send a copy of the notice of sale by registered mail to the judgment debtor at his last address known to the sheriff, and
 - b. Serve a copy of the notice of sale on the judgment debtor's agent, if there is in the county a person known to the sheriff to be an agent who has custody or management of, or who exercises control over, any property in the county belonging to the judgment debtor. (1949, c. 719, s. 1.)

Requirements of Former Statute Held Directory.—The requirements of former § 1-325, that a sheriff advertise a sale under execution, and of former § 1-330, that he serve a copy upon the defendant ten days before the sale, were held to be directory, and when not followed would not render the sale void as against a stranger without notice of the irregularity. *Williams v. Dunn*, 163 N. C. 206, 79 S. E. 512 (1913).

Notice Required of Resale. — Under former § 1-330, relating to the same subject matter as this section, it was held that where after sale of property under execution the judgment creditor posted an advance bid within ten days and resale was ordered, and no notice of the resale was given the judgment debtor or the purchaser at the first sale, the judgment debtor was entitled to an order for a resale of his property upon motion aptly

made, the requirement of the notice to the judgment debtor of sale of his property under execution being applicable to resales as well as to first sales. *Bank of Pinehurst v. Gardner*, 218 N. C. 584, 11 S. E. (2d) 872 (1940).

Liability of Sheriff for Failure to Give Notice.—If the sheriff failed to give the notice provided by former § 1-330, relating to the same subject matter as this section, he was liable in damages for any loss the defendant suffered through his failure to notify. *Williams v. Johnson*, 112 N. C.

424, 17 S. E. 496 (1893).

Procedure to Set Aside Sale for Failure to Give Notice.—The procedure to set aside a sale of lands under an execution which had not been advertised, and where notice had not been given the defendant in compliance with former § 1-330, relating to the same subject matter as this section, was, as against a purchaser with notice of the irregularity, by motion in the cause, for the sale could not be collaterally attacked. *Williams v. Dunn*, 163 N. C. 206, 79 S. E. 512 (1913).

§ 1-339.55. Notification of Governor and Attorney General.—When the State is a stockholder in any corporation whose property is to be sold under execution, notice in writing shall be given by the sheriff by registered mail to the Governor and the Attorney General at least thirty days before the sale, stating the time and place of the sale and including a copy of the process under the authority of which such sale is to be made. Any sale held without complying with the provisions of this section is invalid with respect to the State. (1949, c. 719, s. 1.)

§ 1-339.56. Exception; perishable property.—If, in the opinion of the sheriff, any personal property levied on under execution is perishable because subject to rapid deterioration, he shall forthwith report such levy, together with a description of the property, to the clerk of the superior court, and request instructions as to the sale of such property. If the clerk then determines that the property is such perishable property, he shall thereupon order a sale thereof to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable. If the clerk determines that the property is not perishable, he shall order it to be sold in the same manner as other non-perishable property. (1949, c. 719, s. 1.)

§ 1-339.57. Satisfaction of judgment before sale completed.—If, prior to the time fixed for a sale, or prior to the expiration of the time allowed for submitting any upset bid, payment is made or tendered to the sheriff of the judgment and costs with respect to which the execution was issued, and the sheriff's fees, commissions and expenses which have accrued, together with any expenses incurred on account of the sale or proposed sale including costs incurred in caring for the property levied on, then any right to effect a sale pursuant to the execution ceases. (1949, c. 719, s. 1.)

§ 1-339.58. Postponement of sale.—(a) The sheriff may postpone the sale to a day certain not later than six days, exclusive of Sunday, after the original date for the sale.

- (1) When there are no bidders, or
 - (2) When, in his judgment, the number of prospective bidders at the sale is substantially decreased by inclement weather or by any casualty, or
 - (3) When there are so many other sales advertised to be held at the same time and place as to make it inexpedient and impracticable, in his judgment, to hold the sale on that day, or
 - (4) When he is unable to hold the sale because of illness or for other good reason, or
 - (5) When other good cause exists.
- (b) Upon postponement of a sale, the sheriff shall
- (1) At the time and place advertised for the sale, publicly announce the postponement thereof, and
 - (2) On the same day, attach to or enter on the original notice of sale or

a copy thereof, posted at the courthouse door, as provided by G. S. § 1-339.52 in the case of real property or G. S. § 1-339.53 in the case of personal property, a notice of the postponement.

(c) The posted notice of postponement shall

- (1) State that the sale is postponed,
- (2) State the hour and date to which the sale is postponed,
- (3) State the reason for the postponement, and
- (4) Be signed by the sheriff.

(d) If a sale is not held at the time fixed therefor and is not postponed as provided by this section, or if a postponed sale is not held at the time fixed therefor, the sheriff shall report the facts with respect thereto to the clerk of the superior court, who shall thereupon make an order for the sale of the property to be held at such time and place and upon such notice to be given in such manner and for such length of time as he deems advisable, but nothing herein contained shall be deemed to relieve the sheriff of liability for the nonperformance of his official duty. (1949, c. 719, s. 1.)

§ 1-339.59. Procedure upon dissolution of order restraining or enjoining sale.—(a) When, before the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he may, if the required notice of sale has been given, provide by order that the sale shall be held without additional notice at the time and place originally fixed therefor, or he may, in his discretion, make an order with respect thereto as provided in subsection (b).

(b) When, after the date fixed for a sale, a judge dissolves an order restraining or enjoining the sale, he shall by order fix the time and place for the sale to be held upon notice to be given in such manner and for such length of time as he deems advisable. (1949, c. 719, s. 1.)

§ 1-339.60. Time of sale.—(a) A sale shall begin at the time designated in the notice of sale or as soon thereafter as practicable, but not later than one hour after the time fixed therefor unless it is delayed by other sales held at the same place.

(b) No sale shall commence before 10:00 o'clock A. M. or after 4:00 o'clock P. M.

(c) No sale shall continue after 4:00 o'clock P. M., except that in cities or towns of more than five thousand inhabitants, as shown by the most recent federal census, sales of personal property may continue until 10:00 o'clock P. M. (1949, c. 719, s. 1.)

Cross Reference.—As to validity of sale not made at time required by statute, see note to § 1-339.43.

§ 1-339.61. Continuance of uncompleted sale.—A sale commenced but not completed within the time allowed by G. S. § 1-339.60 shall be continued by the sheriff to a designated time between 10:00 o'clock A. M. and 4:00 o'clock P. M. the next following day, other than Sunday. In case such continuance becomes necessary, the sheriff shall publicly announce the time to which the sale is continued. (1949, c. 719, s. 1.)

§ 1-339.62. Delivery of personal property; bill of sale.—A sheriff holding a sale of personal property shall deliver the property to the purchaser immediately upon receipt of the purchase price. The sheriff may also execute and deliver a bill of sale or other muniment of title for any personal property sold, and, upon application of the purchaser, shall do so when required by the clerk of the superior court of the county where the property is sold. (1949, c. 719, s. 1.)

§ 1-339.63. Report of sale.—(a) The sheriff shall, within five days after the date of the sale, file a report thereof with the clerk of the superior court.

(b) The report shall be signed and shall show

- (1) The title of the action or proceeding;
- (2) The authority under which the sheriff acted;
- (3) The date, hour and place of the sale;
- (4) A description of real property sold, by reference or otherwise, sufficient to identify it, and, if sold in parts, a description of each part so sold;
- (5) A description of personal property sold, sufficient to indicate the nature and quantity of the property sold to each purchaser;
- (6) The name or names of the person or persons to whom the property was sold;
- (7) The price at which the property, or each part thereof, was sold and that such price was the highest bid therefor; and
- (8) The date of the report. (1949, c. 719, s. 1.)

§ 1-339.64. **Upset bid on real property; compliance bond.**—(a) An upset bid is an advanced, increased or raised bid whereby a person offers to purchase real property theretofore sold, for an amount exceeding the reported sale price by ten per cent (10%) of the first \$1000 thereof plus five per cent (5%) of any excess above \$1000, but in any event with a minimum increase of \$25, such increase being deposited in cash with the clerk of the superior court, with whom the report of the sale was filed, within ten days after the filing of such report. An upset bid need not be in writing, and the timely deposit with the clerk of the required amount, together with an indication to the clerk as to the sale to which it is applicable, is sufficient to constitute the upset bid, subject to the provisions in subsection (b).

(b) The clerk of the superior court may require the person submitting an upset bid also to deposit a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with the upset bid. The amount of such bond shall not exceed the amount of the upset bid less the amount of the required deposit.

(c) The clerk of the superior court may in the order of resale require the highest bidder at a resale had pursuant to an upset bid to deposit with the clerk a cash bond, or, in lieu thereof at the option of the bidder, a surety bond, approved by the clerk, conditioned on compliance with his bid. The bond shall be in such amount as the clerk deems adequate but in no case greater than the amount of the bid of the person being required to furnish the bond.

(d) A compliance bond, such as is provided for by subsections (b) and (c), shall be payable to the State of North Carolina for the use of the parties in interest and shall be conditioned on the principal obligor's compliance with his bid. (1949, c. 719, s. 1.)

§ 1-339.65. **Separate upset bids when real property sold in parts; subsequent procedure.**—When real property is sold in parts, as provided by G. S. § 1-339.46, the sale, and each subsequent resale, of any such part shall be subject to a separate upset bid; and to the extent the clerk of the superior court having jurisdiction deems advisable, the sale of each such part shall thereafter be treated as a separate sale for the purpose of determining the procedure applicable thereto. (1949, c. 719, s. 1.)

§ 1-339.66. **Resale of real property; jurisdiction; procedure.**—(a) When an upset bid on real property is submitted to the clerk of the superior court, together with a compliance bond if one is required, the clerk shall order a resale.

(b) Notice of any resale to be held because of an upset bid shall

- (1) Be posted, at the courthouse door in the county in which the property is situated, for fifteen days immediately preceding the sale,
- (2) And in addition thereto,

a. If a newspaper qualified for legal advertising is published in

the county, the notice shall be published in such a newspaper once a week for at least two successive weeks; but

- b. If no such newspaper is published in the county, the notice shall be posted at three other public places in the county for fifteen days immediately preceding the sale.

- (c) When the notice of resale is published in a newspaper,

- (1) The period from the date of the first publication to the date of the last publication, both dates inclusive, shall not be less than eight days, including Sunday, and

- (2) The date of the last publication shall not be more than seven days preceding the date of sale.

(d) When the real property to be resold is situated in more than one county, the provisions of subsections (b) and (c) shall be complied with in each county in which any part of the property is situated.

(e) The sheriff shall report the resale in the same manner as required by G. S. § 1-339.63.

(f) When there is no bid at a resale other than the upset bid resulting in such resale, the person who made the upset bid is deemed the highest bidder at the resale. Such sale remains subject to a further upset bid and resale pursuant to this article.

(g) Resales may be had as often as upset bids are submitted in compliance with this article.

(h) Except as otherwise provided in this section, all the provisions of this article applicable to an original sale are applicable to resale. (1949, c. 719, s. 1.)

Order for Resale Does Not Prolong Life of Judgment.—Where the bid for real estate offered at a sale held under authority of an execution within the period of ten years next after the date of rendition of the judgment, upon which the execution issued, was raised and resales were ordered successively under the provisions of a former statute of similar import, by which

the final sale so ordered took place on a date after the expiration of said period of ten years, such orders did not have the effect of prolonging the statutory life of lien of the judgment within the provisions and the meaning of § 1-234. *Cheshire v. Drake*, 223 N. C. 577, 27 S. E. (2d) 627 (1943).

§ 1-339.67. Confirmation of sale of real property.—No sale of real property may be consummated until the sale is confirmed by the clerk of the superior court. No order of confirmation may be made until the time for submitting an upset bid, pursuant to G. S. § 1-339.65, has expired. (1949, c. 719, s. 1.)

§ 1-339.68. Deed for real property sold; property subject to liens.—(a) Upon confirmation of a sale of real property, the sheriff, upon order of the clerk of the superior court, shall prepare and tender to the purchaser a duly executed deed for the property sold and, upon compliance by the purchaser with the terms of the sale, shall deliver the deed to the purchaser.

(b) Any real property sold under execution remains subject to all liens which became effective prior to the lien of the judgment pursuant to which the sale is held, in the same manner and to the same extent as if no such sale had been held. (1949, c. 719, s. 1.)

Compelling Sheriff to Make Title.—A motion in the cause, and not a distinct action, is the proper means of compelling the sheriff to make title to the purchaser at the execution sale. *Fox v. Kline*, 85 N. C. 174 (1881), decided under a former statute relating to execution sales.

Where the purchaser is implicated in the sheriff's derelictions, he is not entitled to call for a conveyance. *Skinner v.*

Warren, 81 N. C. 373 (1879), decided under a former statute relating to execution sales.

Necessity of Seal.—A deed of a sheriff without a seal attached is not competent evidence in ejectment to show title, and a sheriff will not be allowed to affix his seal to a deed, having omitted it by mistake, unless such equity is set up in the complaint. *Fisher v. Owens*, 132 N. C. 686, 44

S. E. 369 (1903), decided under a former statute relating to execution sales.

Recitals in a sheriff's deed are prima facie evidence of an execution sale, notwithstanding the return upon the execution may be imperfect. The fact that there was a sale may also be proved by parol. *Miller v. Miller*, 89 N. C. 402 (1883), de-

cided under a former statute relating to execution sales.

The recital of execution and sale in a sheriff's deed is prima facie evidence thereof. *Wainwright v. Bobbitt*, 127 N. C. 274, 37 S. E. 336 (1900), decided under a former statute relating to deeds in execution sales.

§ 1-339.69. **Failure of bidder to comply with bid; resale.**—(a) When the highest bidder at a sale of personal property fails to pay the amount of his bid, the sheriff shall at the same time and place immediately resell the property. In the event no other bid is received, a new sale may be advertised in the regular manner provided by this article for an original sale.

(b) When the highest bidder at a sale or resale of real property fails to comply with his bid within ten days after the tender to him of a deed for the property or after a bona fide attempt to tender such deed, the clerk of the superior court who issued the execution may order a resale. The procedure for such resale is the same in every respect as is provided by this article in the case of an original sale of real property except that the provisions of G. S. § 1-339.66 (b), (c) and (d) apply with respect to the posting and publishing of the notice of such resale.

(c) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.

(d) Nothing in this section deprives any person of any other remedy against the defaulting bidder. (1949, c. 719, s. 1.)

Under a former statute it was held that if a purchaser at sheriff's sale failed to pay his bid the sheriff might resell immediately, or he might apply for a rule of court to compel payment, or he might at his own peril as to the plaintiff indulge the purchaser. The sheriff was not obliged to

resell immediately, but might give the purchaser time in which to pay the purchase money, if neither party to the execution objected or complained. *Maynard v. Moore*, 76 N. C. 158 (1877), citing *McKee v. Lineberger*, 69 N. C. 217 (1873).

§ 1-339.70. **Disposition of proceeds of sale.**—(a) After deducting all sums due him on account of the sale, including the expenses incurred in caring for the property so long as his responsibility for such care continued, the sheriff shall pay the proceeds of the sale to the clerk of the superior court who issued the execution, and the clerk shall furnish the sheriff a receipt therefor.

(b) The clerk shall apply the proceeds of the sale so received to the payment of the judgment upon which the execution was issued.

(c) Any surplus shall be paid by the clerk to the person legally entitled thereto if the clerk knows who such person is. If the clerk is in doubt as to who is entitled to the surplus, or if adverse claims are asserted thereto, the clerk shall hold such surplus until rights thereto are established in a special proceeding pursuant to G. S. § 1-339.71. (1949, c. 719, s. 1.)

§ 1-339.71. **Special proceeding to determine ownership of surplus.**—(a) A special proceeding may be instituted before the clerk of the superior court by any person claiming any money, or part thereof, paid into the clerk's office under G. S. § 1-339.70, to determine who is entitled thereto.

(b) All other persons who have filed with the clerk notice of their claim to the money or any part thereof, or who, as far as the petitioner or petitioners know, assert any claim to the money or any part thereof, shall be made defendants in the proceeding.

(c) If any answer is filed raising issues of fact as to the ownership of the money, the proceedings shall be transferred to the civil issue docket of the superior court for trial. When a proceeding is so transferred, the clerk may require any party to the proceeding who asserts a claim to the fund by petition or answer to furnish a

bond for costs in the amount of \$200.00, or otherwise comply with the provisions of G. S. § 1-109.

(d) The court may, in its discretion, allow a reasonable attorney's fee for any attorney appearing in behalf of the party or parties who prevail, to be paid out of the funds in controversy, and shall tax all costs against the losing party or parties who asserted a claim to the fund by petition or answer. (1949, c. 719, s. 1.)

ARTICLE 29C.

Validating Sections.

§ 1-339.72. Validation of certain sales.—All sales of real property under execution, deed of trust, mortgage or other contracts made since February 21, 1929, where the original sale was published for four successive weeks, and any re-sale published for two successive weeks shall be and the same are in all respects validated as to publication of notice. (1933, c. 96, s. 3; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred this section from § 1-329.

§ 1-339.73. Ratification of certain sales held on days other than the day required by statute.—All sales made prior to March 2, 1939, under execution or by order of court on any day other than the first Monday in any month, or the first three days of a term of the superior court of said county are hereby validated, ratified and confirmed.

All sales or resales of real property made prior to March 30, 1939, under order of court on the premises or at the courthouse door in the county in which all, or any part of the property, is situated, on any day other than Monday in any month, are hereby validated, ratified and confirmed. (1876-7, c. 216, ss. 2, 3; 1883, c. 94, ss. 1, 2; Code, s. 454; Rev., s. 643; C. S., s. 690; 1931, c. 23; 1937, c. 26; 1939, cc. 71, 256; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, after striking out the first two paragraphs of former § 1-331 transferred it to this section.

§ 1-339.74. Sales on other days validated.—All sales of real or personal property made prior to February 27, 1933, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law are hereby validated.

All sales of real and personal property made prior to February 14, 1939, by a sheriff under execution, or by commissioner under order of court, in the manner provided by law for sale of real or personal property, on any day other than the days now provided by law are hereby validated.

All sales of real or personal property made prior to March 10, 1939, by a sheriff of any county in North Carolina, in the manner provided by law for sale of real or personal property under execution, on any day other than the day now provided by law, are hereby validated. (1933, c. 79; 1939, cc. 24, 94; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-332 to this section.

§ 1-339.75. Certain sales validated.—All sales of realty made under executions issued prior to March the fifteenth, one thousand nine hundred and one, on judgments regularly obtained in courts of competent jurisdiction, are hereby validated, whether such sales were continued from day to day or for a longer period, not exceeding ten days: Provided, that such executions and sales are in all other respects regular: Provided further, that purchasers and their assigns shall have held continuous and adverse possession under a sheriff's deed for three years:

Provided further, that the rights of minors and married women shall in nowise be prejudiced hereby. (1901, c. 742; Rev., s. 646; C. S., s. 693; 1949, c. 719, s. 3.)

Editor's Note.—The 1949 act, effective Jan. 1, 1950, transferred § 1-335 to this section.

§ 1-339.76. Validation of sales when payment deferred more than two years.—All sales of land conducted prior to February 10, 1927, under authority of G. S. § 28-93, in which the deferred payments were extended over a period longer than two years, are hereby validated. (1917, c. 127, s. 2; C. S., s. 86; 1927, c. 16; 1949, c. 719, s. 3.)

Editor's Note. — Prior to the 1949 amendment, effective Jan. 1, 1950, this section appeared as the former last sentence of § 28-93.

ARTICLE 30.

Betterments.

§ 1-340. Petition by claimant; execution suspended; issues found.—A defendant against whom a judgment is rendered for land may, at any time before execution, present a petition to the court rendering the judgment, stating that he, or those under whom he claims, while holding the premises under a color of title believed to be good, have made permanent improvements thereon, and praying that he may be allowed for the improvements, over and above the value of the use and occupation of the land. The court may, if satisfied of the probable truth of the allegation, suspend the execution of the judgment and impanel a jury to assess the damages of the plaintiff and the allowance to the defendant for the improvements. In any such action this inquiry and assessment may be made upon the trial of the cause. (1871-2, c. 147; Code, s. 473; Rev., s. 652; C. S., s. 699.)

Cross References.—As to registration of conveyances, contracts to convey, and leases of land, see § 47-18. As to judgment for betterments having priority over homestead right, see note to § 1-369.

Rule Stated. — One, who in good faith under colorable title, enters into possession of land under a mistaken belief that his title is good, and who is subsequently ejected by the true owner, is entitled to compensation for the enhanced value of the land due to improvements placed on the land by him. *Rogers v. Timberlake*, 223 N. C. 59, 25 S. E. (2d) 167 (1943).

The right to betterments is a doctrine that gradually grew up in the courts of equity. It was recognized that the owner of land, who recovers it, had no just and equitable claim to anything but the land itself, and a fair compensation for being kept out of possession. If it was enhanced in value by improvements, made under the belief that one was the owner, he ought not to take the increased value. It is now an established equitable principle that whenever a plaintiff seeks aid in a court of equity, against such a person, aid will be given him, only upon the terms that he shall make due compensation to such innocent person, being based upon the principle that he who seeks equity must do

equity. As there are now no separate courts in which the rule can be enforced, all relief must be sought in one tribunal. The legislature has embodied the principle in the form of law, and made it operative when land is sought to be recovered by action without regard to former distinction. *Wharton v. Moore*, 84 N. C. 479 (1881); *Barker v. Owen*, 93 N. C. 198 (1885).

And plaintiff is not confined to a common-law action for improvements, if indeed such right may be enforced by independent action. *Rhyne v. Sheppard*, 224 N. C. 734, 32 S. E. (2d) 316 (1944).

Constitutionality.—This section contravenes no part of the organic law, federal or State. *Barker v. Owen*, 93 N. C. 198 (1885).

The right of recovery, where the occupant in good faith believes himself to be the owner, is declared to stand upon a principle of natural justice and equity and such laws are held not to be unconstitutional as impairing vested rights, since they adjust the equities of the parties as nearly as possible according to natural justice. *Searl v. School District No. 2*, 133 U. S. 553, 10 S. Ct. 374, 33 L. Ed. 740 (1890).

Claim Cannot Defeat Plaintiff's Title.—A claim for betterments, under this section, cannot be set up on the trial to resist

the plaintiff's recovery, but by petition filed after a judgment declaring the plaintiff the owner of the land. *Wood v. Tinsley*, 138 N. C. 507, 51 S. E. 59 (1905). See also, *Rumbough v. Young*, 119 N. C. 567, 26 S. E. 143 (1896).

Sheriff's Return of Writ as Execution.—The sheriff's return of a writ of possession with the endorsement thereon is an execution of the judgment as contemplated by the section, notwithstanding the fact that the judgment is not satisfied. *Boyer v. Garner*, 116 N. C. 125, 21 S. E. 180 (1895).

Color of Title.—Under this section one making permanent improvements on lands he holds under color of title, reasonably believed by him, in good faith, to be good, though with knowledge of an adverse claim, is entitled to recover for betterments in an action by the true owner to recover the lands. *Pritchard v. Williams*, 176 N. C. 108, 96 S. E. 733 (1918).

Same—Parol Contract to Convey.—A vendor in possession, who repudiates a parol contract to convey land, is liable to the vendee for the value of the improvements. *Baker v. Carson*, 16 N. C. 381 (1830); *Albea v. Griffin*, 22 N. C. 9 (1838); *Hedgepeth v. Rose*, 95 N. C. 41 (1886); *Luton v. Badham*, 127 N. C. 96, 37 S. E. 143 (1900).

The vendor, in a parol contract to convey land, will not be permitted to evict a vendee who has entered and made improvements, until the latter has been repaid the purchase money and compensated for betterments. *Vann v. Newsom*, 110 N. C. 122, 14 S. E. 519 (1892).

One who was induced to enter on and improve land by a parol promise that it would be settled on him as an advancement or gratuity will not be evicted until compensation has been made for improvements which he has erected on the property. *Hedgepeth v. Rose*, 95 N. C. 41 (1886).

Same—Defective Deed of Married Woman.—In *Scott v. Battle*, 85 N. C. 185 (1881), it was held that the purchaser of lands from a feme covert, who was not privily examined, and whose husband did not join in the conveyance, was charged by implication of law with the invalidity of his title, and could not maintain a claim for betterments. In 1883, after the decision was published, the legislature changed the wording of the law so as to meet the decision and remove this objectionable construction of the law. From early days in North Carolina, a married woman's deed defectively executed has been held to constitute good color of title. *Greenleaf v.*

Bartlett, 146 N. C. 495, 60 S. E. 419 (1908). And such a deed, while not binding on the feme, has been held sufficient for a claim for betterments under this section. *Gann v. Spencer*, 167 N. C. 429, 83 S. E. 620 (1914).

Same — Fraudulent Misrepresentations.—Where, by fraudulent misrepresentations as to area by the vendor, a vendee is induced to purchase land, on a rescission of the contract he is entitled to reimbursements for improvements put on the land. *Hill v. Brower*, 76 N. C. 124 (1877).

Same—Unregistered Deed.—One who has improved land held by him under an unregistered deed is not entitled to the value of the betterments as against judgment creditors of his grantor. *Eaton v. Dorib*, 190 N. C. 14, 128 S. E. 494 (1925).

Same—Notice Required.—Notice sufficient to bar the right to compensation is not a constructive notice, or such a notice as the petitioner might have acquired by a diligent scrutiny of the title, but such facts and circumstances as might reasonably suggest to the ordinary citizen serious defects in his own title. *Carolina Cent. R. Co. v. McCaskill*, 98 N. C. 526, 4 S. E. 468 (1887).

Where the title to the land was in a feme covert who married in 1846, when under age, and she and her husband executed a bond to convey the land after she became of age to a party from whom the defendant derived title by mesne conveyances, which bond was never registered, and the defendant had no actual notice of any defect in his title, which he believed to be good, the doctrine of constructive notice from registration did not apply to such party, and he is entitled to compensation under the section for permanent improvements made by him on the land. *Justice v. Baxter*, 93 N. C. 405 (1885).

Same—Reasonable Belief.—The petitioner must show not only an honest and bona fide belief in his title, but he must satisfy the jury, also, that he had reasonable grounds for such belief. *Pritchard v. Williams*, 176 N. C. 108, 96 S. E. 733 (1918); *Rogers v. Timberlake*, 223 N. C. 59, 25 S. E. (2d) 167 (1943).

One holding under a tenant for life, making substantial and permanent improvements on the lands, under facts and circumstances affording him a well grounded and reasonable belief that he had by his deed acquired the fee, is entitled to recover for the betterments he has thus made. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221 (1921).

Effect of Agreement to Hold in Trust

and Reconvey.—Where defendant acquired the legal title to certain lands (originally belonging to plaintiff) at a foreclosure sale and subject to an agreement to hold the land in trust for the plaintiff and to reconvey to plaintiff upon the payment of a sum certain on or before a given date, defendant is not entitled to the value of improvements placed upon the land by him while holding same upon such trust. *Rogers v. Timberlake*, 223 N. C. 59, 25 S. E. (2d) 167 (1943).

Court Must Be Satisfied of Probable Truth.—The trial court must be satisfied of the probable truth of the allegations in a petition for betterments before it is required that the courts impanel a jury to ascertain the value of the betterments. *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659 (1903).

One purchasing land at a sale by his own assignee in bankruptcy, with the fraudulent purpose of defeating the rights of his wife and children under a prior deed which he had made to them with intent to defraud his creditors, is not a bona fide holder of the premises under a color of title believed by him to be good, and is therefore not entitled to the value of improvements placed thereon by him. *Hallyburton v. Slagle*, 132 N. C. 957, 44 S. E. 659 (1903).

Same—Evidence.—A defendant in pos-

§ 1-341. Annual value of land and waste charged against defendant.—The jury, in assessing the damages, shall estimate against the defendant the clear annual value of the premises during the time he was in possession, exclusive of the use of the improvements thereon made by himself or those under whom he claims, and also the damages for waste or other injury to the premises committed by the defendant. The defendant is not liable for the annual value or for damages for waste or other injury for any longer time than three years before the suit, unless he claims for improvements. (1871-2, c. 147, ss. 2-3; Code, ss. 474, 475; Rev., ss. 653, 654; C. S., s. 700.)

Where defendants disclaim all right and title to a part of the locus, in an action of ejectment, plaintiffs are entitled to recover the reasonable rental value of that part for the three years next preceding the institution of the action. *Hughes v. Oliver*, 228 N. C. 680, 47 S. E. (2d) 6 (1948).

Rents and Rental Values as Related to Betterments.—Under this section, in an action involving betterments, rents and rental values of the lands, which were obtained by defendants solely by reason of the improvements put on the lands by themselves, cannot be used to offset compensation to defendants for these improvements. *Harrison v. Darden*, 223 N. C. 364, 26 S. E. (2d) 860 (1943).

Three-Year Limitation Inapplicable.—Where one in possession of lands is en-

session of land under the belief that he has a good title, has the right to show in evidence in an action to recover the land, that he has in good faith made permanent improvements after his estate had expired and their value to the extent of the rents and profits claimed by the plaintiff. *Merritt v. Scott*, 81 N. C. 385 (1879).

Either Party Entitled to Jury Assessment.—Either party is entitled to have the issue as to the value of betterments assessed by the jury, if they so desire. *Fortesque v. Crawford*, 105 N. C. 29, 10 S. E. 910 (1890).

Not Applicable to Tenants in Common.—The section does not apply to tenants in common. *Pope v. Whitehead*, 68 N. C. 191 (1873).

But while this and the following sections of this article do not apply to tenants in common or mortgagors and mortgagees, yet upon equitable principles a tenant in common placing improvements upon the property is entitled to have the part so improved allotted to him in partition and its value assessed as if no improvements had been made if this can be done without prejudice to the interests of his cotenants, but this equitable principle does not apply as between mortgagor and mortgagee. *Layton v. Byrd*, 198 N. C. 466, 152 S. E. 161 (1930). See *Jenkins v. Strickland*, 214 N. C. 441, 199 S. E. 612 (1938).

titled to recover, against the true owner, for betterments he has placed thereon, he will be charged with the use and occupation of the land, without regard to the three-year statute of limitation. *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452 (1912); *Pritchard v. Williams*, 176 N. C. 108, 96 S. E. 733 (1918).

But this is because generally the owner of the land at the time of its recovery also owns the rents, and the law gives to each what belongs to him, it awards to the owner the land and his rents, and to the occupant the value of his improvements. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221 (1921).

When Remaindermen May Not Recover.—When one holding under a tenant for life by deed apparently conveying the lands in

fee after her death, is entitled to betterments, and he or the life tenant has received the rents and profits until that time, the remaindermen, after the death of the tenant for life, are not entitled to and may not recover such rents and profits, or have

them credited on the value of the betterments, the ordinary rule to the contrary being inapplicable. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221 (1921).

Cited in *Anderson v. Moore*, 233 N. C. 299, 63 S. E. (2d) 641 (1951).

§ 1-342. Value of improvements estimated.—If the jury is satisfied that the defendant, or those under whom he claims, made on the premises, at a time when there was reason to believe the title good under which he or they were holding the premises, permanent and valuable improvements, they shall estimate in his favor the value of the improvements made before notice, in writing, of the title under which the plaintiff claims, not exceeding the amount actually expended in making them and not exceeding the amount to which the value of the premises is actually increased thereby at the time of the assessment. (1871-2, c. 147, s. 4; Code, s. 476; Rev., s. 655; C. S., s. 701.)

Value of Property Permanently Enhanced.—The sole matter for consideration is embraced in one proposition, and that is, “how much was the value of the property permanently enhanced, estimated as of the time of the recovery of the same, by the betterments put thereon by the labor and expenditure of the bona fide holder of the same?” *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144 (1921).

Same—Fact for the Jury to Find.—It is a matter of fact for the jury, rather than one of law, to estimate upon the evidence whether improvements have added permanent enhanced value to the realty. *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144 (1921).

If unsuitable improvements are put upon the premises, no matter what the cost, the jury can find that it was no enhancement to the property thereby, so if the improvements were unnecessary or injudiciously made, the jury would consider the same. But it is not essential that they be useful to the plaintiff. *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144 (1921).

The measure of the value of the betterments is not the actual cost of their erection, but the enhanced value they impart to the land, without reference to the fact that they were not desired by the true owner, or could profitably be used by him in the prosecution of his business. *Caro-*

lina Cent. R. Co. v. McCaskill, 98 N. C. 526, 4 S. E. 468 (1887).

Same—“Permanent” Defined.—The statute does not permit a recovery except for improvements that are permanent and valuable. The word “permanent” is defined in the Century Dictionary as “lasting, or intended to last indefinitely,” “fixed or enduring,” “abiding,” and the like, and it was held in *Simpson v. Robinson*, 37 Ark. 132, that an improvement does not mean a general enhancement in value from the occupant’s operations. *Pritchard v. Williams*, 181 N. C. 46, 106 S. E. 144 (1921).

How Value of Improvements Estimated.—The rule for estimating the value of improvements is not what they have cost the defendant, but how much they have added to the value of the premises. *Wetherell v. German*, 74 N. C. 603 (1876); *Daniel v. Crumpler*, 75 N. C. 184, 186 (1876).

The trustee of one who has been adjudged a bankrupt and has theretofore paid money for improvements put upon the lands of another by his consent, in fraud of the rights of his creditors, may recover as for betterments, the value of the improvements to the land, but not a greater amount so expended. *Garland v. Arrowood*, 179 N. C. 697, 103 S. E. 2 (1920).

Cited in *Barrett v. Williams*, 220 N. C. 32, 16 S. E. (2d) 405 (1941).

§ 1-343. Improvements to balance rents.—If the sum estimated for the improvements exceeds the damages estimated against the defendant as aforesaid, the jury shall then estimate against him for any time before the said three years the rents and profits accrued against or damages for waste or other injury done by him, or those under whom he claims, so far as is necessary to balance his claim for improvements; but the defendant in such case shall not be liable for the excess, if any, of such rents, profits, or damages beyond the value of improvements. (1871-2, c. 147, s. 5; Code, s. 477; Rev., s. 656; C. S., s. 702.)

If the betterments exceed in value the rental and damages for waste, the rents and profits accruing prior to the three years may be assessed so far as to balance

the improvements, but no further. *Barker v. Owen*, 93 N. C. 198 (1885); *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452 (1912).

§ 1-344. Verdict, judgment, and lien.—After offsetting the damages assessed for the plaintiff, and the allowances to the defendant for any improvements, the jury shall find a verdict for the balance for the plaintiff or defendant, as the case may be, and judgment shall be entered therefor according to the verdict. Any such balance due to the defendant is a lien upon the land recovered by the plaintiff until it is paid. (1871-2, c. 147, ss. 6, 7; Code, ss. 478, 479; Rev., ss. 657, 658; C. S., s. 703.)

The sum adjudged the defendant constitutes a lien upon the land, and this can only be made effectual and enforced, if not paid, by a sale of the premises. *Barker v. Owen*, 93 N. C. 198 (1885).

In ejectment a writ of ouster should not issue until a judgment for betterments has been paid. *Bond v. Wilson*, 129 N. C. 325, 40 S. E. 179 (1901).

§ 1-345. Life tenant recovers from remainderman.—If the plaintiff claims only an estate for life in the land recovered and pays any sum allowed to the defendant for improvements, he or his personal representative may recover at the determination of his estate from the remainderman or reversioner, the value of the said improvements as they then exist, not exceeding the amount as paid by him, and he has a lien therefor on the premises as if they had been mortgaged for the payment thereof, and may keep possession of said premises until it is paid. (1871-2, c. 147, s. 8; Code, s. 480; Rev., s. 659; C. S., s. 704.)

General Rule.—It is the general rule that a life tenant is not entitled to compensation from the remainderman for the enhancement of the property by reason of his improvements. *Harriett v. Harriett*, 181 N. C. 75, 106 S. E. 221 (1921).

A devise of lands for life with limitation over, does not entitle the life tenant to compensation for betterments he has placed on the land during his tenacy. *Northcott v. Northcott*, 175 N. C. 148, 95 S. E. 104 (1918).

Mistaken Belief as to Rights under Contract.—The section does not apply to a situation where the tenant makes improvements upon land during his occupation, as lessee, where he believed he was entitled to the possession for the lessor's life, when under the contract he was not; nor does the fact that the lessor silently acquiesced in the putting up the improvements change the situation. *Dunn v. Bagby*, 88 N. C. 91 (1883).

§ 1-346. Value of premises without improvements.—When the defendant claims allowance for improvements, the plaintiff may by entry on the record require that the value of his estate in the premises without the improvements shall also be ascertained. The value of the premises in such cases shall be estimated as it would have been at the time of the inquiry, if no such improvements had been made by the tenant or any person under whom he claims, and shall be ascertained in the manner hereinbefore provided for estimating the value of improvements. (1871-2, c. 147, ss. 10-11; Code, ss. 482, 483; Rev., ss. 661, 662; C. S., s. 705.)

Betterments Ignored in Assessing Rents.—The rents should be assessed upon the basis of the property without the better-

ments. *Barker v. Owen*, 93 N. C. 198 (1885); *Whitfield v. Boyd*, 158 N. C. 451, 74 S. E. 452 (1912).

§ 1-347. Plaintiff's election that defendant take premises.—The plaintiff in such case, if judgment is rendered for him, may, at any time during the same term, or before judgment is rendered on the assessment of the value of the improvements, in person or by his attorney in the cause, enter on the record his election to relinquish his estate in the premises to the defendant at the value as ascertained, and the defendant shall thenceforth hold all the estate that the plaintiff had therein at the commencement of the suit, if he pays therefor the said value with interest in the manner ordered by the court. (1871-2, c. 147, s. 12; Code, s. 484; Rev., s. 663; C. S., s. 706.)

If the enhanced value is greatly disproportionate to the value of the land unim-

proved, so that it might almost be said that the owner is "improved out of his

property," he has an election to let the land go, relinquishing his estate, upon payment by the defendant of its value as unimproved. *Barker v. Owen*, 93 N. C. 198 (1885).

§ 1-348. **Payment made to court; land sold on default.**—The payment must be made to the plaintiff, or into court for his use, and the land is bound therefor, and if the defendant fails to make the payment within or at the times limited therefor, the court may order the land sold and the proceeds applied to the payment of said value and interest, and any surplus to be paid to the defendant; but if the net proceeds are insufficient to satisfy the said value and interest, the defendant is not bound for the deficiency. (1871-2, c. 147, s. 13; Code, s. 485; Rev., s. 664; C. S., s. 707.)

Application of Section.—If the payment is not made to the plaintiff or into court for his use within a time to be fixed by the court, a sale may be ordered, and therefrom the sum due the plaintiff taken, and the residue, if any, paid to defendant. *Barker v. Owen*, 93 N. C. 198 (1885).

§ 1-349. **Procedure where plaintiff is under disability.**—If the party by or for whom the land is claimed in the suit is a married woman, minor, or insane person, such value is deemed to be real estate, and shall be disposed of as the court considers proper for the benefit of the persons interested therein. (1871-2, c. 147, s. 14; Code, s. 486; Rev., s. 665; C. S., s. 708.)

§ 1-350. **Defendant evicted, may recover from plaintiff.**—If the defendant, his heirs or assigns, after the premises are so relinquished to him, is evicted by force of a better title than that of the original plaintiff, the person so evicted may recover from the plaintiff or his representatives the amount paid for the premises, as so much money had and received by the plaintiff in his lifetime for the use of such person, with lawful interest thereon from the time of the payment. (1871-2, c. 147, s. 15; Code, s. 487; Rev., s. 666; C. S., s. 709.)

§ 1-351. **Not applicable to suit by mortgagee.**—Nothing in this article applies to any suit brought by a mortgagee or his heirs or assigns against a mortgagor or his heirs or assigns for the recovery of the mortgaged premises. (1871-2, c. 147, s. 9; Code, s. 481; Rev., s. 660; C. S., s. 710.)

When Section Inapplicable.—Where relationship of mortgagor and mortgagee is terminated by foreclosure prior to claimant's possession under mesne conveyances from mortgagor, this section does not apply. *Metropolitan Life Ins. Co. v. Allen*, 208 N. C. 13, 179 S. E. 15 (1935).

In *Wharton v. Moore*, 84 N. C. 479, (1881), it was said: "It is very probable the legislature in making the exception had in view the generally admitted principle that the right to betterments is not conceded to mortgagors, for the current of authorities is to the effect that it has no application to them. In 2 Washburn Real Prop., it is laid down that, 'if the mortgagor or any one standing in his place enhances the value of the premises by improvements, they become additional security for the debt, and he can claim the surplus, if any, upon such sale being made after satisfying the debt.'"

ARTICLE 31.

Supplemental Proceedings.

§ 1-352. **Execution unsatisfied, debtor ordered to answer.**—When an execution against property of a judgment debtor, or any one of several debtors in the same judgment, issued to the sheriff of the county where he resides or has a place of business, or if he does not reside in the State, to the sheriff of the county where a judgment roll or a transcript of a justice's judgment is filed, is returned wholly or partially unsatisfied, the judgment creditor at any time after the return, and within three years from the time of issuing the execution, is entitled to an order from the court to which the execution is returned or from the judge thereof, requiring such debtor to appear and answer concerning his prop-

erty before such court or judge, at a time and place specified in the order, within the county to which the execution was issued. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 1; Rev., s. 667; C. S., s. 711.)

Cross Reference. — As to execution against debts due corporate defendants, see § 55-143.

Purpose of Proceedings Supplemental. — The purpose is to give supplemental proceedings only in case the debtor has no property liable to execution, or to what is in the nature of execution, viz.: proceedings to enforce its sale. *McKeithan & Sons v. Walker*, 66 N. C. 95 (1872); *Hutchison v. Symons*, 67 N. C. 156 (1872); *Rand v. Rand*, 78 N. C. 12 (1878).

The proceeding is intended to perfect the creditors' remedy in the same action and to supersede that which in a divided jurisdiction was attainable before by a bill of equity. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411 (1881).

Supplemental proceedings are based upon an execution and may not be instituted against a defendant when there has been no execution issued within three years from the institution of such supplemental proceedings. *International Harvester Co. v. Brockwell*, 202 N. C. 805, 164 S. E. 322 (1932).

Same—Substitute for Creditor's Bill. — In *Carson v. Oates*, 64 N. C. 115 (1870), it was said: "Supplemental proceedings were intended to supply the place of proceedings in equity, where relief was given after a creditor had ascertained his debt by a judgment at law, and was unable to obtain satisfaction by process of law." Such proceedings are held to be a substitute for the former creditors' bill, and are governed by the principles established under the former practice in administering this species of relief in behalf of judgment creditors. *Rand v. Rand*, 78 N. C. 12 (1878). See *Dillard v. Walker*, 204 N. C. 67, 167 S. E. 632 (1933).

Such proceedings differ from the old creditor's bill, however, in that the latter operated for the benefit of all creditors who chose to come in, while the former are only beneficial to the particular creditors who institute them. *Righton v. Pruden*, 73 N. C. 61 (1875).

Same — Complete Determination of Action. — Proceedings supplementary to execution are but a prolongation of the action necessary to the final discharge of the judgment, the purpose being that all matters affecting the complete satisfaction and determination of the action shall be settled in the same action, instead of by a multiplicity of suits. *Rand v. Rand*, 78 N. C. 12

(1878).

Nature of Proceedings—Final Process. — The proceedings under this section are in the nature of equitable proceedings. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408 (1945).

They are in the nature of a final process, when viewed either as a substitute for a creditor's bill to enforce the payment of a judgment at law or as a proceeding having the essential qualities of an equitable *fi. fa.* *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904).

Same—Equitable Execution. — Such proceedings are in the nature of an equitable execution, and are intended to discover and reach the property of the debtor, of every nature and kind, and apply the same according to law, to the payment of the judgment. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885); *Vegelahn v. Smith*, 95 N. C. 254 (1886).

Judgment Conclusive. — A judgment, whether just or unjust, if regularly taken in a court of competent jurisdiction, may be enforced by proceedings supplementary thereto, and the judgment cannot be attacked by any member of the defendant corporation, or its creditors, except for fraud or collusion. *Heggie v. People's Bldg. & L., etc., Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890).

Lunatic Liable. — Supplemental proceedings lie against a lunatic in aid of execution. *Blake v. Respass*, 77 N. C. 193 (1877).

Proceedings Lie against Private Corporations. — Proceedings supplemental to execution lie against a private corporation created by a special act of the legislature, and organized for the purposes of the private gain for its shareholders. *LaFountain v. Southern Underwriters Ass'n*, 79 N. C. 514 (1878).

Not Applicable to Supreme Court. — The provisions respecting supplemental proceedings are not applicable to the Supreme Court, and no power has been given it to issue an attachment in such case. *Phillips v. Trezevant*, 70 N. C. 176 (1874).

Manner of Instituting Proceedings. — Demand Unnecessary. — A personal demand on the debtor that he apply his property to the satisfaction of the creditor's claim, is not necessary to authorize supplemental proceedings. The prosecution of the suit to judgment and execution is a

sufficient demand. *Weller & Co. v. Lawrence*, 81 N. C. 65 (1879).

Same—What Must Be Made to Appear. —To authorize the grant of an order of examination, these three facts must be made to appear, by affidavit or otherwise, to-wit: the want of known property liable to execution, which is provided by the sheriff's return of "unsatisfied," the nonexistence of any equitable estates in land within the lien of the judgment, and the existence of property, choses in action and things of value unaffected by any lien and incapable of levy. *McKeithan & Sons v. Walker*, 66 N. C. 95 (1872); *Hutchison v. Symons*, 67 N. C. 156 (1872); *Hinsdale v. Sinclair*, 83 N. C. 339 (1880).

Same — Who Entitled to Benefits. — Those creditors only are entitled to the benefit of supplementary proceedings who bring themselves within the provisions of the statute by instituting such proceedings. *Righton v. Pruden*, 73 N. C. 61 (1875).

The owner of orders for the payment of shares of stock in a corporation cannot be allowed to interplead in supplementary proceedings by a plaintiff judgment creditor who has obtained his judgment. *Heggie v. People's Bldg., etc., Ass'n*, 107 N. C. 581, 12 S. E. 275 (1890).

A judgment creditor of a corporation caused an execution to issue, which was returned unsatisfied, and he then brought a suit for himself and all other creditors against the corporation and its stockholders, demanding an account to ascertain the amount due upon unpaid stock, to pay debts of the corporation. Such suit was a new and independent action, and not demurrable on the ground that his remedy was by proceeding supplementary to execution. *Bronson v. Wilmington N. C. Life Ins. Co.*, 85 N. C. 411 (1881).

Action against an Administrator. — A judgment creditor whose execution has been returned unsatisfied cannot maintain an action against an administrator or to subject a distributive share of the judgment debtor in the estate to the satisfaction of the debt. He must proceed by supplemental proceedings. *Rand v. Rand*, 78 N. C. 12 (1878).

Three-Year Limitation. — When the ordinary execution is returned unsatisfied in whole or part, the judgment creditor, at any time after such return, within three years from the time the execution is issued, is entitled to an order of the court, requiring the debtor to appear and answer respecting his property. *Vegeahn v. Smith*, 95 N. C. 254 (1886).

The court has the power to order production of proper papers pertinent to the issue to be tried, and in possession of the opposite party. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408 (1945).

Where the examination of the debtor in supplementary proceedings shows that his books of accounts contain evidence material to the investigation he should be required to produce them. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408 (1945).

Accounting of Partnership Affairs. — In order to ascertain if there are any assets of the partnership remaining, a full accounting of the partnership affairs is appropriate, and should be had. *Johnson Cotton Co. v. Reaves*, 225 N. C. 436, 35 S. E. (2d) 408 (1945).

Authority of Clerk. — This section confers upon the clerk of the superior court, acting for and in the place of the court, authority to hear and allow or disallow the motion of the plaintiffs for an order requiring the defendants to "appear and answer" concerning their property as therein allowed. *Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

Where the defendant was ordered to appear before the clerk to be examined in a supplementary proceeding, when the clerk was properly informed that a similar proceeding was then pending before the judge, he should have refused to proceed, and failing to do so, the judge had the power to order that he desist from further action. *Ledford v. Emerson*, 143 N. C. 527, 55 S. E. 969 (1906).

Same—Appeal. — From an order requiring the debtor to appear, made by the clerk, an appeal lay at once to the judge as a matter of right, and the clerk cannot allow or disallow it. *Bank v. Burns*, 107 N. C. 465, 12 S. E. 252 (1890).

Choses in Action. — In proceedings supplemental to execution, notes owned and held by the judgment debtor, or hypothecated as collateral to his own notes made to a bank, are choses in action, and the bank may apply them to the payment of its own claims against the judgment debtor, in accordance with the terms of hypothecation, when the same have matured, and when not matured it has an equitable right of set-off when the debtor is insolvent, to the extent necessary to protect its own interest, and, also, the right of application according to any contract it may hold, which specifically affects the property. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535 (1922).

A bank may apply the deposits of its customer to the payment of his note after maturity, by way of set-off, unless some other creditor has in the meantime acquired a superior right thereto in some way recognized by the law; and a mere notice to the bank in proceedings supplemental to execution is insufficient to deprive the bank of this right. *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535 (1922).

Choses in action cannot be reached by execution. They are subjected to the satisfaction of a judgment under the practice prevailing in this State by supplemental proceedings under this section which are in the nature of an equitable *fi. fa.* or creditor's bill. *Newberry v. Davison Chemical Co.*, 65 F. (2d) 724 (1933).

Notice Required. — "If jurisdiction has never been acquired over the principal defendant, so that a personal judgment can be rendered against him, notice, either actual or constructive, must be given him of any proceedings to reach his property, or by which his rights are to be determined, whether the suit be by garnishment or otherwise, for the reason that the rights of no person can be concluded by any proceeding till he has had his day in court. But in all cases in which he has been personally served with process, or has ap-

peared, so that jurisdiction is acquired by the court to render a personal judgment against him, no notice need be given him of any proceedings by garnishment, instituted in aid of such action, or to collect the judgment rendered therein, unless such notice is required by some provision of the statute under which the garnishment suit is conducted." *Rood on Garnishment*, § 280, quoted in *Wright v. Southern R. Co.*, 141 N. C. 164, 53 S. E. 831 (1906).

Ten Days' Notice Not Required. — The requirement of ten days' notice of motions generally, has no reference to the examination of judgment debtors under supplementary proceedings, but such cases are governed by this section, which refers the time and place of examination to the discretion of the court or judge. *Weiller & Co. v. Lawrence*, 81 N. C. 65 (1879).

Part of Judgment Owned by Person Other than Defendant Cannot Be Attached. — In *Armour Fertilizer Works v. Newbern*, 210 N. C. 9, 185 S. E. 471 (1936), it was held that at the time of the rendition of a judgment another person was the equitable owner of a stipulated part thereof, so defendant had no legal or equitable interest in such part, and plaintiff was not entitled to attach such part in the supplemental proceedings instituted by it against defendant.

§ 1-353. Property withheld from execution; proceedings.—After the issuing of an execution against property, and upon proof by affidavit of a party, his agent or attorney, to the satisfaction of the court or a judge thereof, that any judgment debtor residing in the judicial district where such judge or sheriff resides has property which he unjustly refuses to apply toward the satisfaction of the judgment, such court or judge may, by order, require the judgment debtor to appear at a specified time and place, to answer concerning the same; and proceedings may thereupon be had for the application of the property of the judgment debtor towards the satisfaction of the judgment as provided upon the return of an execution, and the judgment creditor is entitled to the order of examination under this and the preceding section, although the judgment debtor has an equitable estate in land subject to the lien of the judgment, or choses in action, or other things of value unaffected by the lien of the judgment and incapable of levy. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 2; Rev., s. 668; C. S., s. 712.)

Sufficiency of Affidavit.—Such extraordinary proceedings will not be ordered, unless a necessity for it is made to appear by an affidavit that the debtor has no property which can be reached by the execution, and that he has property or choses in action, or things of value, "which he unjustly refuses to apply to the satisfaction of the judgment." *Hutchison v. Symons*, 67 N. C. 156 (1872). See *First, etc., Nat. Bank v. Hinton*, 213 N. C. 162, 195 S. E. 359 (1938).

An affidavit by a judgment creditor, his agent or attorney, that an execution has

been issued upon his judgment — though it has not been returned—and that the defendant has not sufficient property "subject to execution" to satisfy the judgment, but has property "not exempted from execution," which he unjustly refuses to apply to its satisfaction, is sufficient to support an order from the examination of the debtor, and persons alleged to be indebted to him. *Farmers, etc., Bank v. Burns*, 109 N. C. 105, 13 S. E. 871 (1891).

Same — Must Negative Existence of Property Liable to Execution. — An affi-

davit is insufficient to warrant the examination of the judgment debtor, if it does not negative property in the defendant liable to execution and the existence of equitable interests which may be subjected by sale in the nature of an execution; but the omission of such negative averments may be remedied by amendment at the hearing. *Weiller & Co. v. Lawrence*, 81 N. C. 65 (1879); *Hackney v. Arrington*, 99 N. C. 110, 5 S. E. 747 (1888).

Same—Objection as to Property of Defendant. — Objection that the plaintiff, in proceedings supplementary to execution, has not shown, in support of the order to examine the defendant and others, that the defendant has other property, etc., cannot be sustained when this averment is made in the plaintiff's affidavit without denial. *Farmers, etc., Bank v. Burns*, 109 N. C. 105, 13 S. E. 871 (1891), approved. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

Clerk's Finding of Fact Sufficient. — Where, upon the plaintiff's affidavit, the clerk finds as a fact that execution under the judgment had been issued, in proceedings supplementary to execution, it is sufficient to sustain his order in that respect

for the examination of the defendant and others, etc., which the lack of the return of execution does not affect. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

Alias Execution Unreturned.—The fact that the sheriff has an alias execution in his hands unreturned, which was issued on the same judgment on which supplemental proceedings have been taken, is no bar to such proceedings, and no ground on which they can be dismissed. *Vegelahn v. Smith*, 95 N. C. 254 (1886).

Sufficient Service of Order to Appear.—Leaving a copy of an order on a judgment debtor, to appear and answer in supplemental proceedings, with the debtor's wife, is a sufficient notice. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731 (1891).

Court to Apply Property to Judgment.—The section intends that when the debtor refuses to apply such property to the satisfaction of the judgment, he must, when duly required, answer concerning the same, to the end that the court, in a proper way, may so apply the property to which the debtor may direct attention. *Farmers, etc., Bank v. Burns*, 109 N. C. 105, 13 S. E. 871 (1891).

§ 1-354. Proceedings against joint debtors. — Proceedings supplemental to execution may be taken upon the return of an execution unsatisfied, issued upon a judgment recovered in an action against joint debtors, in which some of the defendants have not been served with the summons by which the action was commenced, so far as relates to the joint property of such debtors; and all actions by creditors to obtain satisfaction of judgments out of the property of joint debtors are maintainable in like manner and to the like effect. These provisions apply to all proceedings and actions pending and to those terminated by final decree or judgment. (C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 669; C. S., s. 713.)

Joint, as well as single debtors, may be examined after the issuance of an execution, and before its return. *Weiller & Co. v. Lawrence*, 81 N. C. 65 (1879).

§ 1-355. Debtor leaving State, or concealing himself, arrested; bond.—Instead of the order requiring the attendance of the judgment debtor, the court or judge may, upon proof by affidavit or otherwise to his satisfaction that there is danger of the debtor leaving the State or concealing himself, and that there is reason to believe that he has property which he unjustly refuses to apply to the judgment, issue a warrant requiring the sheriff of any county where such debtor is to arrest him and bring him before the court or judge. Upon being brought before the court or judge, the debtor may be examined on oath, and, if it appears that there is danger of his leaving the State, and that he has property which he has unjustly refused to apply to the judgment, he shall be ordered to enter into an undertaking, with one or more sureties, that he will, from time to time, attend before the court or judge as directed, and that he will not, during the pendency of the proceedings, dispose of any property not exempt from execution. In default of entering into such undertaking, he may be committed to prison by warrant of the court or judge, as for contempt. (1868-9, c. 148, s. 4; 1868-9, c. 277, s. 8; Code, s. 488, subsec. 4; Rev., s. 671; C. S., s. 714.)

§ 1-356. Examination of parties and witnesses.—On examination un-

der this article either party may examine witnesses in his behalf, and the judgment debtor may be examined in the same manner as a witness; and the party or witnesses may be required to appear before the court or judge, or a referee appointed by either, and testify on any proceedings under this article in the same manner as upon the trial of an issue. If before a referee, the examination shall be taken by the referee, and certified to the court or judge. All examinations and answers before a court or judge or referee under this article must be on oath, except that when a corporation answers, the answer shall be on the oath of an officer thereof. (C. C. P., ss. 264, 267, 268; 1868-9, c. 95, s. 2; 1871-2, c. 245; Code, ss. 488 [subsec. 2], 491, 492; Rev., ss. 670, 676; C. S., s. 715.)

Cross-Examination.—Where the judgment debtor is examined the creditor does not make him his witness, but may cross-examine and contradict him. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

Evidence Taken Down in Writing.—In supplemental proceedings the evidence should be taken down in writing. *Coates*

Bros. v. Wilkes, 92 N. C. 377 (1885).

Production of Documents.—Where, on examination of a debtor, it appears that his account books are material to the investigation, the court may require him to produce them. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

§ 1-357. Incriminating answers not privileged; not used in criminal proceedings.—No person, on examination pursuant to this article, is excused from answering any question on the ground that it will tend to convict him of the commission of a crime or that he has, before the examination, executed any conveyance, assignment or transfer of his property for any purpose, but his answer shall not be used as evidence against him in any criminal proceeding or prosecution. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, s. 488, subsec. 5; Rev., s. 672; C. S., s. 716.)

Witness Must Answer Questions.—A witness must answer the questions and he cannot shield himself behind his declaration that they involve self-crimination. *LaFontaine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).

So when called to testify as to his dealings in behalf of a defunct corporation, of which he was an officer, he cannot excuse himself on the ground the evidence thus elicited might be used on the trial of indictments pending against him and others

for conspiring to cheat and defraud divers persons in the management of the affairs of such corporation. *LaFontaine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).

Not Available for Criminal Proceedings.—Facts developed on the examination of the defendants in supplemental proceedings are forbidden to be used in evidence against them in any criminal proceeding or prosecution. *State v. Mallett*, 125 N. C. 718, 34 S. E. 651 (1899).

§ 1-358. Disposition of property forbidden.—The court or judge may, by order, forbid a transfer or other disposition of, or any interference with, the property of the judgment debtor not exempt from execution. (C. C. P., s. 264; 1868-9, c. 95, s. 2; Code, ss. 488 [subsec. 6], 494; Rev., s. 673; C. S., s. 717.)

Section Refers to Property of Debtor at Time of Order.—When this section and § 1-360 are read either singly or as a component part of this article, it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670 (1948).

Prospective Earnings Are Not Property.—Prospective earnings of the judgment

debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670 (1948).

Only Parties May Be Restrained.—In supplemental proceedings, the court cannot restrain the transfer of property owned by one not a party to the action. *Bank v. Burns*, 109 N. C. 105, 13 S. E. 871 (1891).

Where it is alleged that a third person has property of the judgment debtor, it is error to restrain such third person from disposing of such property until the receiver can bring an action for its recovery.

ery, unless such person has been made a party in some way to the proceeding.

Coates Bros. v. Wilkes, 94 N. C. 174 (1886).

§ 1-359. Debtors of judgment debtor may satisfy execution.—After the issuing of an execution against property, all persons indebted to the judgment debtor, or to any one of several debtors in the same judgment, may pay to the sheriff the amount of their debt, or as much thereof as is necessary to satisfy the execution; and the sheriff's receipt is a sufficient discharge for the amount paid. (C. C. P., s. 265; Code, s. 489; Rev., s. 674; C. S., s. 718.)

Protection to Debtors of Judgment Debtor.—The section furnishes an easily secured and safe protection to the debtors of the judgment debtor, who are called upon to satisfy the execution. *Parks v. Adams*, 113 N. C. 473, 18 S. E. 665 (1893).

thorized by this section to receive from debtors of the defendant in the execution in his hands the debts due him, but he is not thereby invested with the power to apply the proceeds of one execution in satisfaction of another. *Smith v. McMillan*, 84 N. C. 593 (1881).

Authority of Sheriff.—A sheriff is au-

§ 1-360. Debtors of judgment debtor, summoned.—After the issuing or return of an execution against property of the judgment debtor, or of any one of several debtors in the same judgment, and upon affidavit that any person or corporation has property of said judgment debtor, or is indebted to him in an amount exceeding ten dollars, the court or judge may, by order, require such person or corporation, or any officer or members thereof, to appear at a specified time and place, and answer concerning the same. The court or judge may also, in its or his discretion, require notice of the proceeding to be given to any party to the action, in such manner as seems proper. (C. C. P., s. 266; 1869-70, c. 79, s. 2; 1870-1, c. 245; Code, s. 490; Rev., s. 675; C. S., s. 719.)

Section Applies Only to Debts Due at Time of Order.—When this section and § 1-358 are read either singly or as a component part of this article it is plain that a supplemental proceeding against a third person is designed to reach and apply to the satisfaction of the judgment property of the judgment debtor in the hands of the third person or debts due to the judgment debtor by the third person at the time of the issuance and service of the order for the examination of the third person. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670 (1948).

Prospective Earnings Are neither Property nor Debt.—Prospective earnings of the judgment debtor are neither property nor a debt, and may not be reached in supplemental proceedings against the employer of the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670 (1948).

When Proceedings May Commence.—The proceedings given by the section may be commenced before the sale of the property levied on, at the presentation of an affidavit or other proof of its insufficient value. *McKeithan & Sons v. Walker*, 66 N. C. 95 (1872).

Purpose of Appearance and Answer.—The purpose of the appearance and answer required by the section is to determine whether the sum alleged, or any part thereof is due the judgment debtor. *Rice v. Jones*, 103 N. C. 226, 95 S. E. 571

(1889).

Assignee May Be Examined.—An order for examination may issue against the defendant's assignee. *Bruce v. Crabtree*, 116 N. C. 528, 21 S. E. 194 (1895).

Procedure.—The section expressly prescribes that persons having property of the judgment debtor may be examined in respect to the same, and mere notice is sufficient to bring them before the courts and make them subject to its jurisdiction for the purpose of securing the debtor's property, not for the purpose of contesting any right of such persons having the same. If they claim an interest in the property, or that the same belongs to them, they may properly suggest so. *Bank v. Burns*, 109 N. C. 105, 13 S. E. 871 (1891); *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

Where one, who is charged in supplemental proceedings as holding property belonging to a judgment debtor, claims such property as his own, the question cannot be decided in the course of such proceedings, but must be settled by an independent action. *Carson v. Oates*, 64 N. C. 115 (1870).

Same—Notice to Defendant.—Notice to the defendant is not required, though the court may, in its discretion, order notice to be given. *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348 (1894); *Wright v. Southern R. Co.*, 141 N. C. 164, 53 S. E. 831 (1906).

§ 1-361. Where proceedings instituted and defendant examined.—Proceedings supplemental to execution must be instituted in the county in which the judgment was rendered; but the place designated where the defendant must appear and answer must be within the county where he resides. (Rev., s. 677; C. S., s. 720.)

Editor's Note.—This section is a substantial enactment of the rule laid down in *Hasty v. Simpson*, 77 N. C. 69 (1877). In *Hutchison v. Symons*, 67 N. C. 156 (1872), it was held that proceedings supplementary should be instituted in the county in which the action was pending; that is, where the judgment was rendered.

Hasty v. Simpson, supra, quoted, and approved this holding, but in addition, held that the place designated for the appearance and answer of the defendant should be in the county of his residence. Thus a beneficial rule was formulated which was, apparently, followed by the legislature in enacting this section.

§ 1-362. Debtor's property ordered sold.—The court or judge may order any property, whether subject or not to be sold under execution (except the homestead and personal property exemptions of the judgment debtor), in the hands of the judgment debtor or of any other person, or due to the judgment debtor, to be applied towards the satisfaction of the judgment; except that the earnings of the debtor for his personal services, at any time within sixty days next preceding the order, cannot be so applied when it appears, by the debtor's affidavit or otherwise, that these earnings are necessary for the use of a family supported wholly or partly by his labor. (C. C. P., s. 269; 1870-1, c. 245; Code, s. 493; Rev., s. 678; C. S., s. 721.)

Order for Condemnation of Debtor's Property.—In proceedings supplemental to execution, an order for the condemnation made by the clerk against land was within the scope of this section. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922).

Property Subject to Sale.—The court may order any property of the judgment debtor not exempt from execution in the hands either of himself or any other person, or due to the judgment debtor, to be applied to the satisfaction of the judgment. *Rand v. Rand*, 78 N. C. 12 (1878).

If it appears that a third person is indebted to the judgment debtor, the court may order such indebtedness, or so much thereof as may be necessary, to be applied to the satisfaction of the judgment against the judgment debtor. *Rice v. Jones*, 103 N. C. 226, 95 S. E. 571 (1889).

Sale Required.—Where it appears from an examination under supplementary proceedings that the judgment debtor holds a claim against a third party, to be discharged by the delivery of corn at a stipulated price per bushel, it is error for the court to order such third person to deliver to the creditor a sufficient quantity of the corn, at the agreed price, to satisfy the debt. The proper order is to sell the corn and apply the proceeds to the debt. *In re Davis*, 81 N. C. 72 (1879).

When Final Order Made.—No final order can be made appropriating to the creditor any property discovered under § 1-360 until the property previously levied on is exhausted, for until that is done it

cannot be known whether anything is still owing. *McKeithan & Sons v. Walker*, 66 N. C. 95 (1872).

Earnings for Sixty Days.—The exemption of earnings for sixty days allowed to a judgment debtor under the section applies only as to proceedings on judgments for private debts and not for taxes due. *Wilmington v. Sprunt*, 114 N. C. 310, 19 S. E. 348 (1894).

The earnings of a nonresident for personal services for the sixty days next preceding are exempt from seizure in garnishment by this section. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904), cited in *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58 (1907).

Salaries of Public Officers and Employees.—For reasons of public policy, the salaries of officers and the pay of employees of the State cannot be reached by creditors by proceedings supplementary to execution. *Swepson v. Turner*, 76 N. C. 115 (1877).

Gratuitous Services.—While creditors may subject, in a supplementary proceeding, the debtor's choses in action, including a claim for compensation due for service rendered under an express or implied contract, they have no lien on his skill or attainments, and cannot compel him to exact compensation for managing his wife's property, or for services rendered to any person with the understanding that it was gratuitous. *Osborne v. Wilkes*, 108 N. C. 651, 13 S. E. 285 (1891).

Where supplemental proceedings are

instituted upon return of execution unsatisfied on a judgment against a husband and wife, and it appears that the husband is totally and permanently disabled and has no property upon which execution could be levied, but is receiving the sum of three hundred dollars a month under disability insurance, the judgment

debtor is entitled, under his personal property exemption, to the three hundred dollars each month if such amount is necessary for the support of himself and wife. *Commissioner of Banks v. Yelverton*, 204 N. C. 441, 168 S. E. 505 (1933).

§ 1-363. Receiver appointed.—The court or judge having jurisdiction over the appointment of receivers may also by order in like manner, and with like authority, appoint a receiver in proceedings under this article of the property of the judgment debtor, whether subject or not to be sold under execution, except the homestead and personal property exemptions. But before the appointment of the receiver, the court or judge shall ascertain if practicable, by the oath of the party or otherwise, whether any other supplementary proceedings are pending against the judgment debtor, and if so, the plaintiff therein shall have notice to appear before him, and shall likewise have notice of all subsequent proceedings in relation to the receivership. No more than one receiver of the property of a judgment debtor shall be appointed. The title of the receiver relates back to the service of the restraining order, herein provided for. (C. C. P., s. 270; 1870-1, c. 245; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 494; Rev., s. 679; C. S., s. 722.)

Cross Reference. — As to duty of receiver generally, see §§ 1-501 through 1-504.

In a race of diligence between creditors under the supplementary proceedings, the earliest applicant is presumed to be entitled to the earliest appointment. *Parks v. Sprinkle*, 64 N. C. 637 (1870).

Action as a Prerequisite to Appointment. — Where supplemental proceedings had discovered that the defendant held a specific fund which had been adjudged to belong to the plaintiff, and the clerk directed the defendant to pay over the same to the plaintiff, it was error in the judge on appeal to appoint a receiver to take charge of the fund until the plaintiff should institute an action to recover the specific fund. *Ross v. Ross*, 119 N. C. 109, 25 S. E. 792 (1896).

Evidence with Application.—The application for a receiver shall be made as in other cases, that is, the motion shall be supported by affidavits and other written or documentary evidence. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

Motion Pending Appeal. — The motion for appointment of a receiver may be made before the judge, pending an appeal to him from the ruling of the clerk upon other questions. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

Subject to Review.—The appointment of a receiver in these proceedings does not rest solely in the discretion of the judge, and his action in appointing or refusing to appoint is subject to review by the Supreme Court. *Coates Bros. v.*

Wilkes, 92 N. C. 377 (1885).

Reasonable Ground. — It is sufficient for the appointment of a receiver if there is reasonable grounds to believe that the judgment debtor has property which ought to be applied to the payment of the judgment. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

Judge to Ascertain if Other Proceedings Pending.—While it is the duty of a judge appointing a receiver under this section to ascertain if other supplemental proceedings are pending against the judgment debtor, and if so, to notify the plaintiffs therein of all proceedings before him, yet a failure to do so does not require the reversal of an order appointing a receiver, where some of the creditors actually appear and make themselves parties, and all have an opportunity to interpose before the final distribution of the fund. *Corbin v. Berry*, 83 N. C. 28 (1880).

There Shall Be But One Receiver.—This section prescribes that there shall be but one receiver of the property of a judgment debtor, to prevent a conflict of authority between the courts having a concurrent jurisdiction over the subject. *Corbin v. Berry*, 83 N. C. 28 (1880).

Consolidation of Several Proceedings.—Where several supplemental proceedings are pending, and the same property is sought to be subjected, or where, in either of such proceedings, a receiver is appointed of property which is the subject of the other proceedings, the court should, in proper cases, order that the same be consolidated, preserving the priorities ac-

quired by the superior diligence of the various litigants. *Monroe Bros. & Co. v. Lewald*, 107 N. C. 655, 12 S. E. 287 (1890).

Cited in Nobles v. Roberson, 212 N. C. 334, 193 S. E. 420 (1937).

§ 1-364. Filing and record of appointment; property vests in receiver.—When the court or a judge grants an order for the appointment of a receiver of the property of the judgment debtor, it shall be filed in the office of the clerk of the superior court of the county where the judgment roll in the action or transcript from justice's judgment, upon which the proceedings are taken, is filed; and the clerk shall record the order in a book to be kept for that purpose in his office, to be called Book of Orders Appointing Receivers of Judgment Debtors, and shall note the time of its filing therein. A certified copy of the order shall be delivered to the receiver named therein, and he is vested with the property and effects of the judgment debtor from the time of the service of the restraining order, if such restraining order has been made, and if not, from the time of the filing and recording of the order for the appointment of a receiver. The receiver of the judgment debtor is subject to the direction and control of the court in which the judgment was obtained upon which the proceedings are founded. (C. C. P., s. 270; 1870-1, c. 245; Code, s. 495; Rev., s. 680; C. S., s. 723.)

When Property Vests in Receiver.—The receiver, by virtue of his appointment, becomes the legal assignee of the judgment, and is vested with the property therein. *Turner v. Holden*, 94 N. C. 70 (1886).

The general principles of law applicable to receivers apply to those appointed in supplemental proceedings. It is the duty of such receivers to take possession of the property of the debtor at once, and to bring actions to recover any property belonging to him which may be in the hands of third persons. *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

In proceedings supplementary to execution if the debtor dies before the appointment of a receiver, or before the order of such appointment is filed in the office of the clerk of the superior court, the property and effects of such judgment debtor do not vest in the receiver. *Rankin v. Minor*, 72 N. C. 424 (1875).

Remedy of Debtor When Receiver Is Negligent.—If the receiver is negligent in the performance of his duty, the remedy of the judgment debtor might be in the removal of the receiver and appointment of a successor, or in seeking compensation in damages for the losses due to such negligence, and, if necessary, up-

on his bond to secure a faithful discharge of duty, he cannot interfere with the receiver's collection and control of the property. *Turner v. Holden*, 94 N. C. 70 (1886).

Control and Direction of Court.—A receiver may be appointed who is invested with all the property and effects of the debtor, and may collect, preserve, and pay out the property and estate of the debtor, or their proceeds, under the direction of the court. *Rand v. Rand*, 78 N. C. 12 (1878).

While the court may exercise very great control over the receiver, and may direct, in appropriate cases, that he shall or shall not do particular things, yet, ordinarily, when he is invested with full power as a receiver, he will have authority to bring appropriate, necessary actions without special leave or direction of the court. *Weill v. First Nat. Bank*, 106 N. C. 1, 11 S. E. 277 (1890).

A receiver, in supplemental proceedings, may bring actions to recover the judgment debtor's property without special leave or direction of the court. *Weill v. First Nat. Bank*, 106 N. C. 1, 11 S. E. 277 (1890). See also, *Coates Bros. v. Wilkes*, 92 N. C. 377 (1885).

§ 1-365. Where order of appointment recorded.—Before the receiver is vested with any real property of the judgment debtor, a certified copy of the order of appointment must be filed and recorded on the execution docket, in the office of the clerk of the superior court of the county in which any real estate of the judgment debtor is situated, and also in the office of the clerk of the superior court of the county in which the debtor resides. (C. C. P., s. 270; Code, s. 496; Rev., s. 681; C. S., s. 724.)

Death of Judgment Debtor before Order Filed.—When the judgment debtor dies before the filing in the clerk's office of an order appointing a receiver, the judg-

ment creditor has no lien on his property as against the administrator of the debtor. *Rankin v. Minor*, 72 N. C. 424 (1875).

Cited in *Nobles v. Roberson*, 212 N. C. 334, 193 S. E. 420 (1937).

§ 1-366. Receiver to sue debtors of judgment debtor.—If it appears that a person or corporation alleged to have property of the judgment debtor, or indebted to him, claims an interest in the property adverse to him, or denies the debt, such interest or debt is recoverable only in an action against such person or corporation by the receiver; but the court or judge may, by order, forbid a transfer or other disposition of such property or interest till a sufficient opportunity is given to the receiver to commence and prosecute the action to judgment and execution, but such order may at any time be modified or dissolved by the court or judge having jurisdiction on such security as he directs. (C. C. P., s. 271; 1870-1, c. 245; Code, s. 497; Rev., s. 682; C. S., s. 725.)

Cross Reference. — As to execution against debts due corporate defendants, see § 55-143.

Court May Restrain Transfer of Property.—Under this section when it is found that a third person, not a party to the action, claims an interest in the property, or denies the debt, which is sought by the plaintiff to be applied to his judgment as belonging to the judgment debtor, the court may, by an order in the cause, restrain the transfer of such property till the receiver can bring an action to recover it, but such is brought by the receiver as the agent of the court. *Ross v. Ross*, 119 N. C. 109, 25 S. E. 792 (1896).

Same — Notice Required.—In *Coates Bros. v. Wilkes*, 94 N. C. 174 (1886), it was said that very clearly this section cannot be construed as implying that the order forbidding “the transfer or other disposition of such property or interest,” may be made without notice to the party to be affected by it. Such an interpretation would produce an effect that would contravene natural justice, as well as fundamental right. In some way, the person to be affected adversely by an order or judgment of the court, must have notice of the proceedings against him, so that he can appear, and be heard in his own behalf. This section must be taken and construed in connection with § 1-351, which provides that “the court or judge, may by an order, require such person or corporation, or any officer or member, thereof, to appear at a

time and place, and answer concerning” the property or debt alleged to belong to the judgment debtor. It moreover gives to the court or judge, authority in its or his discretion, to require the notice of such order to be given in “such manner as may seem to him or it to be proper.” Notice must be given, not necessarily by summons, but as the court or judge may direct, and when the party is before the court to answer as required, the order forbidding “a transfer or other disposition of such property or interest,” may be made. Thus two sections of the same statute may operate consistently and without working injustice.

Third Parties May Interplead.—In supplemental proceedings it was adjudged that the fund in question belonged to the judgment debtor, and an order made that the fund be paid into court. Afterwards, upon claim made by another, the clerk refused to pay the money to him, and appointed a receiver, who brought action against the judgment debtor to try the question of title to the fund. Held, that defendants, claimants to the fund, should have been allowed to interplead in the supplementary proceedings. *Wilson v. Chichester*, 107 N. C. 386, 12 S. E. 139 (1890).

Fraudulent Transactions of Debtor Set Aside.—A receiver is not the representative of the debtor alone, and can maintain an action to set aside fraudulent transactions of such debtor. *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351 (1898).

§ 1-367. Reference.—The court or judge may, in his discretion, order a reference to a referee agreed upon by the parties, or appointed by him, to report the evidence or the facts. The appointment of the referee may be made in the first order or at any time. (C. C. P., s. 272; Code, s. 498; Rev., s. 683; C. S., s. 726.)

Cross References.—As to examination before referee, see § 1-356; as to referees generally, see §§ 1-190 through 1-195; as to disobedience of orders of referee, see § 1-368, and annotations thereto.

Definition. — A reference has been de-

fined as the act of sending any matter by a court of chancery, or one exercising equitable powers, to a master or other officer, in order that he may ascertain facts and report to the court. 2 Bouv. Law Dict., title Reference.

What Law Governs.—The general rule that whatever constitutes part of the procedure is determined by the law of the forum, applies to references, and the validity of a reference, and the proceedings and judgment upon it must be tested by the laws of the forum. *Alexandria Canal Co. v. Swann*, 5 How. (46 U. S.) 83, 12 L.

Ed. 60 (1847).

The evidence taken before a referee must accompany his report if there are any exceptions to which it is applicable, or perhaps any adverse rulings made in the progress of the inquiry which the evidence would tend to elucidate or explain. *Vestal v. Sloan*, 83 N. C. 555 (1880).

§ 1-368. Disobedience of orders punished as for contempt.—Any person, party or witness, who disobeys an order of the court or judge or referee, duly served, may be punished by the judge as for a contempt. In all cases of commitment under this article the person committed may, in case of inability to perform the act required, or to endure the imprisonment, be discharged from imprisonment by the judge committing him, or the judge having jurisdiction, on such terms as are just. (C. C. P., s. 274; 1869-70, c. 79, s. 3; Code, s. 500; Rev., s. 684; C. S., s. 727.)

Cross Reference.—As to contempt generally, see §§ 5-1 through 5-9.

Court May Enforce Its Lawful Orders.—It is an essential attribute of a court to enforce by proper process its lawful orders, and without this its essential functions would be paralyzed or destroyed. *Pain v. Pain*, 80 N. C. 322 (1879); *LaFontaine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).

As to whether the violation of a void order of a court constitutes contempt, see note in 12 N. C. Law Rev. 260.

Paying Salary Accruing after Issuance of Order.—An employer cannot be held in contempt for paying salary accruing to a judgment debtor after issuance and service on the employer of an order in proceedings supplemental to execution, since the order, properly construed, speaks as of the date of its issuance, and since in law the order could not apply to prospective earnings of

the judgment debtor. *Motor Finance Co. v. Putnam*, 229 N. C. 555, 50 S. E. (2d) 670 (1948).

Contempt of Referee Punished by Court.—When, in the course of proceedings supplementary to the execution, a witness is examined by a referee, a contempt, in refusing to answer the questions, must be punished by the court making the reference. *LaFontaine v. Southern Underwriters Ass'n*, 83 N. C. 133 (1880).

Judge Passes on Inability to Comply.—Where a party to an action, having been directed to perform an order of the court, otherwise to be in contempt, applied, after notice, to have the order discharged, and offered to produce affidavits showing his inability to comply with the order, it was the duty of the judge to hear and pass on the affidavits. *Childs v. Wiseman*, 119 N. C. 497, 26 S. E. 126 (1896).

SUBCHAPTER XI. HOMESTEAD AND EXEMPTIONS.

ARTICLE 32.

Property Exempt from Execution.

§ 1-369. Property exempted.—The homestead and personal property exemptions as defined and declared by the article of the State Constitution entitled *Homesteads and Exemptions* are exempt from sale under execution and other final process, as provided in the State Constitution: Provided, the allotment of the homestead shall, as to all property therein embraced, suspend the running of the statute of limitations on all judgments against the homesteader during the continuance of the homestead. (1844, c. 32; 1846, c. 53; 1848, c. 38; R. C., c. 45, ss. 7, 8; 1866-7, c. 61, s. 7; 1876-7, c. 263; 1879, c. 256; Code, s. 501; 1885, c. 359; 1887, c. 17; 1895, c. 397; 1901, c. 612; Rev., s. 685; C. S., s. 728.)

- I. General Consideration.
- II. Nature of Homestead.
- III. Nature and Duration of Exemptions.
- IV. Constitutional Provisions and Pur-

- pose.
- A. In General.
- B. Who Entitled to Homestead and Exemptions.

C. Homestead in Land Only.

V. Judgments and Liens—Suspension of Limitations.

Cross References.

As to conveyance of homestead, see § 1-370 and annotations thereto. See also, N. C. Constitution, Art. X, §§ 1, 2, 3, 4, 5 and 8.

I. GENERAL CONSIDERATION.

Editor's Note.—For article on homestead exemption, see 29 N. C. Law Rev. 143.

In *Poe v. Hardie*, 65 N. C. 447 (1871), the homestead was called a "determinable fee," and in *Littlejohn v. Egerton*, 77 N. C. 379 (1877), it is spoken of as "a quality annexed to land whereby the estate is exempted from sale under execution". These inadvertent expressions, as to the effect produced upon the debtor's estate in the exempt land, have led to serious difficulties in interpreting the beneficent provisions of the Constitution and subsidiary statutes in securing a home to the debtor and his family, without trenching needlessly upon the rights of creditors. *Markham v. Hicks*, 90 N. C. 204 (1884).

The correct view is expressed by *Bynum, J.*, in *Bank v. Green*, 78 N. C. 247 (1878): "Their legal effect is simply to protect the occupant in the enjoyment of the land, set apart as a homestead, unmolested by his creditors". No new estate is conferred upon the owner, and no limitation is imposed upon his old estate. It is obvious that it would be more correct to say that there is conferred upon him a determinable exemption from the payment of his debts in respect to the particular property allotted to him. It cannot be contended that the assignment is in any sense a conveyance of land, nor does it profess to pass title. It only serves to indicate where the homestead is and whether there is any excess subject to levy and sale to pay judgment creditors. *Markham v. Hicks*, 90 N. C. 204 (1884), citing *Keener v. Goodson*, 89 N. C. 273 (1883); *Mebane v. Layton*, 89 N. C. 396 (1883).

Favored by Law.—The law favors the homestead. Every safeguard is given the homesteader and the courts have carefully protected his rights as guaranteed by the Constitution. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

Estoppel to Claim.—Under certain circumstances the homesteader is estopped from claiming the homestead exemption. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928), citing *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912); *Simmons v. McCullin*, 163 N. C. 409, 79 S. E. 625

(1913); *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928).

Equity of Redemption.—It is well settled that the homestead may be allotted in an equity of redemption. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928), citing *Cheatham v. Jones*, 68 N. C. 153 (1873); *Gaster v. Hardee*, 75 N. C. 460 (1876); *Burton v. Spiers*, 87 N. C. 87 (1882); *Hinson v. Adrian*, 92 N. C. 122 (1885); *Thurber v. La Roque*, 105 N. C. 301, 11 S. E. 460 (1890); *Montague v. Bank*, 118 N. C. 283, 24 S. E. 6 (1896); *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928).

Cited in *Sample v. Jackson*, 225 N. C. 380, 35 S. E. (2d) 236 (1945).

II. NATURE OF HOMESTEAD.

Definition of Homestead.—In *Hager v. Nixon*, 69 N. C. 108 (1873), it is said: No precise definition of a homestead is given in the Constitution, and we must look to our own legislation alone to ascertain what it is.

Homestead Is Not Offspring of Judgment Debt.—The homestead, whether allotted on the voluntary petition of the owner or by the sheriff under execution, is not the offspring of and does not draw its life blood from a judgment debt. It stems from the Constitution and "it is not the condition of the homesteader that creates the homestead condition, but the force of the Constitution, attaching to and acting upon the land." *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635 (1895); *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 670 (1949).

Not an Estate.—A homestead is not an estate at all, but merely an exemption. *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889); *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635 (1895); *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1 (1910); *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912). See also, *Hicks v. Wooten*, 175 N. C. 597, 96 S. E. 107 (1918).

In *Thomas v. Fulford*, 117 N. C. 667, 23 S. E. 635 (1895), it was said: "In some of the earlier decisions it is treated as an estate and called a determinable fee, but this doctrine has long since been abandoned."

Not Color of Title.—The assignment of a homestead does not constitute color of title. *Keener v. Goodson*, 89 N. C. 273 (1883).

Exceptions to Homestead Exemption.—A homestead is exempt from sale under execution, except (1) for taxes; (2) for obligations contracted in the purchase of the premises; (3) for mechanics and laborer's lien; (4) for debts contracted prior to the Constitution. *Mebane v. Layton*, 89 N.

C. 396 (1883). And see *Cumming v. Bloodworth*, 87 N. C. 83 (1882).

Time of Application.—The “poor debtor” is in time if he makes his application and procures the assignment to be made at any time before the property is changed and converted by a sale. *State v. Floyd*, 33 N. C. 496 (1850).

Allotment by Sheriff Not Necessary to Vest Right.—Title to the homestead is vested in the owner by the Constitution and no allotment by the sheriff is necessary to create the right or vest the title. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

The action of a sheriff in assigning a homestead by metes and bounds is not needed to any extent to vest the right, but merely to find the quantum so as to enable him to ascertain the excess, if any. *Gheen v. Summey*, 80 N. C. 188 (1879). See also, *Littlejohn v. Egerton*, 77 N. C. 379 (1877).

Sale by Homesteader of Estate in Reversion.—A sale by the owner of a homestead of his estate in reversion stands as at common law, and the owner has full power to sell it, or to mortgage it if he desires to raise money on the credit of it. *Jenkins v. Bobbitt*, 77 N. C. 385 (1877).

III. NATURE AND DURATION OF EXEMPTIONS.

Effect of Exemption Laws.—Exemption laws have no extraterritorial force or effect. *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318 (1898); *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479 (1903); *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904).

The exemption laws of this State protect the property of a debtor in this State from exemptions issuing from the courts of this State, and (by congressional action) from the courts of the United States. *Balk v. Harris*, 122 N. C. 64, 30 S. E. 318 (1898).

Exemptions relate only to the remedy, and the right to an exemption is subject to the law of the forum. *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479 (1903); *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904).

Same—Remedial in Nature.—Exemption laws are remedial in their nature and should always receive a liberal construction. *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904).

Same—Exchange of Exempt Goods.—If an article of property, which has been exempt from execution, is exchanged for another article, the one received in exchange is not exempt. *Lloyd v. Durham*, 60 N. C. 282 (1864).

Presumption in Favor of Exemption.—There is a presumption of fact in favor of the exemption, and the creditor who seeks to subject the homestead to the payment of his debt, must bring himself within one of the exceptions by proper averment and proof. *Mebane v. Layton*, 89 N. C. 396 (1883).

Duration of Exemption.—The personal property exemption exists only during the life of the homesteader. *Johnson v. Cross*, 66 N. C. 167 (1872); *Smith v. McDonald*, 95 N. C. 163 (1886).

How Choses in Action Made Available.—Except in case of attachment proceedings wherein provision is made for exceptional and urgent cases, choses in action can only be made available to the creditor by civil action in the nature of an equitable *fi. fa.* or by the statutory method of supplemental proceedings, both of which remedies in proper instances are here still open to claimants. *Boseman v. McGill*, 184 N. C. 215, 114 S. E. 10 (1922); *McIntosh Grocery Co. v. Newman*, 184 N. C. 370, 114 S. E. 535 (1922).

IV. CONSTITUTIONAL PROVISIONS AND PURPOSE.

A. In General.

Favored by Constitution.—The homestead interest is favored by the Constitution. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312 (1890).

Purpose of Homestead Provisions.—The framers of the Constitution meant exactly what they said and ordained, that a certain part of the real property of the debtor should be set apart for his use and occupation, where he might dwell with his family in peace and contentment without any creditors to molest or make him afraid, so long as he might live, and to extend the benefit of the exemption to the wife during her life, if there should be no children of the marriage, and if there were children then during the minority of the children or any one of them. The leading idea, if not the only one, was to create an exemption and not an estate, and an exemption for a limited period only, leaving the estate which the debtor already had in the land unimpaired. *Joyner v. Sugg*, 132 N. C. 580, 44 S. E. 122 (1903).

The homestead law is a beneficent provision for the protection of a wife and children against the neglect and improvidence of the father and husband. *Hughes v. Hodges*, 102 N. C. 236, 9 S. E. 437 (1889).

The purpose of the homestead provision of the Constitution is to surround the family home with certain protection against

the demands of urgent creditors. It carries the right of occupancy free from levy or sale under execution so long as the claimant may live unless alienated or abandoned. It is the place of residence which the homesteader may improve and make comfortable and where his family may be sheltered and live, beyond the reach of those financial misfortunes which even the most prudent and sagacious cannot always avoid. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Pre-Existing Debt.—The second section of Article X of the Constitution of 1868, which exempts from execution real property of a resident debtor not exceeding in value one thousand dollars, was declared void as to pre-existing debts, being in contravention of Article I, § 10 of the federal Constitution. *Edwards v. Kearzey*, 96 U. S. 595, 24 L. Ed. 793 (1877), reversing *Edwards v. Kearsey*, 74 N. C. 241 (1876). For the law governing cases which arose subsequent to this one concerning pre-existing debts, see *Richardson v. Wicker*, 80 N. C. 172 (1879); *Earle v. Hardie*, 80 N. C. 177 (1879); *Gamble v. Rhyne*, 80 N. C. 183 (1879).

Where a homestead is sold to satisfy a debt created before the ratification of the Constitution of 1868, one thousand dollars of the proceeds of sale, if that sum is left after paying the old debt, will be treated as the homestead. *Leak v. Gay*, 107 N. C. 468, 12 S. E. 312 (1890).

Homestead Is Vested Right. — The homestead right is a right vested by the Constitution, and cannot be destroyed by any irregularity in the proceedings for its allotment. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488 (1895). See *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

B. Who Entitled to Homestead and Exemptions.

Only Residents Entitled to Homestead and Exemptions. — The homestead and personal property exemptions can be claimed only by residents of this State. *Jones v. Alsbrook*, 115 N. C. 46, 20 S. E. 170 (1894); *Goodwin v. Claytor*, 137 N. C. 225, 49 S. E. 173 (1904).

Same—Constitutional Purpose. — The right of homestead provided and secured by the Constitution (Art. X, §§ 2, 5, 8), is incident to residence in this State. Only residents have and are entitled to such right. A non-resident has no such right, although he may be the owner of real property situated in the State. The terms of the Constitution do not embrace him, and moreover, the plain purpose is to ex-

empt the homes of those who have or can acquire them "from sale under execution or other final process obtained on any debt." He has no home within the State for himself or his family, and the reason for the exemption as to him does not exist. *Baker v. Legget*, 98 N. C. 304, 4 S. E. 37 (1887).

Same—Forfeiture of Right.—If the person claiming a homestead voluntarily removes from the State, with a purpose to make his home elsewhere, he forfeits his right in this respect. *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516 (1887).

Where a debtor ceased to be a resident of the State before his property became applicable to a creditor's claim, the general exemption laws of the State do not operate in his favor. *Wierse v. Thomas*, 145 N. C. 261, 59 S. E. 58, 15 L. R. A. (N. S.) 1008 (1907).

A resident, after executing a deed of trust of his property, with a recital reserving his personal property exemptions, and after assigning his exemptions so reserved, became a nonresident without having his exemptions allotted to him. Neither the assignee nor the attaching creditors could get the benefit of the exemptions. *Latta v. Bell*, 122 N. C. 639, 30 S. E. 15 (1898). See also, *Norman v. Craft*, 90 N. C. 211 (1884).

Residents Defined. — The leading purpose of the Constitution, Article X, §§ 1, 2, 3, 8, is to secure the homestead to the debtor and his family and the term "resident" therein should be so construed as to accomplish that purpose, unless there should be found some positive or necessary and reasonable rule of law to the contrary. *Chitty v. Chitty*, 118 N. C. 647, 24 S. E. 517 (1896).

The words "a resident of this State," employed in the Constitution, Art. X, § 2, in respect to homesteads, have a more restricted meaning than that usually given to domicile. *Lee v. Mosely*, 101 N. C. 311, 7 S. E. 874 (1888).

The residence must be actual, and not constructive. *Munds v. Cassidy*, 98 N. C. 558, 4 S. E. 353 (1887).

Right Not Destroyed by Fraud.—When the owner of lands has had his deed thereto to his wife set aside by his creditors as fraud upon them, and has continued in the occupation of the lands, he is still entitled to his homestead interest therein. *Rankin v. Shaw*, 94 N. C. 405 (1886); *Rose v. Bryan*, 157 N. C. 173, 72 S. E. 960 (1911).

When Wife and Children Succeed to Homestead.—The wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal

from the State, though they may remain. *Finley v. Saunders*, 98 N. C. 462, 4 S. E. 516 (1887).

A widow is not entitled to a homestead in the lands of her husband if he die leaving children—minors or adults. *Wharton v. Leggett*, 80 N. C. 169 (1879). See also, *Hager v. Nixon*, 69 N. C. 108 (1873). But see later case under "Purpose of Homestead Provisions," *supra*.

When Dower Right Paramount to Homestead Right.—In *Watts v. Leggett*, 66 N. C. 197 (1872), *Pearson, C. J.*, speaking for the court, said: "If the homestead had been laid off in the lifetime of the husband, at his death the dower of the wife would have been assigned so as to include the dwelling house in which the husband had usually resided and buildings used therewith. Thus the dower would be assigned so as to include the homestead or a part thereof, and the right of dower having attached at the time of marriage, would have been paramount, and the right of the children to enjoy the homestead during the minority of any one of them must have been taken subject to this paramount right of dower, the effect being to postpone the enjoyment of the children as to so much of the homestead as is covered by the dower, until the death of the widow, leaving them, of course, to the present enjoyment of such part of the homestead and land appertaining thereto as is not covered by the dower." See also, *Gregory v. Ellis*, 86 N. C. 579 (1882).

Reversionary Interest.—The reversionary interest in a homestead cannot be sold by an administrator in a petition to make real estate assets during the minority of one of the children of the intestate. *Hinsdale v. Williams*, 75 N. C. 430 (1876). See also, *Maynard v. Moore*, 76 N. C. 158 (1877); *Mebane v. Layton*, 89 N. C. 396 (1883); *Barnes v. Cherry*, 190 N. C. 772, 130 S. E. 611 (1925).

Collateral Attack.—The allotment of a homestead to one having no right thereto is void, and may be attacked collaterally. *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924 (1892).

But the allotment cannot be attacked collaterally by the judgment debtor or anyone claiming under him. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488 (1895).

Mortgage or Deed of Trust Paramount.—As against a mortgage or deed of trust, the grantor has no right of homestead. *Roper v. National Fire Ins. Co.*, 161 N. C. 151, 76 S. E. 869 (1912).

Adverse Possession under Sheriff's Deed.

—Where there is an actual adverse possession under a sheriff's deed, the Supreme Court, in order to give full effect to the constitutional provision, will remand the case to the end that the superior court may have the homestead laid off. *Littlejohn v. Egerton*, 77 N. C. 379 (1877).

C. Homestead in Land Only.

Not Applicable to Proceeds of Sale.—The law confers a homestead right only in land, and not in the proceeds of the sale of land. *Uteley v. Jones*, 92 N. C. 261 (1885).

Where a homestead is sold, the proceeds lose the quality of homestead exemptions, and become subject to the personal property exemption. *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189 (1889).

Lands Subject to Homestead Right.—To claim a homestead in land it must be owned and occupied by and allotted to the claimant at the time of the issuance of the execution; and the vendee of a judgment debtor cannot claim and have laid off a homestead in the lands conveyed as against a levy by the sheriff thereon under a judgment had against the vendor prior to his deed. *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1 (1910).

The owner of land is not restricted to the tract of land on which he resides. *Mayho v. Cotton*, 69 N. C. 289 (1873).

Reservation of Right.—A reservation of an indefinite right of homestead in land from a conveyance thereof is valid. *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264 (1917).

V. JUDGMENTS AND LIENS—SUSPENSION OF LIMITATIONS.

Limitations.—The running of the statute of limitations on a judgment is not suspended until there has been an actual allotment of a homestead. *Farrar v. Harper*, 133 N. C. 71, 45 S. E. 510 (1903). See also, *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567 (1942).

The allotment of homestead suspends the running of the statute of limitations against the judgment as a lien upon the property embraced in the homestead, but does not toll the statute in respect to the debt as such or the personal liability of the debtor for the payment thereof. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Same—As to Judgments.—When the judgment debtor's homestead is allotted, the allotment, as to all property therein embraced, suspends the running of the statute of limitations on all judgments against the homesteader during the con-

tinuance of the homestead. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488 (1895); *Barnes v. Cherry*, 190 N. C. 772, 130 S. E. 611 (1925).

Same—Judgments Docketed.—The statute of limitations does not run against a debt of a homesteader during the existence of his interest in the homestead, provided it has been actually laid off; and then only as to debts affected by the allotment, that is, judgments docketed in the county where the land is situated and solely with reference to the lien of such judgments upon the reversionary interest. *McDonald v. Dickson*, 85 N. C. 248 (1881); *Morton v. Barber*, 90 N. C. 399 (1884).

In *Cotten v. McClenahan*, 85 N. C. 254 (1881), it was said: "There is no stay to the statute until there has been an allotment of the homestead, and then only to the enforcement of the liens of docketed judgments upon the interest in reversion. As to all other debts and for all other purposes the statute runs." *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264 (1917).

The laying off of a homestead under a docketed judgment suspends the statute of limitations during the continuance of the homestead, and when it has been laid off since the enactment of the statute it is taken by the homesteader subject to its provisions, and upon conveyance thereof is subject to execution under the judgment. *Watters v. Hedgpeth*, 172 N. C. 310, 90 S. E. 314 (1916).

In *Davenport v. Fleming*, 154 N. C. 291, 70 S. E. 472 (1911), it was said: "It follows that when the ownership of a tract of land and any and all interests therein, except the homestead interest, has been passed from the debtor by valid conveyance, and such homestead interest determines by the death of the parties entitled, or by any of the recognized methods of abandonment, it does so in favor of the grantee in such conveyance, and where such conveyance has become effective before a judgment is docketed, there is no estate in the debtor to which a judgment lien could attach and no interest of the judgment creditor in the property that would call for or permit the interference of a court in his behalf by injunction or otherwise." *Kirkwood v. Peden*, 173 N. C. 460, 92 S. E. 264 (1917).

Same—Ten Year Limitation.—Under a statute limiting the life of the docketed judgment to ten years, a lien of such judgment is not prolonged by the allotment and recording of the homestead to the debtor after the expiration of ten years, though the judgment was kept revived. *Wilson v. Beaufort County Lum-*

ber Co., 131 N. C. 163, 42 S. E. 565 (1902).

The Judgment Lien.—The Acts of 1885, ch. 359, restored the lien of a docketed judgment upon land set apart as a homestead. *Rankin v. Shaw*, 94 N. C. 405 (1886).

In *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889), it was said: "The condition and measure of the state of the owner of the homestead in the land is not changed by, or because of, the homestead—the estate, unchanged, continues—and the restriction, the limitation that distinguishes the homestead, is upon the right of the judgment creditor to have the land sold by execution or other proper final process to satisfy his docketed judgment, which constitutes his lien upon the land."

This lien is not meaningless and nugatory; it implies that the creditor shall have the property devoted to the satisfaction of his judgment debt, as far as may be necessary, when and as soon as the exemption of it from sale shall be over. The law is true and sincere; it does not thus create and allow a lien in favor of the creditor, and leave the owner of the homestead at liberty to destroy the property, and thus render such lien worthless. He is allowed to live upon and use it, but not destroy or impair the substance of it, as against the creditor having a lien. *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889).

Under this section a docketed judgment has a lien upon the homestead even after it has been set apart. *Summers Hdw. Co. v. Jones*, 222 N. C. 530, 23 S. E. (2d) 883 (1943).

Lien by Attachment.—The lien of an attachment levied upon land of a non-resident debtor is paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. *Watkins v. Overby*, 83 N. C. 165 (1880).

Merger of Judgments.—Where a judgment creditor sues on his judgment constituting a lien on the homestead of the debtor and obtains a new judgment, the first judgment is not merged in the second. *Springs v. Pharr*, 131 N. C. 191, 42 S. E. 590, 92 Am. St. Rep. 775 (1902).

Payment of Judgment Does Not Extinguish Homestead.—Payment of the judgment under which homestead has been allotted does not extinguish the homestead, and does not start the running of the statute against judgments then of record or thereafter docketed. *Williams*

v. Johnson, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Judgments Obtained Prior to 1868.—A judgment obtained on an obligation incurred prior to the Constitution of 1868, could have been enforced on the lands of the judgment debtor, notwithstanding the allotment thereof as a homestead under another judgment, and is barred by the ten-year statute of limitations. *Blow v.*

Harding, 161 N. C. 375, 77 S. E. 340 (1913).

As against the liens of judgment creditors, a mortgagor of lands is entitled to his homestead exemption in his equity of redemption and an injunction will lie against the sale of the property under execution when his homestead has not been allotted. *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-370. Conveyed homestead not exempt.—The allotted homestead is exempt from levy so long as owned and occupied by the homesteader or by any one for him, but when conveyed by him in the mode authorized by the Constitution, article ten, section eight, the exemption ceases as to liens attaching prior to the conveyance. The homesteader who has conveyed his allotted homestead may have another allotted, and as often as is necessary. This section shall not have any retroactive effect. (1905, c. 111; Rev., s. 686; C. S., s. 729.)

Construction of Constitution.—This section is in accordance with the views of the court, and expresses the proper construction of the Constitution, Article X, § 2. *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1 (1910).

This section seems to deal with "allotted homesteads." See *Chadbourn Sash, etc., Co. v. Parker*, 153 N. C. 130, 69 S. E. 1 (1910); *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928); *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928); *Equitable Life Assur. Soc. v. Russos*, 210 N. C. 121, 185 S. E. 632 (1936).

Conveyance of Homestead.—The homestead exemption ceases upon its conveyance by the homesteader. *Caudle v. Morris*, 160 N. C. 168, 76 S. E. 17 (1912); *Crouch v. Crouch*, 160 N. C. 447, 76 S. E. 482 (1912).

Same—Examination of Wife.—As to former holding, see *Dalrymple v. Cole*, 170 N. C. 102, 86 S. E. 988 (1915).

Same—By Mortgage.—The conveyance of an allotted homestead by mortgage does not destroy the exemption or revive the right to issue execution on an outstanding and unsatisfied judgment; and a homestead may be allotted in mortgaged land. *Cleve v. Adams*, 222 N. C. 211, 22 S. E. (2d) 567 (1942).

Section Not Retroactive.—By its express terms this section does not have a retroactive effect, and has no application to homesteads allotted prior to 1905. *Watters v. Hedgpeth*, 172 N. C. 310, 90 S. E. 314 (1916).

Under the section a vendee cannot acquire title under color until seven years adverse possession since 1905. *Crouch v. Crouch*, 160 N. C. 447, 76 S. E. 482 (1912).

Cited in *Duplin County v. Harrell*, 195 N. C. 445, 142 S. E. 481 (1928); *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928); *Farris v. Hendricks*, 196 N. C. 439, 146 S. E. 77 (1929).

§ 1-371. Sheriff to summon and swear appraisers.—Before levying upon the real estate of any resident of this State who is entitled to a homestead under this article, and the Constitution of this State, the sheriff [or a deputy sheriff designated by the sheriff, and who shall be twenty-one years of age or over], or other officer charged with the levy shall summon three discreet persons qualified to act as jurors, to whom he shall administer the following oath: "I, A. B., do solemnly swear (or affirm) that I have no interest in the homestead exemption of C. D., and that I will faithfully perform the duties of appraiser (or assessor, as the case may be), in valuing and laying off the same. So help me, God." In cases where he deems it necessary he may summon the county surveyor or some other competent surveyor to assist in laying off the homestead by metes and bounds. The portions of this section in brackets shall apply to the following counties only: Alamance, Ashe, Bertie, Brunswick, Buncombe, Cabarrus, Caldwell, Camden, Chowan, Cumberland, Currituck, Davidson, Davie, Duplin, Durham, Edgecombe, Forsyth, Gates, Graham, Guilford, Halifax, Harnett, Henderson, Hertford, Iredell, Jackson, Johnston, Lenoir, Lincoln, Martin, Mecklenburg, Moore, New Hanover, Onslow, Pasquotank, Perquimans, Pitt, Randolph, Rock-

ingham, Rowan, Sampson, Scotland, Vance, Wayne, Wilson. (1868-9, c. 137, s. 2; Code, s. 502; 1893, c. 58; Rev., s. 687; C. S., s. 730; 1931, c. 58; 1933, cc. 37, 147.)

Cross References.—As to the form of a certificate to be endorsed on return, see § 1-392, No. 4; as to resident within the meaning of this section, see annotations under § 1-369.

Editor's Note.—The 1931 amendment inserted the words in brackets in this section, and provided that the amendment should apply only to certain named counties. They, together with counties added by later amendments, are enumerated in the last sentence of the section.

Public Laws 1933, c. 37, made the amendment of 1931 applicable in Duplin, Graham and Martin counties, although the original act was applicable to Martin County. Public Laws 1933, c. 147, made the amendment of 1931 applicable in Onslow County.

Purpose of Allotment by Sheriff.—No sale can be had until the homestead is first ascertained and set apart to the judgment debtor. The allotment by the sheriff is only for the purpose of ascertaining whether there be any excess of property over the homestead which is subject to sale under execution. *Lambert v. Kinney*, 74 N. C. 348 (1876); *Littlejohn v. Egerton*, 77 N. C. 379 (1877); *Gheen v. Summey*, 80 N. C. 187 (1879). The issuance of the execution and the levy thereunder merely set in motion the machinery through which the homestead is valued and set apart to the owner. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Allotment Does Not Create Homestead Right.—When a sheriff is seeking to collect a judgment under execution issued to him, he must, before levying upon the real property of the debtor, proceed to have the debtor's homestead allotted as required by this section. But this does not create the homestead right. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Duty of Officer Mandatory.—This section enjoins upon the sheriff the mandatory duty of summoning three discreet persons to appraise and allot a homestead to any judgment debtor who is entitled to such exemption, before levying an execution in his hands upon the land. Neither his ignorance of the rights of a debtor nor his obstinate refusal to rec-

ognize them will be allowed to defeat the latter's claim to the benefit of a homestead for which the Constitution provides, though the presumption of law prevails in favor of the legality of his action in selling until a party attacking it shows its invalidity because made in disregard of a statute enacted to carry into effect the organic law. *Dickens v. Long*, 112 N. C. 311, 17 S. E. 150 (1893).

Appraisers — Qualifications.—There is no requirement that appraisers in order to allot the homestead shall have the qualification of being freeholders, as is the case with extraordinary or tales jurors, but simply that they shall be "qualified to act as jurors," i. e., as ordinary or regular jurors. *Hale Bros. v. Whitehead*, 115 N. C. 28, 20 S. E. 166 (1894).

Same—Exception.—An exception on the ground of the disqualification of an appraiser of a homestead exemption should be taken before the appraisers enter upon the discharge of their official duties. *Burton v. Spiers*, 87 N. C. 87 (1882).

Same—May Be Appointed by Clerk.—For the allotment of a homestead, the court may direct the clerk to appoint three commissioners for that purpose. *Benton v. Collins*, 125 N. C. 83, 34 S. E. 242 (1899).

Same—Constable May Summons.—A constable, to whom an execution from the court of a justice of the peace has been delivered, may summons appraisers and administer to them the prescribed oaths. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

Necessity That Appraisers Be Sworn.—Appraisers appointed to lay off a homestead must be sworn; and unless it appears that they were sworn the proceedings may be treated as a nullity. *Smith v. Hunt*, 68 N. C. 482 (1873).

Same—Oath Administered by Deputy Sheriff.—That appraisers laying off a homestead were sworn by a deputy sheriff is, at most, an irregularity, and can not be taken advantage of in a collateral proceeding if exceptions were not taken in apt time. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457 (1900).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-372. Duty of appraisers; proceedings on return.—The appraisers shall value the homestead with its dwelling and buildings thereon, and lay off to the owner or to any agent or attorney, in his behalf, such portion as he selects not

exceeding in value one thousand dollars, and must fix and describe the same by metes and bounds. They must then make and sign in the presence of the officer a return of their proceedings, setting forth the property exempted, which shall be returned by the officer to the clerk of the court for the county in which the homestead is situated and filed with the judgment roll in the action, and a minute of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. The officer must likewise make a transcript of the return over his hand and return it without delay to the clerk of the court of the county from whence the execution issued, and said clerk must likewise file and make minute of the same as above directed. In all judicial proceedings the original return or a certified copy may be read in evidence. Provided, that the return of the appraisers of their proceedings as described in this section shall be invalid, void, and of no effect as to the rights of third persons or parties or as to the rights of persons, firms or corporations who are not parties to the judgment or proceeding unless said return is filed with the judgment roll in the action, and the minutes of the same entered on the judgment docket, and a certified copy thereof under the hand of the clerk shall be registered in the office of the register of deeds for the county. (1868-9, c. 137, ss. 3-4; 1877, c. 272; Code, ss. 503-4; Rev., ss. 688, 689; C. S., s. 731; 1945, c. 912.)

Cross References.—As to appeal as to reallocation, see § 1-374. As to reallocation for increase of value, see § 1-373. As to form of appraisers return, see § 1-392. As to costs of laying off and appraising homestead, see § 6-28.

Editor's Note. — The 1945 amendment added the proviso at the end of this section.

Interpretation of Section.—The section, prescribing how the homestead shall be valued and laid off, is as broad and comprehensive in its terms and effect as it can be; properly interpreted, there is no exceptive provision in it, by implication or otherwise, as to any debt or class of debts; it allows, and in legal effect requires, that the homestead shall be valued and laid off in every case where it may be done. *Long v. Walker*, 105 N. C. 90, 10 S. E. 858 (1890).

Valuation of Land and Buildings.—The section provides that "the appraisers shall thereupon proceed to value the homestead with its dwellings and buildings thereon, and lay off," etc. This evidently means that the land and buildings there shall be valued together in making up the estimate of a thousand dollars. *Ray v. Thornton*, 95 N. C. 571 (1886).

Same — Must Not Exceed \$1,000. — Where lands belonging to a judgment creditor are indivisible, he is not entitled to have the whole of it allotted to him as a homestead, if it exceeds one thousand dollars in value. *Campbell v. White*, 95 N. C. 491 (1886).

Where the jury value the tract at \$2,000, the land should be divided into two parts of equal value, and the homesteader will take his choice. *Shoaf & Co. v. Frost*, 123

N. C. 343, 31 S. E. 653 (1898).

Same—When Less than \$1000.—An allotment of a homestead to the value of \$800, laid off under execution, does not render the allotment void, especially when the plaintiff in an independent action contesting its validity has introduced the former record containing the proceedings for laying off the homestead, and contends on appeal that it was erroneously admitted in the trial court. *Carstarphen v. Carstarphen*, 193 N. C. 541, 137 S. E. 658 (1927).

Same — Conclusive. — The valuation placed on the tract of land by the jury is conclusive. *Shoaf & Co. v. Frost*, 123 N. C. 343, 31 S. E. 653 (1898).

Same—May Take Present Value. — Judgment creditors cannot complain of the homesteader's election to take the present value of his homestead. *Leak v. Gay*, 107 N. C. 482, 12 S. E. 315 (1890).

Same — Duty of Appraisers. — The duty of the appraisers extends no further than the valuation and allotment by bounds of the homestead. *Aiken v. Gardner*, 107 N. C. 236, 12 S. E. 250 (1890).

In the allotment of a homestead the appraisers should estimate the value of the interest of the homesteader in the land, taking into consideration any encumbrances thereon, and assign to him his interest in the land, and not the corpus itself. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).

Manner of Allotment.—The law does not intend that the defendant shall have the empty form of a homestead, but the substance as well, when he has land that may be laid off to him for that purpose, and this without reference to whether it embraces the dwelling house or not.

Generally the dwelling house and buildings used therewith, must be embraced, but there may be reasons why this cannot be done, as when the land on which they are situated is encumbered for all or more than its value. *Flora v. Robbins*, 93 N. C. 38 (1885).

Where a judgment debtor owned several town lots, some of which, including the one on which his dwelling was situated, in which he resided—were encumbered by prior liens (mortgages) to the extent of their full value, and the others were unencumbered, it was held, that he had the right to have his homestead allotted from the unencumbered lands without reference to whether they embraced his dwelling and other buildings. *Flora v. Robbins*, 93 N. C. 38 (1885).

Same—Must Be in Severalty.—There must be a specific allotment of the homestead in severalty without any community of interest between the homesteader and the purchaser of the excess. *Campbell v. White*, 95 N. C. 491 (1886).

Debtor's Right to Select.—A judgment debtor is entitled to an opportunity to be present and exercise his constitutional right to select his homestead; and where it appears upon the face of the return that he was not present, by no fault of his own, the appraisal and allotment of a homestead under an execution is void. *McGowan v. McGowan*, 122 N. C. 164, 29 S. E. 372 (1898); *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285 (1906).

Same—What Constitutes.—Where a mortgagor conveyed his personal property, more than \$500 in value, with a clause in the deed reserving his "personal property exemption and to be selected by him" the title to the whole of it passed to the mortgagee and remained in him, until the exempted articles were legally set apart; and the act of executing a second mortgage

conveying a part of said property is not a selection of such part, nor a separation of the same from the bulk. *Norman v. Craft*, 90 N. C. 211 (1884).

Description of Allotment.—When the land is sufficiently identified the allotment is not open to the objection that the homestead should have been fixed and described by metes and bounds. *Ray v. Thornton*, 95 N. C. 571 (1886); *Kelly v. McLeod*, 165 N. C. 382, 81 S. E. 455 (1914).

Report of Appraisers.—The omission of appraisers to insert in their report the date of the allotment is not a sufficient ground for vacating it. *Bevans v. Goodrich*, 98 N. C. 217, 3 S. E. 516 (1887).

It is allowable for appraisers of a homestead to amend their return before it has been filed. *Gudger v. Penland*, 118 N. C. 832, 23 S. E. 921 (1896).

Same—Registration.—As to when registration not necessary prior to the 1945 amendment, see *Bevan v. Ellis*, 121 N. C. 224, 28 S. E. 471 (1897); *Crouch v. Crouch*, 160 N. C. 447, 76 S. E. 482 (1912); *Carstarphen v. Carstarphen*, 193 N. C. 541, 137 S. E. 658 (1927); *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949).

Prior to the 1945 amendment it was held that the unregistered allotment of a homestead was competent evidence, unless objected to in apt time. *Gudger v. Penland*, 118 N. C. 832, 23 S. E. 921 (1896).

Same—As Notice of Extent.—The direction contained in the section as to the disposition to be made of the report of the exemption, is not to give notice of its extent only, but to subject it to a motion made in a reasonable time to set it aside. *Burton v. Spiers*, 87 N. C. 87 (1882).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-373. Reallotment for increase of value.—A judgment creditor of a debtor whose homestead has been allotted may apply in writing to the clerk of the superior court of the county in which the homestead lies for an order for its reallotment, if there is in the hands of the sheriff of that county an execution issued from the proper court against said debtor. The application must be accompanied by the affidavits of three disinterested freeholders of the county in which the homestead lies, setting forth that, in their opinion, it has increased in value fifty per centum or more since the last allotment. Upon the filing of the application and affidavits the clerk shall issue notice to the judgment debtor to appear before him on a day not more than five days from the day of its service and show cause why his homestead should not be reallotted. The notice must state upon whose application it is issued. Upon the return day of the notice the clerk shall consider the affidavits filed, as heretofore required, and any additional affidavits filed by either party, and if he is of opinion that the homestead has probably appreciated in value fifty per centum or more since the last allotment, he shall command the sheriff to reallot to the judgment debtor his homestead, in the same manner as if

no homestead had been allotted. If upon the reallocation any excess is found, it shall be disposed of by the sheriff as in ordinary cases of execution and levy. This section does not prevent the judgment creditor from resorting to the equity jurisdiction of the courts for a reallocation of the homestead of his judgment debtor in any case. (1893, c. 149; Rev., s. 691; C. S., s. 732.)

Cross Reference.—As to costs, see § 6-21.

Where in bankruptcy proceedings homestead was allotted in certain lands, subject to a specified judgment the court held that as against this judgment there was no determination of the extent of debtor's homestead in the lands, and the judgment creditor was not remitted to reallocation of homestead either by suit in equity or by application to the clerk under this section, but could proceed by levy of execution and allotment of homestead. *Sample v. Jackson*, 226 N. C. 408, 38 S. E. (2d) 155 (1946).

Procedure for Reallocation.—If the increase is 50 per cent or more, the creditor may have a reallocation in a proceeding before the clerk, in aid of an execution in the sheriff's hands. If the increase is less than 50 per cent, the judgment creditor can proceed by suit in the nature of an equitable action to subject the excess to his debt. *Vanstory v. Thornton*, 110 N.

C. 10, 14 S. E. 637 (1892); *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).

Where a portion of the land included in the allotment was subject to a mortgage prior thereto, and has since been sold thereunder, in making the reallocation it must clearly appear that this portion was not included in the revaluation. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).

Same—Intrinsic and Market Value.—If it appears, upon a reallocation of the homestead, that the value thereof has increased, it is immaterial in point of law whether the increase had come in the market value or in the intrinsic value, the effect is the same—the homestead is not to exceed in value the sum of \$1,000. *McCaskill v. McKinnon*, 125 N. C. 179, 34 S. E. 273 (1899).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-374. **Appeal as to reallocation.**—From the order of the clerk commanding or refusing a reallocation, either party may appeal to the judge resident in or holding the courts of the district, who shall hear the matter in chambers in any county of the judicial district to which belongs the county in which the proceedings were instituted. In other respects the proceedings upon such appeal are as now provided for appeals from the clerk on issues of law. (1893, c. 149; Rev., s. 691; C. S., s. 733.)

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-375. **Levy on excess; return of officer.**—The levy may be made upon the excess of the homestead, not laid off according to this chapter, and the officer shall make substantially the following return upon the execution: "A. B., C. D., and E. F., summoned and qualified as appraisers or assessors (as the case may be), who set off to X. Y. the homestead exempt by law. Levy made upon the excess." (1868-9, c. 137, s. 5; Code, s. 505; Rev., s. 692; C. S., s. 734.)

The levy must be only upon the excess. *Gardner v. McConnaughey*, 157 N. C. 481, 73 S. E. 125 (1911).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-376. **When appraisers select homestead.**—If no selection is made by the owner, or any one acting in his behalf, of the homestead to be laid off as exempt, the appraisers shall make selection for him, including always the dwelling and buildings used therewith. (1868-9, c. 137, s. 6; Code, s. 506; Rev., s. 693; C. S., s. 735.)

When No Buildings on Land.—If the land proposed to be sold is all that the execution debtor has, he is entitled to have his homestead therein laid off to him, although there is no dwelling house or

other habitable building thereon, because he may build a house and other buildings on the land, and thus have the beneficent provisions of the Constitution. *Spoon v. Reid*, 78 N. C. 244 (1878); *Murchison v.*

Plyer, 87 N. C. 79 (1882); *Flora v. Robbins*, 93 N. C. 38 (1885); *McCracken v. Adler*, 98 N. C. 400, 4 S. E. 138 (1887).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-377. **Homestead in tracts not contiguous.**—Different tracts of land not contiguous may be included in the same homestead, when a homestead of contiguous land is not of the value of one thousand dollars. (1868-9, c. 137, s. 15; Code, s. 509; Rev., s. 694; C. S., s. 736.)

Application of Section.—While it may have been supposed by the framers of the organic law that a debtor would usually elect to have his homestead allotted in his dwelling-place and the surrounding land, his choice is not positively restricted to that, nor to contiguous land. *Flora v. Robbins*, 93 N. C. 38 (1885); *Hughes v.*

Hodges, 102 N. C. 236, 9 S. E. 437 (1889); *Fulton v. Roberts*, 113 N. C. 421, 18 S. E. 510 (1893).

A homestead may be laid off in two tracts of land not contiguous, the two not exceeding \$1,000 in value. *Martin v. Hughes*, 67 N. C. 293 (1872).

§ 1-378. **Personal property appraised on demand.**—When the personal property of any resident of this State is levied upon by virtue of an execution or other final process issued for the collection of a debt, and the owner or an agent, or attorney in his behalf, demands that the same, or any part thereof, be exempt from sale under such execution, the sheriff or other officer making the levy shall summon three appraisers, as heretofore provided, who, having been first duly sworn, shall appraise and lay off to the judgment debtor such articles of personal property as he or another in his behalf selects and to which he is entitled under this article and the Constitution of the State, in no case to exceed in value five hundred dollars, which articles are exempt from said levy, and return thereof shall be made by the appraisers, as upon the laying off of a homestead exemption. (1868-9, c. 137, ss. 12, 13; Code, s. 507; Rev., s. 695; C. S., s. 737.)

Cross References. — As to summons, oath, and qualification of appraisers, see § 1-371, and annotations thereto. As to return made by appraisers, see § 1-372. As to appraisers' oath and fees, see § 1-379. As to residents, see annotations under § 1-369. As to persons entitled to exemptions see annotations under § 1-369. As to costs of appraisal and laying of exemptions, see § 6-28.

Editor's Note.—As to right to claim income from life insurance policies as exempt, see note in 12 N. C. Law Rev. 67.

Section Subsidiary to Constitution. — This section was enacted to carry out the provisions of Art. X, § 1. *Jones v. Allsbrook*, 115 N. C. 46, 20 S. E. 170 (1894).

Continuation of Levy.—In *Shepherd v. Murrill*, 90 N. C. 208 (1884), the language of the section, "whenever the personal property of any resident of this State shall be levied upon," etc., is held to mean, at any time, while it is levied upon, and the levy continues to the day of sale.

Same—Time of Allotment.—The complete capacity to make the allotment would always remain until the day of sale, and we can see no reason, certainly no substantial reason, why it might not be done on the day of the levy, or on any day before the sale, or on that day. *Shepherd v. Murrill*, 90 N. C. 208 (1884). See *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936).

Unlike the homestead exemption, which must be allotted before levying upon the land, the right to personal property exemption may be insisted on at any time before sale, or appropriation of the property by the court. *Chemical Co. v. Sloan*, 136 N. C. 122, 48 S. E. 577 (1904); *BeFarrah v. Spell*, 178 N. C. 231, 100 S. E. 321 (1919).

So long as an execution is in the officer's hands and in force, the preliminary action of the appraisers is in fieri and capable of correction and amendment, and it is a right both of the debtor and the creditor that the exemption shall be ascertained up to and just before the process is executed by a sale, so that, in behalf of the debtor, the exemption may be enlarged if any property to which he is entitled has been omitted, and so that, in behalf of the creditor, no exemption shall be allowed to the debtor if it appears at the sale that he is not entitled to the same. *Jones v. Allsbrook*, 115 N. C. 46, 20 S. E. 170 (1894).

Order of Court as Final Process.—The order of the court directing the payment of money is "final process," within the meaning of the Constitution and this section. *BeFarrah v. Spell*, 178 N. C. 231, 100 S. E. 321 (1919).

Debtor's Right of Selection.—It is immaterial how much, or what other personal

estates, the debtor possessed, the statute gives him the right, when his property is seized under execution, to select such, not exceeding the limits in value, as he may prefer to retain as exempt. *Scott v. Kenan*, 94 N. C. 298 (1886).

Property from Which Exemption Is Made.—In laying off the personal property exemption of a debtor, the property upon which there is no lien must be first exempted. *Cowan v. Phillips*, 122 N. C. 72, 28 S. E. 961 (1898). See *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936).

Same—Choses in Action.—A chose in action may be chosen by a debtor as a part of his exemption. *Frost v. Naylor*, 68 N. C. 325 (1873).

A judgment is personal property, and, if it was required to make up the amount to which the person, in whose favor it was rendered, is entitled to exemption, it is the duty of the officer having the execution to so allot it. *Curlee v. Thomas*, 74 N. C. 51 (1876).

Property Not Subject to Exemption.—A tenant cannot claim his personal property exemption out of the crops, as against his landlord, until the rents are paid. *Hamer v. McCall*, 121 N. C. 196, 28 S. E. 297 (1897).

Fines and Costs in Criminal Action.—The personal property exemption cannot be claimed as against a fine and costs in a criminal action. *State v. Williams*, 97 N. C. 414, 23 S. E. 370 (1887).

Value of Exemption.—The section merely follows the language of the Constitution, Art. X, § 1, in giving each resident of the State a personal property exemption of \$500, against execution or any other final process. *Befarrah v. Spell*, 178 N. C. 231, 100 S. E. 321 (1919).

A debtor is entitled to \$500 of personal property as a personal property exemption, and when this amount has been once allotted, and has been diminished by use, loss or other cause, the debtor has a right to have any other personal property he may have exempted, up to the prescribed limit. *Campbell v. White*, 95 N. C. 344 (1886).

§ 1-379. Appraiser's oath and fees.—The persons summoned to appraise the personal property exemption must take the same oath and are entitled to the same fees as the appraisers of the homestead, and when both exemptions are claimed by the judgment debtor, at the same time, one board of appraisers must lay off both, and are entitled to but one fee. (1868-9, c. 137, s. 14; Code, s. 508; Rev., s. 696; C. S., s. 738.)

Cross Reference.—As to oaths required of homestead appraisers, see § 1-371.

Necessity of Oath.—Freeholders appointed to allot personal property exemp-

Right Personal to Debtor.—As far as personal property is concerned, the right of exemption is personal to the debtor, and it loses its quality of exemption as soon as it is transferred. *Lane v. Richardson*, 104 N. C. 642, 10 S. E. 189 (1889).

Appraisers' Report.—When there has been a failure to levy under an execution on the property of a judgment debtor, a report of the jury of appraisers to set aside his personal property exemption will be void which does not set aside to him specifically the articles his exemption gives him, or allow him an opportunity to select the articles. *Gardner v. McConnaughey*, 157 N. C. 481, 73 S. E. 125 (1911).

Same—Made to Clerk.—The return of the appraisers of personal property exemptions should be made to the clerk of the superior court, but an allotment is not vitiated by making it returnable to another place. The court has power to direct the return to be made to the proper office, and it should exercise that power instead of dismissing the proceedings for defect in the return. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

When Exception Not Regular.—Where a defendant's exceptions to an allotment did not comply with the requirements of the section and while the proceeding was not, in some respects, regular, but when it appears that the defendant's constitutional right has not been preserved, the matter of form becomes immaterial, and the facts having been found by the judge and all the parties are before the court, the proceeding may be treated as a motion in the cause and relief administered. *McKeithen v. Blue*, 142 N. C. 360, 55 S. E. 285 (1906).

Both Creditor and Debtor Are Entitled to Have Procedure Conform to Statute.—In the allotment of the personal property exemption, the creditor as well as the debtor is entitled to have the procedure conform to the constitutional provisions and the statutes enacted pursuant thereto. *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936).

tions must be sworn, and it must appear that they were sworn. *Smith v. Hunt*, 68 N. C. 482 (1873).

§ 1-380. Returns registered.—It is the duty of the register of deeds to indorse on each of said returns the date when received for registration, and to cause the same to be registered without unnecessary delay. He shall receive for registering the returns the same fees allowed him by law for other similar or equivalent services, which fees shall be paid by said resident applicant, his agent or attorney, upon the reception of the returns by the register. (1868-9, c. 137, s. 9; Code, s. 513; Rev., s. 698; C. S., s. 739.)

§ 1-381. Exceptions to valuation and allotment; procedure.—If the judgment creditor for whom levy is made, or judgment debtor or other person entitled to homestead and personal property exemption, is dissatisfied with the valuation and allotment of the appraisers or assessors, he, within ten days thereafter, or any other creditor within six months and before sale under execution of the excess, may notify the adverse party and the sheriff having the execution in hand, and file with the clerk of the superior court of the county where the allotment is made a transcript of the return of the appraisers or assessors which they or the sheriff shall allow to be made upon demand, together with his objections in writing to said return. Thereupon the said clerk shall put the same on the civil issue docket of the superior court for trial at the next term thereof as other civil actions, and such issue joined has precedence over all other issues at that term. The sheriff shall not sell the excess until after the determination of said action. The ten days and six months respectively begin to run from the date of the filing of the return of the valuation and allotment of the appraisers or assessors by the officer with the clerk of the superior court of the county from whence the execution issued. (1883, c. 357; Code, s. 519; 1887, c. 272, s. 2; Rev., s. 699; C. S., s. 740.)

Cross References.—As to proof of service, see § 1-102. As to costs of reassessment, see § 6-29.

Editor's Note.—As to early provision for review of allotment of appraisers by township trustees, see *Hartman v. Spiers*, 94 N. C. 150 (1886). And see *Jones v. Commissioners*, 85 N. C. 278 (1881); *Hartman v. Spiers*, 87 N. C. 28 (1882); *Burton v. Spiers*, 87 N. C. 87 (1882).

Estopped from Claiming Additional Allotment.—An allotment of a homestead to the debtor of lands less in value than one thousand dollars, regular in form and unobjected to within the time allowed by law, was an estoppel of the debtor from claiming any additional allotment in other lands which he had at the time of the allotment. *Whitehead v. Spivey*, 103 N. C. 66, 9 S. E. 319 (1889).

Time of Application.—The application for a re-assessment of a homestead by the township board of trustees (now the superior court) must be made before the sale of the excess by the sheriff. *Heptinstall v. Perry*, 76 N. C. 190 (1877).

Service of Notice.—Notices of dissatisfaction with allotment of personal property exemption under the section cannot be served by mail or given orally. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780 (1888).

Where Exception Filed.—Exceptions to

the allotment of a homestead or personal property exemptions, in all cases, must be filed in the office of the clerk of the superior court of the county where the allotment is made, together with a transcript of the allotment or appraisal. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

The section does not require that the exception be filed in the court of a justice of the peace if the judgment shall be in or the execution shall issue thereupon from that court. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

Appraiser's Return.—The return of the appraisers of the personal property exemption in question should regularly have been made by the constable to the clerk of the superior court of the county in which the appraisal was made, and filed there as directed in the statute; but that the return was inadvertently or improperly made to the court of the justice of the peace did not render the appraisal and allotment void. *McAuley v. Morris*, 101 N. C. 369, 7 S. E. 883 (1888).

Collateral Attack of Allotment.—An allotment of a homestead cannot be collaterally attacked by the judgment debtor or anyone claiming under him. *Welch v. Welch*, 101 N. C. 565, 8 S. E. 156 (1888); *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488 (1895).

If he is dissatisfied therewith, he must

present his objections in the manner prescribed by this section. *Welch v. Welch*, 101 N. C. 565, 8 S. E. 156 (1888).

Where a homesteader acquiesces in allotment of his homestead for many years, a grantee of the homesteader will not be

permitted to defeat judgment creditors by proof of purchase in good faith for a full price. *Oates v. Munday*, 127 N. C. 439, 37 S. E. 457 (1900).

Applied in *Crow v. Morgan*, 210 N. C. 153, 185 S. E. 668 (1936).

§ 1-382. Revaluation demanded; jury verdict; commissioners; report.—When an increase of the exemption or an allotment in property other than that set apart is demanded, the party demanding must in his exceptions specify the property from which the increase or reallocation is to be had. If the appraisal or assessment is reduced, the jury shall assess the value of the property embraced therein; if increased, the value of the property specified in the objections from which the increase is demanded shall also be assessed; but if the allotment is made in property other than that first set apart, the jury shall assess the value of the property so allotted. The court shall appoint three disinterested commissioners to lay off and set apart the homestead and personal property exemption in accordance with the verdict of the jury and the judgment of the court, and in the manner prescribed by law. The commissioners, who shall be summoned by the sheriff, must meet upon the premises and, after being sworn by the sheriff or a justice of the peace to faithfully perform the duties of appraisers or assessors in allotting and laying off the homestead or personal property exemption, or both, in accordance with the verdict and judgment aforesaid, must allot and lay off the same and file their report to the next term of the court, when it shall be heard by the court upon exceptions thereto. (1885, c. 347; Rev., s. 700; C. S., s. 741.)

When Valuation by Jury Unnecessary.—Where the debtor designated the particular land which he desires to have allotted him as “an increase of exemption” and the creditors assent thereto, neither party can demand that the property shall be valued by a jury. *Beavans v. Goodrich*, 98 N. C. 217, 3 S. E. 516 (1887).

Appointment and Summons of Commissioners.—Upon an appeal from the appraisal of homestead and personal property exemptions and the assessment of the value thereof by a jury, the commissioners to set apart the exemptions in accordance

with the verdict must be appointed by the court and summoned by the sheriff. *Shoaf & Co. v. Frost*, 116 N. C. 675, 21 S. E. 409 (1895).

Valuation by Jury Is Final.—Upon an appeal from an appraiser the valuation as determined by the verdict of the jury is final and the commissioners appointed by the court to set apart the exemptions in accordance with the verdict must be guided by that valuation. *Shoaf & Co. v. Frost*, 116 N. C. 675, 21 S. E. 409 (1895); *Shoaf & Co. v. Frost*, 121 N. C. 256, 28 S. E. 412 (1897).

§ 1-383. Undertaking of objector.—The creditor, debtor, or claimant objecting to the allotment made by the appraisers or assessors under execution or petition must file with the clerk of the superior court an undertaking in the sum of one hundred dollars for the payment to the adverse party of such costs as are adjudged against him. (Code, s. 522; Rev., s. 701; C. S., s. 742.)

§ 1-384. Set aside for fraud, or irregularity.—An appraisal or allotment by appraisers or assessors may be set aside for fraud, complicity, or other irregularity; but after an allotment or assessment is made or confirmed by the superior court at term time, as hereinbefore provided, the homestead shall not thereafter be set aside or again laid off by any other creditor except for increase in value. (Code, s. 523; Rev., s. 702; C. S., s. 743.)

Cross References.—As to reallocation for increase of value, see § 1-373; as to appeal as to reallocation, see § 1-374.

When Reason Not Sufficient.—An allotment of a homestead will not be set aside, because it might have been assigned in a manner more convenient to the home-

stead. *Ray v. Thornton*, 95 N. C. 571 (1886).

Where the homestead has once been regularly allotted and set apart, it cannot be reallocated at the instance of a judgment creditor whose debt was in existence when the allotment was made, except for fraud

or other irregularity. *Gully v. Cole*, 96 N. C. 447, 1 S. E. 520 (1887). This case was decided before the enactment of §§ 1-373, 1-374.

§ 1-385. Return registered; original or copy evidence.—When the homestead and personal property exemption is decided by the court at term time the clerk of the superior court shall immediately file with the register of deeds of the county a copy of the same, which shall be registered as deeds are registered; and in all judicial proceedings the original or a certified copy of the return may be introduced in evidence. (Code, s. 524; Rev., s. 703; C. S., s. 744.)

Object of Section. — The object of the section is to give notice to all persons dealing with the owner of the homestead, that it is his homestead, not subject to be sold

“under execution” or other final process obtained on any debt against him. *Gully v. Cole*, 96 N. C. 447, 1 S. E. 520 (1887).

§ 1-386. Allotted on petition of owner.—When any resident of this State desires to take the benefit of the homestead and personal property exemption as guaranteed by article ten of the State Constitution, or by this article, such resident, his agent or attorney, must apply to a justice of the peace of the county in which he resides, who shall appoint as assessors three disinterested persons, qualified to act as jurors, residing in said county. The jurors, on notice by the order of the justice, shall meet at the applicant's residence, and, after taking the oath prescribed for appraisers before some officer authorized to administer an oath, lay off and allot to the applicant a homestead with metes and bounds, according to the applicant's direction, not to exceed one thousand dollars in value, and make and sign a descriptive account of the same and return it to the office of the register of deeds.

Said assessors shall set apart of the personal property of said applicant, to be by him selected, articles of personalty to which he is entitled under this chapter, not exceeding in value the sum of five hundred dollars, and make, sign and return a descriptive list thereof to the register of deeds. (1868-9, c. 137, ss. 7, 8; Code, ss. 511, 512; Rev., ss. 697, 704; C. S., s. 745.)

Cross References.—As to form of petition, see § 1-392, No. 2; as to form for return, see § 1-392, No. 3; as to who is a resident within the meaning of the section, see annotations under § 1-369; as to qualifications of assessors, see annotations under § 1-371; as to procedure generally, see annotations under §§ 1-369 through 1-372.

Insolvency or the need for protection against sale is not a prerequisite to a homestead's allotment. While the homestead may have real beneficial value only when the owner is in debt and pressed by final process of the court, it is ever operative. A resident occupant of real property, though free from debt and possessed of great wealth, may, if he so elects, have it set apart to him on his own voluntary petition. *Williams v. Johnson*, 230 N. C. 338, 53 S. E. (2d) 277 (1949). See *Hughes v.*

Hodges, 102 N. C. 236, 9 S. E. 437 (1889) (dis. op.).

Nature of Proceedings. — The allotment of a homestead is a quasi in rem proceeding. *Williams v. Whitaker*, 110 N. C. 393, 14 S. E. 924 (1892).

Return of Appraisers.—A return of the appraisers of the personal property set apart, which designates it with sufficient certainty, is all that the section requires. *Ray v. Thornton*, 95 N. C. 571 (1886).

Same — Descriptive List. — Appraisers of personal property for exemption, must make such a descriptive list of the property as will enable creditors to ascertain what property is exempt. *Smith v. Hunt*, 68 N. C. 482 (1873).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-387. Advertisement of petition; time of hearing.—When a person entitled to a homestead and personal property exemption files the petition before a justice of the peace to have the same laid off and set apart under the preceding sections, the justice shall make advertisement in some newspaper published in the county, for six successive weeks, and if there is no newspaper in the county, then at the courthouse door of the county in which the petition is filed, notifying all creditors of the applicant of the time and place for hearing the petition. The petition shall not be heard nor any decree made in the cause in less than six nor more

than twelve months from the day of making advertisement as above required. (1868-9, c. 137, s. 11; Code, s. 515; Rev., s. 705; C. S., s. 746.)

Who Are Bound. — The allotment of constructive notice are bound thereby. homestead is a quasi in rem proceeding *Williams v. Whitaker*, 110 N. C. 393, 14 S. and only those persons having actual or E. 924 (1892).

§ 1-388. **Exceptions, when allotted on petition.**—When the homestead or personal property exemption is allotted on the petition of the person entitled thereto, any creditor may, within six months from the time of the assessment or appraisal, and upon ten days' notice to the petitioner, file his objections with the register of deeds of the county in which the premises are situated, and the register of deeds shall return the same to the clerk of the superior court of that county, who shall place them on the civil issue docket, and they shall be tried as provided for homestead and personal property exemptions set off under execution. (Code, s. 520; Rev., s. 706; C. S., s. 747.)

§ 1-389. **Allotted to widow or minor children on death of homesteader.**—If a person entitled to a homestead exemption dies without the homestead having been set apart, his widow, if he leaves no children, or his child or children under the age of twenty-one years, if he leaves such, may proceed to have the homestead exemption laid off by petition. If the widow or children have failed to have the exemption set apart in the manner provided, then in an action brought by his personal representatives to subject the realty of the decedent to the payment of debts and charges of administration, it is the duty of the court to appoint three disinterested freeholders to set apart to such widow, child or children a homestead exemption under metes and bounds in the lands of the decedent. The freeholders shall under their hands and seals make return of the same to the court, which shall be registered in the same manner as homestead exemptions. (1868-9, c. 137, s. 10; Code, s. 514; 1893, c. 332; Rev., s. 707; C. S., s. 748.)

Cross References.—As to constitutional provisions, see Art. X, §§ 3 and 5. As to widows and minor children entitled to homestead, see annotations under § 1-369.

Purpose and Constitutionality. — The manifest purpose of the section is to prevent the widow and minor children from being prejudiced by the failure of one entitled to a homestead to cause it to be laid off in his lifetime. It cannot be supposed that the effect of the statute is to go beyond the Constitution when its professed object is to carry into effect its provisions. *Watts v. Leggett*, 66 N. C. 197 (1872).

Widow Entitled to Homestead. — A widow who has no homestead of her own, is entitled to have one allotted to her out of the lands of her deceased husband, even though no homestead was allotted to him during his life. *Smith v. McDonald*, 95 N. C. 163 (1886).

But a widow cannot, under this section, have a homestead laid off for herself and minor children after the death of her husband when he died without leaving debts. *Hager v. Nixon*, 69 N. C. 108 (1873).

Unborn Child Entitled to Allotment.—A child in ventre sa mere at the time of its father's death is entitled to have a homestead allotted from the homestead of its father. *In re Seabolt*, 113 F. 766 (1902).

When to "Widow and Minor Children". —The fact that an assignment of a homestead was made to "the widow and minor children" of decedent does not make it void, since it will be considered surplusage as to the widow. *Formeyduval v. Rockwell*, 117 N. C. 320, 23 S. E. 488 (1895).

When Homestead Can Not Be Divested. —A homestead, whether laid off to a husband in his lifetime, or to his widow (there being no children), after his death, can not be divested in favor of the heir by the release or extinguishment of the deceased husband's debts. *Tucker v. Tucker*, 103 N. C. 170, 9 S. E. 299 (1889).

Widow Not Entitled to Exemption of Personalty. — The personal property exemption exists only during the life of the homesteader, and after his death his widow has no right to have it allotted to her. *Smith v. McDonald*, 95 N. C. 163 (1886).

§ 1-390. **Liability of officer as to allotment, return and levy.**—Any officer making a levy, who refuses or neglects to summon and qualify appraisers as heretofore provided, or fails to make due return of his proceedings, or levies upon the homestead set off by appraisers or assessors except as herein provided,

is guilty of a misdemeanor, and he and his sureties are liable to the owner of the homestead for all costs and damages in a civil action. (1868-9, c. 137, s. 17; Code, s. 516; Rev., ss. 708, 3584; C. S., s. 749.)

Officer's Breach of Duty. — The section subjects the sheriff to indictment and to liability on his official bond for disregard or nonperformance of his duty under the provisions of the law relating to homestead and personal property exemptions. *Richardson v. Wicker*, 80 N. C. 172 (1879); *Mebane v. Layton*, 89 N. C. 396 (1883); *Welch v. Welch*, 101 N. C. 565, 8 S. E. 176 (1888); *State v. Barefoot*, 104 N. C. 224, 10 S. E. 170 (1889).

And for such a breach of duty, and action on the officer's official bond lies in favor of the debtor. *Scott & Burton v. Kenan*, 94 N. C. 296 (1886).

Where a complaint alleges that a judg-

ment debtor demanded his personal property exemptions in apt time, but that the sheriff failed and refused to allot it to him, and afterwards sold the property and applied the money to executions in his hands, it sufficiently alleges a breach of the bond. *Scott & Burton v. Kenan*, 94 N. C. 296 (1886).

Same — Measure of Damages. — The measure of damages is the actual loss sustained, and not the value of the property at the time of the levy. *Jones v. Allsbrook*, 115 N. C. 46, 20 S. E. 170 (1894).

Cited in *Cheek v. Walden*, 195 N. C. 752, 143 S. E. 465 (1928).

§ 1-391. Liability of officer, appraiser, or assessor, for conspiracy or fraud.—Any officer, appraiser, or assessor who willfully or corruptly conspires with a judgment debtor, judgment creditor, or other person, to undervalue or to overvalue the homestead or personal property exemption of a debtor, or applicant, or assigns false metes and bounds, or makes or procures to be made a false and fraudulent return thereof, is guilty of a misdemeanor and is liable to the party injured thereby for all costs and damages in a civil action. (1868-9, c. 137, ss. 18, 19; Code, ss. 517, 518; Rev., ss. 690, 3585, 3586; C. S., s. 750.)

Duty of Sheriff. — It is the duty of a sheriff to lay off the homestead of the defendant in the execution, and to sell the

excess in a prudent and just manner so as to realize a fair price. *Andrews v. Pritchett*, 72 N. C. 135 (1875).

§ 1-392. Forms.—The following forms must be substantially followed in proceedings under this article:

[No. 1]

Appraisers' Return.

When the homestead is valued at one thousand dollars or less,
and personal property also appraised.

The undersigned having been duly summoned and sworn to act as appraisers of the homestead and personal property exemption of A. B., of Township, County, by C. D., Sheriff (or constable or deputy) of said county, do hereby make the following return: We have viewed and appraised the homestead of the said A. B., and the dwellings and buildings thereon, owned and occupied by said A. B. as a homestead, to be one thousand dollars (or any less sum) and that the entire tract, bounded by the lands of and is therefore exempted from sale under execution according to law. At the same time and place we viewed and appraised at the values annexed the following articles of personal property, selected by said A. B. (here specify the articles and their value, to be selected by the debtor or his agent), which we declare to be a fair valuation, and that the said articles are exempt under said execution. We hereby certify that we are not related by blood or marriage to the judgment debtor or the judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of, 19.....

O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable).

[No. 2.]

Petition for Homestead before a Justice of the Peace.

Before....., J. P.
.....County.

In the Matter of A. B.

A. B. respectfully shows that he (she or they, as the case may be) is (or are) entitled to a homestead exempt from execution in certain real estate in said county, and bounded and described as follows: (Here describe the property). The true value of which he (she or they, as the case may be) believes to be one thousand dollars, including the dwelling, and buildings thereon. He (she or they) further shows that he (she or they, as the case may be) is (or are) entitled to a personal property exemption from execution, to the value of (here state the value), consisting of the following property: (Here specify.) He (she or they, as the case may be) therefore prays your worship to appoint three disinterested persons qualified to act as jurors, as assessors, to view the premises, allot and set apart to your petitioner his homestead and personal property exemption, and report according to law.

[No. 3]

Form for Appraisal of Personal Property Exemption.

The undersigned having been duly summoned and sworn to act as appraisers of the personal property of A. B., of Township,..... County, and to lay off the exemption given by law thereto, by C. D., Sheriff (or other officer) of said county, do hereby make and subscribe the following return:

We viewed and appraised at the values annexed, the following articles of personal property selected by the said A. B., to wit:which we declare to be a fair valuation, and that said articles are exempt under said execution.

We hereby certify, each for himself, that we are not related by blood or marriage to the judgment debtor or judgment creditor in this execution, and have no interest, near or remote, in the above exemptions.

Given under our hands and seals, this day of, 19.....
O. K.....[L. S.]
L. M.....[L. S.]
R. S.....[L. S.]

The above return was made and subscribed in my presence, day and date above given.

C. D....., (Sheriff or Constable).

[No. 4]

Certificate of Qualification to Be Endorsed on Return by Sheriff.

The within named B. F., G. H., and J. R. were summoned and qualified according to law, as appraisers of the exemption of the said A. B., under an execution in favor of X. Y., this day of, 19...

C. D.....(Sheriff).

[No. 5]

Minute on Execution Docket.

X Y
vs.

A B

Execution issued, 19

Homestead appraised and set off and return made 19
(Code, s. 524; Rev., s. 709; C. S., s. 751.)

Cited in Crow v. Morgan, 210 N. C. 153,
185 S. E. 668 (1936).

SUBCHAPTER XII. SPECIAL PROCEEDINGS.

ARTICLE 33.

Special Proceedings.

§ 1-393. Chapter applicable to special proceedings.—The provisions of this chapter on civil procedure are applicable to special proceedings, except as otherwise provided. (Code, s. 278; Rev., s. 710; C. S., s. 752.)

Statutory Provisions. — The provision that “any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, etc.,” contained in § 1-69 is applicable in special proceedings. Welfare v. Welfare, 108 N. C. 272, 12 S. E. 1025 (1891). But in an action by the heirs at law for partition of an intestate’s lands, the administrator cannot be made a party defendant, upon his opposition to the partition, as he does not come within the foregoing provision. Garrison v. Cox, 99 N. C. 478, 6 S. E. 124 (1888).

Regular Action Bars Right to Special Proceedings.—Where an action in the nature of a creditor’s bill was brought by the plaintiff (a creditor of defendant’s testatrix) to the superior court at term time, and after the institution of the action the defendant commenced a special proceeding in the probate court for a sale of the land of his testatrix for assets, it was held, that the superior court had acquired jurisdiction

of the matter, and that the defendant should be restrained from further proceedings in the probate court. Haywood v. Haywood, 79 N. C. 42 (1878).

Abandonment of Proceedings.—By virtue of this section petitioners in condemnation proceedings may abandon the proceedings and take a voluntary nonsuit even after the commissioners have made their appraisal and report and petitioners have filed exceptions thereto, provided petitioners abandon the proceedings before confirmation of the commissioners’ report. Nantahala Power, etc., Co. v. Whiting Mfg. Co., 209 N. C. 560, 184 S. E. 48 (1936).

A judgment may be either interlocutory or final in a special proceeding as well as in a civil action. Russ v. Woodard, 232 N. C. 36, 59 S. E. (2d) 351 (1950).

Stated in Seawell v. Purvis, 232 N. C. 194, 59 S. E. (2d) 572 (1950).

§ 1-394. Contested special proceedings; commencement; summons.—Special proceedings against adverse parties shall be commenced as is prescribed for civil actions. The summons shall command the officer to summons the defendant or defendants to appear and answer the complaint, or petition, of the plaintiff within ten days after its service upon the defendant or defendants, and must contain a notice stating in substance that if the defendant or defendants fail to answer the complaint, or petition, within the time specified, plaintiff will apply to the court for the relief demanded in the complaint, or petition. The summons must run in the name of the State, be signed by the clerk of the superior court having jurisdiction in the special proceeding, and be directed to the sheriff or other proper officers of the county, or counties, in which the defendant, or defendants, or any of them reside or may be found, and must be returnable before the clerk. The clerk shall indicate on the summons by appropriate words that the summons is issued in a special proceeding and not in a civil action. The manner of service, whether by the sheriff or by publication, shall be as is prescribed for summons in civil actions by § 1-89: Provided, however, that in special proceedings before the clerk, the plaintiff or petitioner shall not be required to serve a copy of the petition or complaint upon each of the defendants, as required in civil actions, but in lieu thereof such petitioner or petitioners may deliver to the clerk at the time of the issuance of the summons copies (not to exceed three) of the petition or complaint for the use of the defendants. Provided, further, where the defendant is

an agency of the federal government, or an agency of the State, or a local government, or an agency of a local government, the time for filing answer or other plea shall be within thirty (30) days after the date of service of summons or after the final determination of any motion required to be made prior to the filing of an answer. (1868-9, c. 93, s. 4; Code, ss. 279, 287; Rev., ss. 711, 712; C. S., s. 753; 1927, c. 66, s. 5; 1929, c. 50; 1929, c. 237, s. 3; 1939, c. 49, s. 2; 1939, c. 143; 1951, c. 783.)

Editor's Note. — The first 1939 amendment changed all of this section as amended except the first sentence. The second 1939 amendment added the proviso at the end of this section, and the 1951 amendment rewrote the proviso. For comment on the 1939 amendments, see 17 N. C. Law Rev. 345.

Condemnation Proceedings. — A special proceeding for the purpose of condemning land for railroad purposes must be begun by the issuance of a summons. *Carolina R. R. v. Pennearden Lumber Co.*, 132 N. C. 644, 44 S. E. 358 (1903).

No Sessions of Court in Proceedings before Clerk. — There are no terms or sessions of court for proceedings pending before the clerk, each case having its own return day; and a demurrer to a petition or written motion made and entitled in the original cause in proceedings for partition before the clerk to set aside a judgment therein, on the ground that it fails to state the term at which it was rendered, is bad. *Hartsfield v. Bryan*, 177 N. C. 166, 98 S. E. 379 (1919).

Duty of Clerk to Issue Execution. — It is the duty of the clerk of the court, upon the application of the plaintiff, to issue, in proper cases, the execution against the person of the defendant. *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43 (1887).

§ 1-395. Return of summons.—The officer to whom the summons is addressed shall note on it the day of its delivery to him, and, if required by the plaintiff, shall execute it immediately. When executed, he shall immediately return the summons with the date and manner of its execution, by mail or otherwise, to the clerk of the court issuing it. (C. C. P., s. 75; Code, s. 280; Rev., s. 713; C. S., s. 754.)

Cross Reference. — See §§ 1-88 et seq. and notes thereto.

The failure of the clerk to note the summons the day it was received is irregular but does not render the summons void. *Strayhorn v. Blalock*, 92 N. C. 292 (1885).

Before Whom Returnable. — The summons in special proceedings is returnable before the clerk. *Tate v. Powe*, 64 N. C. 644 (1870).

"Service" Prima Facie Sufficient.—When the sheriff returns that he has "served" the summons, this is prima facie sufficient and implies that he has served it as the statute directs, until the contrary is made to appear

Some form of action or special proceeding is essential to the rendition of a judgment and in this State it must always be commenced by summons or attachment. *Morris v. House*, 125 N. C. 550, 34 S. E. 712 (1899).

Where Service Made Returnable to Court in Term. — Where a summons in a special proceeding was improperly made returnable to the superior court in term, it was proper for the judge to remand the proceeding, with directions that the summons be amended so as to make it returnable before the clerk on a day certain. *Simmons v. Norfolk, etc., Steamboat Co.*, 113 N. C. 147, 18 S. E. 117 (1893).

Less than Ten Days' Notice Given.—A judgment under a service of less than ten days, although irregular, is valid until reversed or vacated by a direct action, and cannot be collaterally attacked. *Nall v. McConnell*, 211 N. C. 258, 190 S. E. 210 (1937). When the time between service and return day of the summons is less than the time allowed by statute, the clerk is not bound to dismiss the action, but should allow further time to the defendant for an appearance. *Stafford v. Gallops*, 123 N. C. 19, 31 S. E. 265 (1898).

Cited in *Green v. Chrismon*, 223 N. C. 723, 28 S. E. (2d) 215 (1943).

in some proper way. *Strayhorn v. Blalock*, 92 N. C. 292 (1885).

Fees.—Under the practice of the Code of Civil Procedure a sheriff is not required to execute process until his fees are paid or tendered by the person at whose instance the service is to be rendered; but this does not excuse him for a failure to make a return of the process. A writ of summons is a mandate of the court, and must be obeyed by its officer, and if he has any valid excuse for not executing the writ, he must state it in his return. *Jones v. Gupton*, 65 N. C. 48 (1871); *Johnson v. Kenneday*, 70 N. C. 436 (1874).

§ 1-396. When complaint filed.—The complaint or petition of the plaintiff must be filed in the clerk's office at or before the time of the issuance of the summons, unless time for filing said complaint or petition is extended as provided by § 1-398. (C. C. P., s. 76; 1876-7, c. 241, s. 4; Code, s. 281; Rev., s. 714; C. S., s. 755; 1943, c. 543.)

Editor's Note.—Prior to the 1943 amendment the plaintiff was required to file his complaint or petition at the time of issuing the summons or within ten days thereafter.

§ 1-397: Repealed by Session Laws 1943, c. 543.

§ 1-398. Filing time enlarged.—The time for filing the complaint, petition, or any pleading may be enlarged by the court for good cause shown by affidavit, but may not be enlarged by more than ten additional days, nor more than once, unless the default was occasioned by accident over which the party applying had no control, or by the fraud of the opposing party. (C. C. P., s. 79; Code, s. 283; Rev., s. 716; C. S., s. 757.)

Power of Clerk after Remand. — Where an application was filed to remove an administrator, and no answer having been filed, the clerk refused the motion, and on appeal the judge reversed the order and remanded the case, the clerk has power to allow an answer to be filed. *Patterson v. Wadsworth*, 94 N. C. 538 (1886).

§ 1-399. Defenses pleaded; transferred to civil issue docket; amendments.—In special proceedings a defendant or other party thereto may plead any equitable or other defense, or ask any equitable or other relief in the pleadings which it would be competent to ask in a civil action; and when such pleas are filed the clerk shall transfer the cause to the civil issue docket for trial during term upon all issues raised by the pleadings. The trial judge may, with a view to substantial justice between the parties, allow amendments to the pleadings and interpleas in behalf of any person claiming an interest in the property. (1903, c. 566; Rev., s. 717; C. S., s. 758.)

Clerk Must Transfer Case Where Equitable Defense Pleaded. — "When a party shall plead any equitable or other defense, or ask for any equitable or other relief in the pleadings, it is required that the clerk shall transfer the cause to the civil issue docket, for trial during term, upon all issues raised by the pleadings, and the judge may allow amendments to the pleadings for the purpose of a hearing of the case upon its merits." *Little v. Duncan*, 149 N. C. 84, 62 S. E. 770 (1908). See also, *Ex parte Wilson*, 222 N. C. 99, 22 S. E. (2d) 262 (1942) (con. op.).

In *Smith v. Johnson*, 209 N. C. 729, 184 S. E. 486 (1936), it was held that defendant could plead the equitable relief of mutual mistake and when this plea was filed the clerk properly transferred the cause to the civil issue docket.

Questions of Fact Decided by Clerk. — Questions of fact are first determined by the clerk and on appeal they are subject to review by the judge. *Vanderbilt v. Roberts*, 162 N. C. 273, 78 S. E. 156 (1913).

Clerk May Not Grant Affirmative Equitable Relief.—The clerk, in special proceedings, has no power to make any order granting affirmative equitable relief. Equitable defenses may be set up in the an-

swer in such proceedings by way of avoidance, and when such equitable defenses exist they should be so pleaded; but when pleaded they amount to no more than defenses, and cannot be affirmatively administered. *Vance v. Vance*, 118 N. C. 864, 24 S. E. 768 (1896).

Right to Jury Trial. — In special proceedings, pending before clerks, the parties have the right to insist that any issue of fact raised by the pleadings shall be framed by the clerk and transmitted to the superior court in term for trial by jury. *Southern R. Co. v. Porter*, 105 N. C. 246, 11 S. E. 328 (1890).

Same — Alimony without Divorce. — When in special proceedings for alimony without divorce the pleadings raise the issues of the validity of the marriage, or whether the husband has abandoned the wife, or whether the husband is a drunkard or spendthrift, the right of trial by jury arises and the case should be transferred by the judge to the civil issue docket for the purpose. *Crews v. Crews*, 175 N. C. 168, 95 S. E. 149 (1918).

Same—Waiver.—Where they fail, before an order appointing commissioners is made, to insist upon a verdict upon the controverted facts, they waive the right of

trial by jury. *Southern R. Co. v. Porter*, 105 N. C. 246, 11 S. E. 328 (1890).

Boundary Disputes.—For full treatment of partitioning of land and settlement of boundary disputes, see §§ 38-1 et seq. and the notes thereto.

Where in a special proceeding under chapter 38 of General Statutes, to establish a boundary line, the defendant, by his answer, denies the petitioner's title and pleads the twenty years' adverse possession under § 1-40, as a defense, the proceeding is assimilated to an action to quiet title (§ 41-10) and the clerk, as directed by this section, should "transfer the cause to the civil issue docket for trial during term upon all issues raised by pleadings," in accordance with rules of practice applicable to such actions originally instituted in that court. *Simmons v. Lee*, 230 N. C. 216, 53 S. E. (2d) 79 (1949).

Ejectment.—When tenancy in common is denied and there is a plea of sole seizin, non tenant insimul, the proceeding in legal effect is converted into an action in ejectment and should be transferred, by virtue of this section, to the civil issue docket for trial at term on issue of title, the burden being upon the petitioners to prove their title as in ejectment. *Gibbs v. Higgins*, 215 N. C. 201, 1 S. E. (2d) 554 (1939).

Partition.—While the clerk has original

jurisdiction of special proceedings for the partition of land held by tenants in common, this jurisdiction is divested or suspended by a plea of non tenant insimul or of sole seizin. He is required to forthwith transfer the cause to the civil issue docket for trial as in case of other civil actions. *Bailey v. Hayman*, 222 N. C. 58, 22 S. E. (2d) 6 (1942).

Amendments on Appeal.—In cases of appeal from the probate court (now the clerk of the superior court) to the superior court the judge has the same right to allow amendments as if the case had been constituted in his court. *Sudderth v. McCombs*, 67 N. C. 353 (1872).

Evidence Considered upon Appeal.—If there be issues of law or material questions of fact decided by the clerk, they may be reviewed by the judge at term or in chambers, on appeal properly taken; and in passing upon these questions of fact, the court may act on the evidence already received, or if this is not satisfactory, it may ordinarily require the production of other evidence as an aid in the proper disposition of the question presented. *Mills v. McDaniel*, 161 N. C. 112, 76 S. E. 551 (1912).

Applied in *Jernigan v. Jernigan*, 226 N. C. 204, 37 S. E. (2d) 493 (1946).

Cited in *Jackson v. Jernigan*, 216 N. C. 401, 5 S. E. (2d) 143 (1939).

§ 1-400. **Ex parte; commenced by petition.**—If all the parties in interest join in the proceeding and ask the same relief, the commencement of the proceedings shall be by petition, setting forth the facts entitling the petitioners to relief, and the nature of the relief demanded. (1868-9, c. 93; Code, s. 284; Rev., s. 718; C. S., s. 759.)

Judgment Creditors May Become Parties.—Where the executor has filed a proper petition for the sale of realty to pay debts, the judgment creditors interested in the surplus, if not made parties, and desiring to contest one of the debts set out in the partition for fraud, may make them-

selves parties and proceed therein accordingly, the procedure being ex parte on the part of the executor and an independent action by them will not lie for fraud until after final judgment in the proceedings. *Wadford v. Davis*, 192 N. C. 484, 135 S. E. 353 (1926).

§ 1-401. **Clerk acts summarily; authority from nonresident.**—In cases under § 1-400, if all persons to be affected by the decree, or their attorney, have signed the petition and are of full age, the clerk of the superior court has power to hear and decide the petition summarily. If any of the petitioners reside out of the State, an authority from them, to the attorney, in writing, must be filed with the clerk before he may make any order or decree to prejudice their rights. (1868-9, c. 93, s. 2; Code, s. 285; Rev., s. 719; C. S., s. 760.)

All Parties Interested Must Be Joined.—When in special proceeding, under which certain timber interests were sold by a commissioner, it does appear upon the face of the record that certain persons of age were not made parties, or that they have not appeared as such in person or by at-

torney, and they have in no way waived their rights, they are not bound by a judgment rendered therein, and as to them the entire proceeding is void upon its face. *Moore v. Rowland Lumber Co.*, 150 N. C. 261, 63 S. E. 953 (1909).

§ 1-402. Judge approves when petitioner is infant.—If any petitioner is an infant, or the guardian of an infant, acting for him, no final order or judgment of the clerk, affecting the merits of the case and capable of being prejudicial to the infant, is valid, unless submitted to and approved by the judge resident or holding court in the district. (C. C. P., s. 420; 1868-9, c. 93, s. 3; Code, s. 286; 1887, c. 61; Rev., s. 720; C. S., s. 761.)

Infants Represented by Guardian.—In an ex parte proceeding to sell land for assets infant heirs are represented by a guardian or next friend, and the order must be approved by the judge. *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877 (1898).

Same—Where Represented by Administrator.—While it is irregular for the administrator in such case to represent a minor heir as guardian, yet, where there is no suggestion of any unfair advantage having been taken in the sale, confirmation or elsewhere in the proceeding, such irregularity will not vitiate the title of purchaser. *Harris v. Brown*, 123 N. C. 419, 31 S. E. 877 (1898).

Who May Approve.—An emergency judge has the same jurisdiction for making approvals under this section as has the reg-

ular judge of the superior court. See discussion in 1 N. C. Law Rev. 284.

One who joins as infant in a petition is bound by the judgment, though it is not approved by the judge of the court. *Lindsay v. Beaman*, 128 N. C. 189, 38 S. E. 811 (1901).

Court Presumed to Have Protected Interests of Infants.—Where the lands of infants are sold under an order of the superior court upon an ex parte petition, in which the infants are represented by next friends, it is presumed that the court protected their interests, and was careful to see that they suffered no prejudice. *Tyson v. Belcher*, 102 N. C. 112, 9 S. E. 634 (1889).

Cited in *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451 (1927).

§ 1-403. Orders signed by judge.—Every order or judgment in a special proceeding required to be made by a judge of the superior court, in or out of term, must be authenticated by his signature. (1868-9, c. 93, s. 5; 1872-3, c. 100; Code, s. 288; Rev., s. 722; C. S., s. 762.)

Section, While Directory, Should Always Be Observed.—“We have a plain provision in our statute law requiring every judgment granted by a judge to be signed by him. And this court has held that this statute, apparently mandatory, should always be observed; still it is held to be only directory, and a judgment passed in open court and filed with the papers as a part of the judgment

roll is a valid judgment, though not signed by the judge.” *Rollins v. Henry*, 78 N. C. 342 (1878); *Matthews v. Joyce*, 85 N. C. 258 (1881); *Keener v. Goodson*, 89 N. C. 273 (1883); *Spencer v. Credle*, 102 N. C. 68, 8 S. E. 901 (1889); *Bond v. Wool*, 113 N. C. 20, 18 S. E. 77 (1893); *Range Co. v. Carver*, 118 N. C. 328, 24 S. E. 352 (1896).

§ 1-404. Reports of commissioners and jurors.—Every order or judgment in a special proceeding imposing a duty on commissioners or jurors must prescribe the time within which the duty must be performed, except in cases where the time is prescribed by statute. The commissioners or jurors shall within twenty days after the performance of the duty file their report with the clerk of the superior court, and if no exception is filed to it within ten days, the court may proceed to confirm the same on motion of any party and without special notice to the other parties. (1893, c. 209; Rev., s. 723; C. S., s. 763; 1945, c. 778.)

Editor's Note.—The 1945 amendment substituted “ten” for “twenty” in the second sentence.

Confirmation Discretionary with the Court.—The confirmation by the court, if no exception is filed to the report within the twenty (now ten) days after it is filed with the clerk, lies within the discretion of the court. But in partition proceedings it is obligatory for the court to confirm the same. *Ex parte Garrett*, 174 N. C. 343, 93

S. E. 838 (1917).

Proceedings to Sell Land Appealable.—A proceeding to sell lands to make assets to pay the debts of the deceased, under this section, is appealable from the clerk of the superior court, and open to revision and such further orders or decrees on the part of the judge as justice and the rights of the parties may require, and is to be heard and decided by him on the same or such additional evidence as may aid him to a correct

conclusion of the matter. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772 (1920).

Same—Jurisdiction of Judge.—The fact that the commissioner appointed to sell lands to make assets to pay the debts of a deceased person has sold them several times under resales ordered by the clerk of the superior court, and that the clerk has granted the purchaser's motion to confirm the sale after the lapse of more than twenty days from the last sale, without an advanced bid until after the expiration of that time, does not affect the jurisdiction of

the judge on appeal to examine into the matter and order resale upon being satisfied that justice and the rights of the parties require it. *Perry v. Perry*, 179 N. C. 445, 102 S. E. 772 (1920).

Power of Clerk.—The clerk has no power to confirm a sale reported by a commissioner until the expiration of twenty (now ten) days from the date on which the report was filed. *Vance v. Vance*, 203 N. C. 667, 166 S. E. 901 (1932).

Applied in *Buncombe County v. Arbogast*, 205 N. C. 745, 172 S. E. 364 (1934).

§ 1-405. **No report set aside for trivial defect.**—No report or return made by any commissioners may be set aside and sent back to them or others for a new report because of any defect or omission not affecting the substantial rights of the parties, but the defect or omission may be amended by the court, or by the commissioners with permission of the court. (1868-9, c. 93, s. 7; Code, s. 289; Rev., s. 724; C. S., s. 764.)

Report Conclusive until Set Aside.—The report of commissioners appointed to condemn lands and assess damages for the purpose of drainage is, like the verdict of a jury, conclusive of the facts therein ascertained, until set aside. *Norfolk Southern R. Co. v. Ely*, 101 N. C. 8, 7 S. E. 476 (1888).

Substantial Rights Affected.—The omission in a report of commissioners to make partition of lands to state affirmatively that the allotments in their opinion were equal in value, affects the substantial rights of

the parties, and the clerk or judge may set it aside with directions, either that the commissioners shall make a reallocation, or that others shall be appointed to do so. *Skinner v. Carter*, 108 N. C. 106, 12 S. E. 908 (1891).

Description of Land Unnecessary.—A report of the commissioners is not invalid because it does not contain a description. Nor is it mandatory that such report be under seal. *Hanes v. R. R.*, 109 N. C. 490, 13 S. E. 896 (1891).

§ 1-406. **Commissioner of sale to account in sixty days.**—In all actions or special proceedings when a person is appointed commissioner to sell real or personal property, he shall, within sixty days after the maturity of the note or bond for the balance of the purchase money of said property, or the payment of the amount of the bid when the sale is for cash, file with the clerk of the superior court a final account of his receipts and disbursements on account of the sale; and the clerk must audit the account and record it in the book in which the final settlements of executors and administrators are recorded. If any commissioner appointed in any action or special proceeding before the clerk fails, refuses or omits to file a final account as prescribed in this section, or renders an insufficient or unsatisfactory account, the clerk of the superior court shall forthwith order such commissioner to render a full and true account, as required by law, within twenty days after service of the order. Upon return of the order, duly served, if such commissioner shall fail to appear or refuse to exhibit such account, the clerk of the superior court may issue an attachment against said commissioner for a contempt and commit him till he exhibits such account, or files a bond for the amount held or unaccounted for as is prescribed by law for administrators, the premium for which is to be deducted from the commissioner's fee, earned by said commissioner in said action or special proceeding. (1901, c. 614, ss. 1, 2; Rev., s. 725; C. S., s. 765; 1933, c. 98.)

Editor's Note.—The last two sentences of this section, giving the clerk power to force a final settlement, were added by the

1933 amendment.

Applied in *Peal v. Martin*, 207 N. C. 106, 176 S. E. 282 (1934).

§ 1-407. **Commissioners selling land for reinvestment, etc., to give bond.**—Whenever in any cause or special proceeding there is a sale of real

estate for the purpose of a reinvestment of the money arising from such sale or for any other purpose, and the proceeds from such sale are held by a commissioner or other officer designated by the court to receive such money, for purposes of reinvestment or otherwise, the commissioner or officer so receiving same shall execute a good and sufficient bond, to be approved by the court, in an amount at least equal to the corpus of the fund, and payable to the State of North Carolina for the protection of the fund and the parties interested therein, and conditioned that such custodian of the money shall faithfully comply with all the orders of the court made or to be thereafter made concerning the handling of reinvestment of said funds and for the faithful and final accounting of the same to the parties interested; but the court in its discretion may waive the requirement of such bond in those cases where the court requires the funds or proceeds from such sale to be paid by the purchaser or purchasers direct to the court. The premium for any such bond shall be paid from the corpus of the fund intended to be thereby protected. (1919, c. 259; C. S., s. 766; 1935, c. 45.)

Local Modification.—Duplin: 1935, c. 45.

Editor's Note.—Prior to the amendment of 1935 the clause at the end of the first sentence provided that the court could dispense with the bond where it was not contemplated that the money would be ultimately reinvested under the direction of the court.

Bond.—Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner

appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc.; but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Midyette v. Lycoming Timber & Lumber Co.*, 185 N. C. 423, 117 S. E. 836 (1923). See also, *Pools v. Thompson*, 183 N. C. 588, 112 S. E. 323 (1922).

§ 1-408. Action in which clerk may allow fees of commissioners; fees taxed as costs.—In all civil actions and special proceedings instituted in the superior court in which a commissioner, or commissioners, are appointed under a judgment by the clerk of said court, said clerk shall have full power and authority and he is hereby authorized and empowered to fix and determine and allow to such commissioner or commissioners a reasonable fee for their services performed under such order, decree or judgment, which fee shall be taxed as a part of the costs in such action or proceeding, and any dissatisfied party shall have the right of appeal to the judge, who shall hear the same de novo. (1923, c. 66, s. 1; C. S., s. 766(a).)

SUBCHAPTER XIII. PROVISIONAL REMEDIES.

ARTICLE 34.

Arrest and Bail.

§ 1-409. Arrest only as herein prescribed.—No person may be arrested in a civil action except as prescribed by this article, but this provision shall not apply to proceedings for contempt. (C. C. P., s. 148; Code, s. 290; Rev., s. 726; C. S., s. 767.)

Cross References.—As to execution against the person, see § 1-311. As to persons taken in arrest and bail proceeding being entitled to insolvent debtor's oath, see § 23-29. As to arrest in criminal actions, see §§ 15-39 through 15-47.

Constitutional Provision.—Article I, § 16 of the State Constitution provides that "There shall be no imprisonment for debt in this State except for fraud." This pro-

vision has no application to actions of tort but is confined to actions arising ex contractu. *Long v. McLean*, 88 N. C. 3 (1883).

The words "except in cases of fraud" are very broad, and they comprehend not only fraud in attempting to delay and defeat the collection of a debt by concealing property or other fraudulent devices, but embraces also fraud in making the con-

tract, false representations, for instance, and fraud in increasing the liabilities, as when an administrator, by applying the funds of the estate to his own use, paying his own debts, and the like. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888), quoting *Melvin v. Melvin*, 72 N. C. 384 (1875).

Now, in order to avoid a violation of this section of the Constitution and at the same time protect honest creditors against dishonest debtors, it devolved upon the legislature, in cases of fraud, to enact such laws as were necessary, in its discretion, for arrest and imprisonment in proper cases, and to provide for all necessary proceedings in relation thereto. This is done in this and the following sections. *Preiss v. Cohen*, 117 N. C. 54, 23 S. E. 162 (1895).

Section 23-13 Applies.—Parties arrested and in custody, in pursuance of the provisions contained in this and the following sections, if the order of arrest is not vacated “on motion,” must seek their discharge in the mode prescribed in § 23-13. *Wingo v. Watson*, 98 N. C. 482, 4 S. E. 463 (1887); *Preiss v. Cohen*, 117 N. C. 54, 23 S. E. 162 (1895).

§ 1-410. In what cases arrest allowed.—The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages on a cause of action not arising out of contract where the action is for wilful, wanton, or malicious injury to person or character or for wilfully, wantonly or maliciously injuring, taking, detaining, or converting real or personal property.

Cross Reference.—See note under § 1-311.

Editor’s Note.—The 1943 amendment omitted the words “where the defendant is not a resident of the State, or is about to remove therefrom, or” formerly appearing after the word “contract” in subdivision 1. It also added the requirement of the subdivision that the injury, etc., be wilful, wanton or malicious.

In General.—The following cases were decided before the 1943 amendment, and should be evaluated with that fact in mind.

In *Hoover v. Palmer*, 80 N. C. 313 (1879), the court said: It is fair to conclude that the legislature in providing for arrest and bail in an action for injury to person used those words—injury to person—according to their established legal significance in the classification of rights and injuries thereto as taught in the elementary writers, and, thus considered, the language employed in legal effect authorized, as we think, an arrest for all those injuries (seduction included) which may be suffered in respect of any rights of person, absolute or relative. This, we hold, was in-

Application to Partnership.—Where a partnership has terminated and all debts have been paid and the partnership affairs otherwise adjusted, or where the partnership was for a single venture or special purpose which has been closed, and nothing remains but to pay over the amount due, in either case an action will lie in favor of one partner against the other, and if the facts bring the claim within the provisions of this article on arrest and bail, the plaintiff is entitled to this ancillary remedy. *Ledford v. Emerson*, 140 N. C. 288, 52 S. E. 641 (1905).

Where Judgment of Nonsuit Reversed.—Where there has been a motion for an order of arrest and bail under this section, and a judgment of nonsuit is reversed, the motion may be renewed. *Hensley v. Helvenston*, 189 N. C. 636, 127 S. E. 625 (1925).

For definition of arrest see *Journey v. Sharpe*, 49 N. C. 165 (1856); *State v. Buxton*, 102 N. C. 129, 8 S. E. 774 (1889); *Hadley v. Tinnin*, 170 N. C. 84, 86 S. E. 1017 (1915).

Cited in *Ledford v. Smith*, 212 N. C. 447, 193 S. E. 722 (1937).

tended to be and is the proper construction of the section.

Mere Negligence Insufficient.—A judgment that execution issue against the person of the defendant cannot be sustained upon the mere finding that the defendant negligently injured the plaintiff’s property; in order to justify such execution under this section and § 1-311, the injury must have been intentionally or maliciously inflicted, i. e., with some element of violence, fraud or criminality. *Oakley v. Lasater*, 172 N. C. 96, 89 S. E. 1063 (1916).

Malpractice.—In an action to recover for malpractice of defendant, execution against the person of defendant may not issue in the absence of allegation and evidence of actual malice. *Olinger v. Camp*, 215 N. C. 340, 1 S. E. (2d) 870 (1939).

Wrongful Conversion.—Where a cotenant wrongfully converted a race horse, by selling it while in his possession, he was liable to arrest under this section. *Doyle v. Bush*, 171 N. C. 10, 86 S. E. 165 (1915).

Libel.—An arrest in an action for libel is not within the provisions of the Constitution (Art. I, § 16) prohibiting imprison-

ment for debt. *Moore v. Green*, 73 N. C. 394 (1875).

Slander of Title.—Although it was not necessary in the case to decide the precise point, the court stated in *Sneeden v. Harris*, 109 N. C. 349, 13 S. E. 920 (1891), that it was questionable whether an action for slander of title was embraced by this article on arrest and bail.

Seduction.—The seduction of a daughter, being an infringement of the father's relative rights of persons, is an injury to his person within the meaning of this section, and a sufficient ground for the arrest of the defendant in an action for such tort. *Hoover v. Palmer*, 80 N. C. 313 (1879). It involves also fraud and deceit *ex vi termini*. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892). See also the next subsection as to seduction.

This section was mentioned as applying to injury to character in *Michael v. Leach*,

166 N. C. 223, 81 S. E. 760 (1914). As applying to injury to person in *Howie v. Spittle*, 156 N. C. 180, 72 S. E. 207 (1911).

Complaint May Allege Facts Necessary to Support Provisional Remedy.—In an action for assault and battery in which the provisional remedy of arrest and bail is invoked, it is appropriate for plaintiff to allege in the complaint the facts necessary to support the provisional remedy of arrest and bail, notwithstanding that such facts were also set out in the affidavit filed as a basis for the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

Thus a motion to strike allegations that the injury was willful, wanton or malicious is properly denied, since plaintiff is entitled to allege facts necessary to support the provisional remedy. *Long v. Love*, 230 N. C. 535, 53 S. E. (2d) 661 (1949).

2. In an action for a fine or penalty, for seduction, for money received, for property embezzled or fraudulently misapplied by a public officer, attorney, solicitor, or officer or agent of a corporation or banking association in the course of his employment, or by any factor, agent, broker or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Editor's Note.—Originally, this subdivision contained the words "in an action on a promise to marry." In *Moore v. Mullen*, 77 N. C. 327 (1877), the court held this provision to be in conflict with Art. I, § 16 of the Constitution. Soon thereafter this provision was stricken out of the section by the legislature and the word "seduction" substituted. This seems to be a legislative construction that where a woman should sue for the seduction, instead of a mere breach of promise, an arrest would lie. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892).

In General.—This section is plain and very comprehensive in its terms and purpose. It intends, certainly, to embrace all cases where the relation of trust and confidence, in respect to money received by, or personal property in the possession of one party for the benefit of another, is raised and exists between such parties by reason of their mutual contract, express or implied. The purpose is to give the more efficient remedy where the cause of action involves a breach of trust on the part of the defendant sustaining a fiduciary relation to the plaintiff. *Chemical Co. v. Johnson*, 98 N. C. 123, 3 S. E. 723 (1887); *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888); *Travers v. Deaton*, 107 N. C. 500, 12 S. E. 373 (1890); *Boykin, etc., Co. v. Maddrey & Son*, 114 N. C. 89, 19 S. E.

106 (1894).

The section gives to a plaintiff, whose money or property has been put beyond his reach by his agent or trustee by an act in violation of his duty, the remedy of arrest and bail, that he may the better compel his unfaithful agent or trustee to make amends for his unfaithfulness, and it "turns a deaf ear" to one who would excuse himself by asserting that he did not mean to do wrong when consciously doing that which was a breach of the trust reposed in him, or by alleging that he honestly believed that he would be able to replace the misapplied funds, so that no loss would eventually come to the plaintiff. *Boykin, etc., Co. v. Maddrey & Son*, 114 N. C. 89, 19 S. E. 106 (1894).

Applications of the Section.—Where a firm of merchants gave to manufacturers of fertilizers its note for a consignment of goods, agreeing to hold such goods or the proceeds of the sale thereof, or the notes of farmers given therefor, in trust for the manufacturers, a fiduciary relation was established and a violation of the contract was a breach of trust for which, upon proper affidavits and the required undertaking, an order of arrest could be obtained. *Boykin, etc., Co. v. Maddrey & Son*, 114 N. C. 89, 19 S. E. 106 (1894).

One who fraudulently conveys property held by him as trustee can be legally ar-

rested under this section. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 24 S. E. 664 (1896).

An action for seduction may be brought under this section by the woman seduced, and an order for the arrest of the defendant may be granted in such action. *Hood v. Sudderth*, 111 N. C. 215, 16 S. E. 397 (1892). As to parent bringing action, see *Kinney v. Laughenour*, 97 N. C. 325, 2 S. E. 43 (1887).

A defendant, in an action for money received or property fraudulently misapplied by him as agent, may be arrested under the provisions of this section. *Gossler v. Wood*, 120 N. C. 69, 27 S. E. 33 (1897).

This section applies to arrest for alienating the affections of a wife. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

Fraud Committed in Another State. — The fact that the fraud for which the defendant was arrested was committed in another state is no ground for immunity from arrest, under this section, authoriz-

ing arrests for frauds in fiduciary transactions. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888).

When Partner Liable.—Where members of a firm assume a fiduciary relation as to property committed to them, and a misappropriation is made by one partner with the knowledge, connivance, or assent of the other, the intent of the latter to commit a breach of trust is conclusively presumed, from such knowledge and acts, for all the purposes of arrest and bail. *Boykin, etc., Co. v. Maddrey & Son*, 114 N. C. 89, 19 S. E. 106 (1894).

Insolvent May Be Arrested.—An insolvent defendant may be arrested in a civil action for money received and fraudulently misapplied. *Carroll v. Montgomery*, 128 N. C. 278, 38 S. E. 874 (1901).

Nonresident Liable. — A nonresident of this State may be arrested and held to bail for fraud under this section. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888).

3. In an action to recover the possession of personal property, unjustly detained, where all or any part of the property has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff and with the intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought, in concealing or disposing of the property for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

No Arrest unless Action Pending. — Where plaintiff brought an action against defendant, setting out two causes of action, one on a note and the other for embezzlement, and judgment was rendered on the note by default but no judgment was entered upon the other cause and it was removed from the docket, no order of arrest was permissible under this section since there is no action pending wherein the allegations of fraud in the complaint, used as an affidavit, could authorize a warrant of arrest. *Stewart v. Bryan*, 121 N. C. 46, 28 S. E. 18 (1897).

Contract Action Not Affected.—Where, in an action on contract, the plaintiff alleges fraud and deceit on the part of the defendant and sues out the ancillary process of arrest and bail, this does not change the nature of the contract action. *Copeland v. Fowler*, 151 N. C. 353, 66 S. E. 215

(1909.)

Fraud Necessary for Arrest under Section. — A defendant cannot be arrested under this section, unless he has been guilty of fraud in contracting the debt for which the action is brought. *McNeely v. Haynes*, 76 N. C. 122 (1877).

Section Applies to Subsequent Fraud.—A person may be arrested and held to bail for a fraud committed after the contracting of the debt—e. g.—by concealing property, or other devices for the purpose of defeating his creditor. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888).

Partner Must Have Knowledge.—One partner can not be arrested for the fraud of his copartner of which he had no knowledge, and in which he in nowise connived. *McNeely v. Haynes*, 76 N. C. 122 (1877); *Boykin, etc., Co. v. Maddrey & Son*, 114 N. C. 89, 19 S. E. 106 (1894).

5. When the defendant has removed, or disposed of his property, or is about to do so, with intent to defraud his creditors.

No woman shall be arrested in any action except for a willful injury to person, character or property, and no person shall be arrested on Sunday. (1777, c.

118, s. 6, P. R.; R. C., c. 31, s. 54; C. C. P., s. 149; 1869-70, c. 79; Code, s. 291; 1891, c. 541; Rev., s. 727; C. S., s. 768; 1943, c. 543.)

In General.—The words "removed, or disposed of" used in this section are of different and broader meaning than the words in subsection 2, *supra*, and are broad enough to comprehend real estate. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 24 S. E. 664 (1896).

That there can be no arrest on Sunday, see *White v. Morris*, 107 N. C. 93, 12 S. E. 80 (1890).

Fraudulent Conveyance. — One who fraudulently conveys his real estate with

intent to defeat his creditors can be legally arrested under this section. *Durham Fertilizer Co. v. Little*, 118 N. C. 808, 24 S. E. 664 (1896).

Arrest for "Willful Injury."—For the arrest of a woman under the provisions of this section, for "willful injury," etc., an actual intent is not necessary if the defendant's negligence is so gross as to manifest a reckless indifference to the rights of others. *Weathers v. Baldwin*, 183 N. C. 276, 111 S. E. 183 (1922).

§ 1-411. Order and affidavit.—An order for the arrest of the defendant must be obtained from the court in which the action is brought or a judge thereof, and may be made where it appears to the court or judge, by affidavit of the plaintiff or of any other person, that a sufficient cause of action exists and that the case is one of those provided for in this article. (C. C. P., ss. 150, 151; Code, ss. 292, 293; Rev., ss. 728, 729; C. S., s. 769.)

The Order.—The order of arrest must proceed from the court in which the action is brought or from a judge thereof. *Houston v. Walsh*, 79 N. C. 36 (1878).

Same—Jurisdiction.—An order of arrest under this section is a judicial and not a ministerial proceeding, in the issuance of which the judge and the clerk have concurrent jurisdiction. *Bryan v. Stewart*, 123 N. C. 93, 31 S. E. 286 (1898).

Same—Voidable Only.—An order of arrest granted by a court having jurisdiction is not void. It may be erroneous if issued upon an insufficient affidavit. *Tucker v. Davis*, 77 N. C. 330 (1877).

Grounds May Be Stated in Complaint.—The grounds for the arrest may be, and most usually are, set forth in an affidavit by the plaintiff, or any other person, that a sufficient cause of action exists, and that the case is one of those mentioned in § 1-410. *Roulhac v. Brown*, 87 N. C. 1 (1882). The cause of arrest may be stated in the complaint but the statement must be as explicit as if set forth in an affidavit and properly verified. *Peebles v. Foote*, 83 N. C. 102 (1880).

Positive Statement of Facts Desirable.—The affidavit should state the facts positively, when this can be done. *Peebles v. Foote*, 83 N. C. 102 (1880); *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801 (1888).

Grounds of Belief Should Be Stated.—If the affidavit states certain things which the party believes are about to be done, then the grounds of belief must be stated in order that the court may judge of the reasonableness thereof. *Peebles v. Foote*, 83 N. C. 102 (1880) and cases cited.

Examples — Sufficient Statement. — In an action for arrest and bail, the affidavit

of the plaintiff alleged the existence of a cause of action and the fraud committed by defendants in contracting the debt, and that upon information and belief they had fraudulently removed and disposed of their property; Held, sufficient to justify the order of arrest. *Paige v. Price*, 78 N. C. 10 (1878).

Where the affidavit upon which an order of arrest and attachment was obtained was as follows: "That the said P. has disposed of and secreted his property with intent to defraud his creditors," it was held to be sufficient. *Hughes v. Person*, 63 N. C. 548 (1869).

Same—Insufficient Statement.—An affidavit for arrest of an administrator who has been charged with assets to a certain amount is not sufficient if it does not show fraud in the misapplication of the funds by an administrator. *Melvin v. Melvin*, 72 N. C. 384 (1875).

General Rumor. — Mere general rumor that a person indebted has removed to another state is not sufficient to justify his creditor in suing out a warrant for his arrest. There should be such evidence as would induce a reasonable man to believe that the facts existed upon which he based his application. *Tucker v. Wilkins*, 105 N. C. 272, 11 S. E. 575 (1890).

Court Must Be Convinced. — It is not sufficient that the cause of action may exist—this must not be left to conjecture or bare probability—the court must be satisfied from the evidence before it that a cause does exist. *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801 (1888).

Allowing Second Affidavit.—The refusal to allow a second affidavit to be filed is an exercise of discretion, which can not be re-

viewed upon appeal; the plaintiff might have filed a second sufficient affidavit immediately, and obtained a second warrant of arrest. *Wilson v. Barnhill*, 64 N. C. 121 (1870).

§ 1-412. Undertaking before order.—Before making the order the court or judge shall require a written undertaking on the part of the plaintiff of at least one hundred dollars, with sufficient surety, payable to the defendant, to the effect that if the defendant recovers judgment the plaintiff will pay all damages which he sustains by reason of the arrest, not exceeding the sum specified in the undertaking. (C. C. P., s. 152; 1868-9, c. 277, s. 7; Code, s. 294; Rev., s. 730; C. S., s. 770.)

Cross Reference.—As to giving the bond of a surety company as surety, see § 109-17.

Applies to Suits in Forma Pauperis.—A plaintiff who is allowed to sue, in forma pauperis, has no right to an order of arrest, without first filing the undertaking required by this section. *Rowark v. Homesley*, 68 N. C. 91 (1873).

Judge Can Increase Bond.—The trial court has power to increase or diminish the

Question of Law.—The question of the sufficiency of the affidavit is one of law, addressed to the court alone. *Wood v. Harrell*, 74 N. C. 338 (1876).

bond, and an order increasing the bond can not be questioned unless abuse of discretion is shown. *Fayetteville Light, etc., Co. v. Lessem Co.*, 174 N. C. 358, 93 S. E. 836 (1917).

Amount of Bond Not Subject to Review.—The discretion of the court in fixing the amount of the bond is not subject to review. *Fayetteville Light, etc., Co. v. Lessem Co.*, 174 N. C. 358, 93 S. E. 836 (1917).

§ 1-413. Issuance and form of order.—The order may be made to accompany the summons, or to issue at any time afterwards, before judgment. It shall require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a place and time therein mentioned to the clerk of the court in which the action is brought. Notice of the return must be served on the plaintiff or his attorney as prescribed by law for the service of other notices. (C. C. P., s. 153; Code, s. 295; Rev., s. 731; C. S., s. 771.)

Cross Reference.—As to execution against the person of a debtor after judgment, see § 1-311.

The words "before judgment," as used in this section mean "final judgment" upon the matters put in issue by the pleadings, and hence the judgment rendered for the debt simply, in an action in which there are allegations of fraud, does not interfere with the rights of the parties in the matters in dispute on the question of fraud, if properly prosecuted. *Houston v. Walsh*, 79 N. C. 35 (1878); *Preiss v. Cohen*, 117 N. C. 54, 23 S. E. 162 (1895).

Process Can Be Served on Prisoner in Jail.—The sheriff can serve process anywhere in his county—the jail possesses no "privilege of sanctuary" and service of process upon a prisoner there is valid. *White v. Underwood*, 125 N. C. 25, 34 S. E. 104 (1899).

Written Warrant Necessary.—For the benefit of the citizen, that he may at all times be able to call upon the officers to produce his authority, and to see precisely what it was, the law established the necessity of a written warrant. *Lutterloh v. Powell*, 2 N. C. 395 (1796).

Defendant under Criminal Process.—

A defendant, who has been brought into court on criminal process, and discharged from arrest under the same on bail, is not privileged from being arrested on civil process immediately afterwards, during the sitting of the court and before he leaves the court room. *Moore v. Green*, 73 N. C. 394 (1875).

The exemption of witnesses and jurors from civil arrest accorded by §§ 8-64 and 9-18, and of nonresident parties and witnesses voluntarily attending court here, on grounds of public policy does not apply to parties arrested in criminal proceeding. *White v. Underwood*, 125 N. C. 25, 34 S. E. 104 (1899).

Suitor Attending Court.—The principle of the common law, that a suitor, while going to, remaining at, and returning home from court, is exempted from arrest, is in force in this State. *Hammerskold v. Rose*, 52 N. C. 629 (1860).

Nonresident Attending as Witness.—A citizen of another state, while voluntarily attending court as a witness, is privileged from arrest in a civil case. *Ballinger v. Elliott*, 72 N. C. 596 (1875).

Cited in Powers v. Davenport, 101 N. C. 286, 7 S. E. 747 (1888).

§ 1-414. Copies of affidavit and order to defendant.—The affidavit and order of arrest shall be delivered to the sheriff, who, upon arresting the defendant, shall deliver him a copy thereof. (C. C. P., s. 154; Code, s. 296; Rev., s. 732; C. S., s. 772.)

§ 1-415. Execution of order.—The sheriff shall execute the order by arresting the defendant and keeping him in custody until discharged by law. The sheriff may call the power of the county to his aid in the execution of the arrest. (C. C. P., s. 155; Code, s. 297; Rev., s. 733; C. S., s. 773.)

§ 1-416. Vacation of order for failure to serve.—The order of arrest is of no avail, and shall be vacated or set aside on motion, unless it is served upon the defendant, as provided by law, before the docketing of any judgment in the action. (C. C. P., s. 153; Code, s. 295; Rev., s. 734; C. S., s. 774.)

An order of arrest issued after final judgment in an action is illegal and void. *Houston v. Walsh*, 79 N. C. 35 (1878).

§ 1-417. Motion to vacate order; jury trial.—A defendant arrested may at any time before judgment apply on motion to vacate the order of arrest or to reduce the amount of bail. He may deny upon oath the facts alleged in the affidavit of the plaintiff on which the order of arrest was granted, and demand that the issue so raised by the plaintiff's affidavit and the defendant's denial be submitted to the jury and tried in the same manner as other issues. If the issues are found by the jury in favor of the defendant, judgment shall be rendered discharging him from arrest and vacating the order of arrest, and he shall recover of the plaintiff all costs of the proceeding in such arrest incurred by him in defending the action. (C. C. P., s. 174; Code, s. 316; 1889, c. 497; Rev., s. 735; C. S., s. 775.)

In General.—This section and §§ 1-419 and 23-29 et seq., prescribing the methods by which a prisoner may be discharged in certain instances before final judgment, should be construed together; and, when so construed, the remedies given in § 23-29 et seq. are in addition to those given in §§ 1-417 and 1-419. *Edwards v. Sorrell*, 150 N. C. 712, 64 S. E. 898 (1909).

Motion Must Be Made before Judgment.—A motion to vacate the order of arrest can only be made before judgment. And where such a motion has been once refused, and no appeal taken, the matter is res adjudicata and a similar motion will not be entertained. *Roulhac v. Brown*, 87 N. C. 1 (1882).

Motion Heard Anywhere in District.—A motion to vacate an order of arrest may be heard by a judge out of court anywhere within the district that his duties require him to be during the time in which he is assigned to the district. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893). See also *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897).

Clerk Can Hear Motion.—It would be perfectly regular to move to vacate before the clerk and appeal from his ruling to the judge, as was done in *Roulhac v. Brown*, 87 N. C. 1 (1882). But the clerk might be

dilatory in acting, and the party has his election to proceed more summarily by applying in the first instance to the judge. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

New Matter Not to Be Considered.—The validity of an order of arrest and warrant of attachment is determined upon facts alleged in the original affidavit, and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. *Devries & Co. v. Summit*, 86 N. C. 126 (1882).

Where Jury Trial Demanded.—If the defendant demanded the jury trial permitted by this section the judge would have been compelled to remand the motion to vacate to the county where the action was pending, that the issues so arising might be tried at the first term of court. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

Lower Court's Finding of Fact Conclusive.—In arrest and bail proceedings, where a motion was made by the defendant to vacate the order of arrest and the court found that the facts were sufficient to sustain the order, the findings of fact by the court below are final, and will not be reviewed unless it be objected properly that there was no evidence to support them. *Harriss v. Sneed*, 101 N. C. 273, 7 S. E.

801 (1888); *Travers v. Deaton*, 107 N. C. 500, 12 S. E. 373 (1890); *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

A party under arrest in a civil action, moving to vacate the order upon affidavits submitted to the court, is not entitled to a trial by jury upon the questions of fact raised. *Wingo v. Watson*, 98 N. C. 482, 4 S. E. 463 (1887).

Irregular or False Order Will Be Vacated.—An order of arrest will be vacated by a judge without any undertaking by the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. *Bear v. Cohen*, 65 N. C. 511 (1871).

Supplemental Affidavit Sufficient.—Where an order of arrest was made upon an invalid affidavit, and a counter affidavit was filed by the defendant, and a supplemental one by the plaintiff which was duly verified, it was held, that the judge below erred in vacating the order. *Benedict, etc., Co. v. Hall*, 76 N. C. 113 (1877).

Rendition of judgment prior to hearing is not reversible error. *Allison v. Mad-*

drey, 114 N. C. 421, 19 S. E. 646 (1894).

Prior Acquittal in Another State.—It is no ground for vacating an order of arrest that the defendant had been indicted, tried and acquitted by the courts of another state upon the same charge. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888).

Appeal.—An order vacating an order of arrest “affects a substantial right claimed” and hence an appeal from such order lies. *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894).

But where, in the hearing of a motion to vacate an order of arrest, the judge finds as a fact that the act upon which it was based was not committed, the finding is final and can not be reviewed. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

An appeal from the judgment of a justice of the peace discharging one who has been arrested in a civil action vacates the judgment, and the order of arrest continues in force pending the appeal. *Patton v. Gash*, 99 N. C. 280, 6 S. E. 193 (1888).

§ 1-418. Counter affidavits by plaintiff.—If the motion is made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits, or other proof, in addition to those on which the order of arrest was made. (C. C. P., s. 175; Code, s. 317; Rev., s. 736; C. S., s. 776.)

Simple Denial Insufficient.—If the order was properly granted it ought not to be vacated upon the simple denial of the alleged cause of action; but where the answer or counter affidavits meet the allegations of the plaintiff fully and in detail, and furnish convincing evidence of their truth, the order should be vacated. *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801 (1888).

Facts Must Be Fully Controverted.—When one who has been arrested moves to vacate the order of arrest upon counter affidavits, purporting to meet the facts alleged against him, he should do so fully

and clearly, otherwise the order of arrest will be continued. *Powers v. Davenport*, 101 N. C. 286, 7 S. E. 747 (1888).

Additional Evidence.—Where the defendant moves to vacate the order upon the ground that it was irregularly or improvidently granted, the plaintiff will not be allowed to offer additional evidence in support of his application; but if the defendant moves to vacate upon counter proofs the plaintiff may produce further evidence. *Harriss v. Sneed*, 101 N. C. 273, 7 S. E. 801 (1888).

§ 1-419. How defendant discharged.—The defendant, at any time before execution, shall be discharged from the arrest, either upon giving bail or upon depositing the amount mentioned in the order of arrest, as provided in this article. (C. C. P., s. 156; Code, s. 298; Rev., s. 737; C. S., s. 777.)

Rights of Nonresidents.—Where nonresidents are arrested under the provisions of this article they are entitled to the benefit of §§ 23-29 through 23-42, relating to

insolvent debtors, in securing their discharge. *Burgwyn v. Hall*, 108 N. C. 489, 13 S. E. 222 (1891).

§ 1-420. Defendant's undertaking.—The defendant may give bail by causing a written undertaking, payable to the plaintiff, to be executed by sufficient surety to the effect that the defendant shall at all times render himself amenable to the process of the court, during the pendency of the action, and to such as may be issued to enforce the judgment therein, or if he is arrested in an action to recover the possession of personal property unjustly claimed, an

undertaking to the same effect as that provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (C. C. P., s. 157; Code, s. 299; Rev., s. 738; C. S., s. 778.)

The word "amenable" as used in this section means "answerable" or "responsive" to the process of the court having jurisdiction; and when execution is issued against the person of the debtor it is his duty to surrender himself, or of the obligors on the bond to do so, and a failure constitutes a breach of the obligation. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

Voluntary Appearance. — The condition of the undertaking that the defendant shall, at all times during the pendency of the action, render himself amenable to the process of the court is met when the defendant voluntarily appears in court upon the hearing of the motion against his surety. *Stepp v. Robinson*, 203 N. C. 803, 167 S. E. 147 (1933).

§ 1-421. Defendant's undertaking delivered to clerk; exception.—Within the time limited for that purpose, the sheriff shall deliver the order of arrest to the clerk of the court in which the suit is brought, with his return endorsed, and a certified copy of the undertaking of the bail, and notify the plaintiff or his attorney thereof. The plaintiff, within ten days thereafter, may serve upon the sheriff a notice that he does not accept the bail, or he is deemed to have accepted it and the sheriff is exonerated from the liability. (C. C. P., s. 162; Code, s. 304; Rev., s. 739; C. S., s. 779.)

§ 1-422. Notice of justification; new bail.—On the receipt of notice of exception to the bail, the sheriff or defendant may, within ten days thereafter, give to the plaintiff or his attorney notice of the justification of the same or other bondsmen (specifying the places of residence and occupation of the latter) before the court, justice of the peace, or judge, at a specified time and place; the time to be not less than five nor more than ten days thereafter. In case other bondsmen are given, there must be a new bond, in the form hereinbefore prescribed. (C. C. P., s. 163; Code, s. 305; Rev., s. 741; C. S., s. 780.)

§ 1-423. Qualifications of bail.—The qualifications of bail must be as follows:

1. Each of them must be a resident and freeholder within the State.
2. They must each be worth the amount specified in the order of arrest, exclusive of property exempt from execution; but the judge, on justification, may allow more than two bail to justify severally in amounts less than that expressed in the order, if the whole justification is equivalent to that of two sufficient bail. (C. C. P., s. 164; Code, s. 306; Rev., s. 740; C. S., s. 781.)

Definition.—Bail are those persons who become sureties for the appearance of a defendant in court. *Bouvier's Law Dict.*, Vol. 2, p. 209.

bond should show on its face that the surety is a resident and freeholder within the State, or his justification should establish these facts. *Howell v. Jones*, 113 N. C. 429, 18 S. E. 672 (1893).

Bond Should Show Facts. — A bail

§ 1-424. Justification of bail.—For the purpose of justification, each of the bail shall attend before the court or judge, or a justice of the peace, at the time and place mentioned in the notice, and may be examined on oath, on the part of the plaintiff, touching his sufficiency, in such manner as the court, judge or justice of the peace, in his discretion, may think proper. The examination must be reduced to writing and subscribed by the bail, if required by the plaintiff. (C. C. P., s. 165; Code, s. 307; Rev., s. 742; C. S., s. 782.)

§ 1-425. Allowance of bail.—If the court, judge or justice of the peace finds the bail sufficient, he shall annex the examination to the undertaking, endorse his allowance thereon, and cause them to be filed with the clerk. The

sheriff is then exonerated from liability. (C. C. P., s. 166; Code, s. 308; Rev., s. 743; C. S., s. 783.)

Purpose of Bail.—The main object of a bail bond taken to release the prisoner from custody in arrest and bail is to secure his presence to answer the process of the court and, for this purpose, to keep him within its jurisdiction, and not merely to obtain money upon his default. *Picklesimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

§ 1-426. **Deposit in lieu of bail.**—The defendant may, at the time of his arrest, instead of giving bail, deposit with the sheriff the amount mentioned in the order. The sheriff shall then give a certificate of the deposit to the defendant, who shall be discharged from custody. (C. C. P., s. 167; Code, s. 309; Rev., s. 744; C. S., s. 784.)

§ 1-427. **Deposit paid into court; liability on sheriff's bond.**—Within four days after the deposit the sheriff must pay it into court, and take from the officer receiving it two certificates of such payment, one of which he must deliver to the plaintiff, and the other to the defendant. For any default in making such payment, the same proceedings may be had on the official bond of the sheriff, to collect the sum deposited, as in other cases of delinquency. (C. C. P., s. 168; Code, s. 310; Rev., s. 745; C. S., s. 785.)

Cross Reference.—As to payment by sheriff of money collected on execution, see § 162-18.

§ 1-428. **Bail substituted for deposit.**—If money is deposited, as provided in §§ 1-426 and 1-427, bail may be given and justified upon notice according to law at any time before judgment. Thereupon the judge, court or justice of the peace shall direct, in the order of allowance, that the money deposited be refunded by the sheriff or other officer to the defendant, and it shall be refunded accordingly. (C. C. P., s. 169; Code, s. 311; Rev., s. 746; C. S., s. 786.)

§ 1-429. **Deposit applied to plaintiff's judgment.**—When money has been deposited, and remains on deposit at the time of an order or judgment for the payment of money to the plaintiff, the clerk or other officer shall, under the direction of the court, apply the same in satisfaction thereof, and after satisfying the judgment shall refund any surplus to the defendant. If the judgment is in favor of the defendant the clerk or other officer shall refund to him the whole sum deposited and remaining unapplied. (C. C. P., s. 170; Code, s. 312; Rev., s. 747; C. S., s. 787.)

§ 1-430. **Defendant in jail, sheriff may take bail.**—If a person for want of bail is lawfully committed to jail, at any time before final judgment, the sheriff, or other officer having him in custody, may take bail and discharge him; and the bail bond shall be regarded in every respect as other bail bonds, and shall be returned and sued on in like manner; and the officer taking it shall make special return thereof, with the bond, at the first court which is held after it is taken. (R. C., c. 11, s. 8; Code, s. 318; Rev., s. 748; C. S., s. 788.)

§ 1-431. **When sheriff liable as bail.**—If, after arrest, the defendant escapes, or is rescued, or bail is not given or justified, or a deposit is not made instead thereof, the sheriff is himself liable as bail. But he may discharge himself from such liability by the giving and justification of bail at any time before process against the person of the defendant to enforce an order or judgment in the action. (C. C. P., s. 171; Code, s. 313; Rev., s. 749; C. S., s. 789.)

In General.—A sheriff who accepts an insufficient undertaking in arrest and bail proceedings, or who, after exceptions filed thereto by the plaintiff, fails to give notice of the time when and the place where the bail will justify, is liable as special bail to the plaintiff, and he will not be exonerated from liability by the fact that he acted in good faith in taking the insufficient bond, or by the fact that the plaintiff was nearby

and knew what was going on when an alleged justification was being made by the surety. *Howell v. Jones*, 113 N. C. 429, 18 S. E. 672 (1893).

In *State v. Brittain*, 25 N. C. 17 (1842), it is said that after once taking the bail the sheriff, on finding the bail to be insufficient, has no right to rearrest the defendant, and that the defendant in such a case is justified in resisting the arrest. *State v. Queen*, 66 N. C. 615 (1872).

Escape of Prisoner. — A sheriff having permitted one arrested by him upon mesne process in a civil action to go into an adjoining room, from which he escaped, subjected himself to the liability as bail. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 15 S. E. 882 (1892).

§ 1-432. **Action on sheriff's bond.**—If a judgment is recovered against the sheriff, upon his liability as bail, and an execution thereon is returned wholly or partly unsatisfied, the same proceedings may be had on the official bond of the sheriff, to collect the deficiency, as in other cases of delinquency. (C. C. P., s. 172; Code, s. 314; Rev., s. 750; C. S., s. 790.)

§ 1-433. **Bail exonerated.** — At any time before final judgment against them, the bail may be exonerated, either by the death of the defendant or his imprisonment in a State prison, or by his legal discharge from the obligation to render himself amenable to the process, or by his surrender to the sheriff of the county where he was arrested, in execution of the judgment. (C. C. P., s. 161; Code, s. 303; Rev., s. 751; C. S., s. 791.)

Meaning of "State Prison". — The term "State prison," as used in this section, applies to either the penitentiary or the county jail. *Sedberry v. Carver*, 77 N. C. 319 (1877).

When Imprisonment Does Not Exonerate.—Where the imprisonment of a defendant under this section, expired before judgment was obtained, either against the principal in the original action or against the bail upon his undertaking: Held, that such imprisonment does not exonerate the bail. *Adrian v. Scanlin*, 77 N. C. 317 (1877); *Sedberry v. Carver*, 77 N. C. 319 (1877).

Imprisonment on Other Charges.—Upon the failure of defendant to appear when his case was called, judgment nisi was entered and sci. fa. and capias issued. Upon the hearing of the sci. fa., the surety showed that at the time of the call of the case defendant was incarcerated in another county of this State on other charges, that upon the subsequent trial in such other county defendant was sentenced to imprisonment, and that the surety had secured capias and filed same with the officials of the State's prison so that defendant would be surrendered to the court to stand trial upon the expiration of his sentence. Held; Notwithstanding that this section relates only to

Same — Defendants Insolvency Immaterial.—When the sheriff is sued as bail he cannot give in evidence, in mitigation of damages, the defendant's insolvency. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 15 S. E. 882 (1892).

Notice and Exceptions Unnecessary.—If the sheriff fails to take bail, the plaintiff need not file exceptions nor give notice to fix him as bail. *Adams v. Jones*, 60 N. C. 198 (1864).

Defective Bond Does Not Satisfy Section.—A paper, though intended as a bail bond, which is so defective and imperfect as to be adjudged not to be such, cannot be regarded as the taking of bail. *Adams v. Jones*, 60 N. C. 198 (1864).

bonds executed in arrest and bail proceedings, the bail will be exonerated during defendant's detention, since only the State and not the surety can produce the body of defendant, and judgment absolute against the surety should be stricken out and hearing on the sci. fa. continued until the surety has had opportunity to produce defendant after his release from prison. *State v. Eller*, 218 N. C. 365, 11 S. E. (2d) 295 (1940).

Exoneration by Surrender of Principal. — The obligors on the bond may, at any time before final judgment against them, be released by the defendant's voluntary surrender of his person, or his production by the obligors in accordance with the terms of the bond, etc., whereupon the liability of the latter ceases. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

When Absolute Judgment Error. — Where a defendant and the sureties on his appearance bond appear in answer to a scire facias and show that defendant's failure to appear at a prior term of court in accordance with the terms of the bond was due to the fact that defendant had been turned over to a federal court by a prior bondsman and that defendant was then serving a sentence imposed by that court,

it is error for the court to enter absolute judgment on the bond, the cases against defendant as well as the hearing on the scire facias being subject to continuance. *State v. Welborn*, 205 N. C. 601, 172 S. E. 174 (1934).

§ 1-434. Surrender of defendant.—At any time before final judgment against them, the bail may surrender the defendant in their exoneration, or he may surrender himself to the sheriff of the county where he was arrested, in the following manner:

1. A certified copy of the undertaking of the bail shall be delivered to the sheriff, who shall detain the defendant in his custody thereon, as upon an order of arrest, and acknowledge the surrender by a certificate in writing.

2. Upon the production of a copy of the undertaking and sheriff's certificate, the court or judge may, upon a notice to the plaintiff of ten days, with a copy of the certificate, order that the bail be exonerated, and on filing the order and papers used on said application they shall be exonerated accordingly. But this section does not apply to an arrest in an action to recover the possession of personal property unjustly detained, so as to discharge the bail from an undertaking given to the effect provided by law to be given by defendant for the retention of property, under the article entitled Claim and Delivery. (C. C. P., s. 158; Code, s. 300; Rev., s. 752; C. S., s. 792.)

Cross References. — As to surrender of defendant when he appears upon motion against the surety, see § 1-436 and note. As to claim and delivery, see §§ 1-472 to 1-484.

Where Prisoner Again Arrested. — Where in arrest and bail the prisoner under bail bond has been again arrested to await a warrant in extradition proceedings, and imprisoned in the jail of the county by the same sheriff, semble, upon the re-

fusal of the sheriff to receive the prisoner from the obligors on the bail bond, that the trial judge upon hearing the obligors' motion should order the prisoner retained in custody pending the action of the Governor, who, upon notification, may consider the rights of our own courts as being prior to those of other jurisdiction, and hold the prisoner to answer in our courts. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

§ 1-435. Bail may arrest defendant.—For the purpose of surrendering the defendant, the bail, at any time or place, before they are finally charged, may themselves arrest him, or by a written authority endorsed on a certified copy of the undertaking may empower any person over twenty-one years of age to do so. (C. C. P., s. 159; Code, s. 301; Rev., s. 753; C. S., s. 793.)

In General.—Where a prisoner in arrest and bail is released from custody of the law upon bail, the principal is regarded as delivered to the custody of his sureties under the original process, who may thereafter seize and deliver him in discharge of their liability, or imprison him temporarily when necessary until this can be done, exercis-

ing this right in person or by agent in this or another state, upon the Sabbath or otherwise, and, if necessary, break and enter his house for that purpose. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

Stated in *Hightower v. Thompson*, 231 N. C. 491, 57 S. E. (2d) 763 (1950).

§ 1-436. Proceedings against bail by motion.—In case of failure to comply with the undertaking the bail may be proceeded against by motion in the cause on ten days' notice to them. (C. C. P., s. 160; Code, s. 302; Rev., s. 754; C. S., s. 794.)

Motion Must Be Brought within Three Years. — Proceedings against bail, in civil actions, are barred, unless commenced within three years after judgment against the principal, notwithstanding the principal may have left the State in the meantime. *Albemarle Steam, etc., Co. v. Williams*, 111 N. C. 35, 15 S. E. 877 (1892). See § 1-52, par. 7.

Principal's Insolvency No Defense.—In-

solveny of the principal is no defense to an action against the bail. *Winborne & Bro. v. Mitchell*, 111 N. C. 13, 15 S. E. 882 (1892).

When Action against Bail Lies.—Where the debtor is released upon bail, the creditor may proceed to judgment, and issue execution against the debtor's property, and afterwards against his person, if returned "nulla bona"; and should the latter

writ be returned “non est inventus,” the plaintiff may move on ten days’ notice for judgment against the bail, making available to the latter all defenses he may have as to the surrender of his principal; and a judgment rendered against him at an intermediate stage of the proceedings is reversible error. *Pickelsimer v. Glazener*, 173 N. C. 630, 92 S. E. 700 (1917).

Where the defendant, appeared in open

court, in response to notice served upon his surety or bail, he was then “amenable to the process of the court,” notwithstanding his refusal thus to surrender himself, and the court should have ordered execution against the person of the defendant, rather than hold the surety or bail, for failure to surrender him. *Stepp v. Robinson*, 203 N. C. 803, 167 S. E. 147 (1933).

§ 1-437. **Liability of bail to sheriff.**—The bail taken upon the arrest are, unless they justify, or other bail are given or justified, liable to the sheriff by action for damages which he may sustain by reason of such omission. (C. C. P., s. 173; Code, s. 315; Rev., s. 755; C. S., s. 795.)

§ 1-438. **When bail to pay costs.**—When a notice issues against a person, as the bail of another, and the bail, at or before the term of the court at which he is bound to appear, or ought to plead, is not discharged from his liability by the death or surrender of his principal or otherwise, he is liable for all costs which accrue on said notice, notwithstanding he may be afterwards discharged, by the death or surrender of the principal, or otherwise. (R. C., c. 11, s. 10; Code, s. 319; Rev., s. 756; C. S., s. 796.)

Certain Costs Not Allowed.—The costs incurred on account of an improper and ineffectual appeal. *Clark v. Latham*, 53 N. C. 1 (1860).

§ 1-439. **Bail not discharged by amendment.**—No amendment of process or pleading discharges the bail of the party arrested thereon, unless it enlarges the sum demanded beyond the sum expressed in the bail bond. (R. C., c. 11, s. 11; Code, s. 320; Rev., s. 757; C. S., s. 797.)

ARTICLE 35.

Attachment.

Part 1. General Provisions.

§ 1-440: Superseded by Session Laws 1947, c. 693, codified as §§ 1-440.1 et seq.

§ 1-440.1. **Nature of attachment.**—(a) Attachment is a proceeding ancillary to a pending principal action, is in the nature of a preliminary execution against property, and is intended to bring property of a defendant within the legal custody of the court in order that it may subsequently be applied to the satisfaction of any judgment for money which may be rendered against the defendant in the principal action.

(b) No personal judgment, even for costs, may be rendered against a defendant unless

(1) Personal service within the State is had on

a. The defendant, or

b. A process agent authorized by him, or

c. A process agent authorized expressly or impliedly by law, or unless

(2) The defendant makes a general appearance.

(c) Although there is no personal service on the defendant, or on an agent for him, and although he does not make a general appearance, judgment may be rendered in an action in which property of the defendant has been attached which judgment shall provide for the application of the attached property, by the method set out in § 1-440.46, to the satisfaction of the plaintiff’s claim as established in the principal action. If plaintiff’s claim is not thereby satisfied in

full, subsequent actions for the unsatisfied balance are not barred. (1947, c. 693, s. 1.)

Editor's Note. — The 1947 amendment rewrote this article, which formerly consisted of §§ 1-440 through 1-471 appearing in the original volume, to read as set forth herein. Therefore the named sections have been superseded. For a brief account of the 1947 act, see 25 N. C. Law Rev. 386.

Most of the cases in the following note were decided under the superseded sections, or under earlier statutes.

Definitions and Object.—An order of attachment is an execution by anticipation. It empowers the officer to seize and hold the estate of the alleged debtor for the satisfaction of a claim or demand to be established in the future and for which a judgment may never be obtained. See *Green v. Van Buskirk*, 7 Wall. (74 U. S.) 139, 19 L. Ed. 109 (1868).

Attachment is a mesne process, merely an incident to a suit. *Ex parte Railway Co.*, 103 U. S. 794, 26 L. Ed. 461 (1880).

The object of the writ is to enable the plaintiff to obtain a lien upon the property which may be subsequently enforced by a sale upon execution, if judgment be obtained. *Roller v. Holly*, 176 U. S. 398, 20 S. Ct. 410, 44 L. Ed. 520 (1900).

Origin of Writ.—Attachment, other than the common-law writ which issued out of the common pleas upon the non-appearance of the defendant at the return of the original writ, had its origin in the civil law, and afterwards was adopted in England in the form of a custom of the London merchants, and out of this, as modified and extended by statute, has grown the modern law in respect to this remedy. It was resorted to in order to compel the attendance of the debtor as well as to afford a security to the creditor. *Grocery Co. v. Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906). See *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

Nature and Function.—An attachment is not the foundation of an independent action, but is an ancillary and auxiliary remedy collateral to the action. *Marsh v. Williams*, 63 N. C. 371 (1869); *Toms v. Warson*, 66 N. C. 417 (1872). Its function is to seize the property of a defendant and hold it within the grasp of the law until the trial can be had and the rights of the parties determined, or it may be released pending the action if seized without proper cause. In no sense is it a process to bring the defendant into court. It may be issued to accompany the summons, or at any time thereafter. *Ditmore v. Goins*, 128 N. C.

325, 39 S. E. 61 (1901). See *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

Conflict between State and Federal Jurisdiction.—In case of conflict of authority under a state and federal process, in order to avoid unseemly collision between them, the question as to which authority should for the time prevail does not depend upon the rights of the respective parties to the property seized, whether the one is paramount to the other, but upon the question as to which jurisdiction has first attached by the seizure and custody of the property under its process. *Covell v. Heyman*, 111 U. S. 176, 4 S. Ct. 355, 28 L. Ed. 390 (1884).

And this rule applies notwithstanding the fact that the property has been brought into custody by illegal means. *Gumbel v. Pitkin*, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374 (1888).

There is a marked distinction between the ordinary writ and an attachment. In this latter the plaintiff is allowed to get a judgment against the defendant without personal service of process, which is contrary to the course of the common law, and as a protection to the absent defendant, the statute requires all the material facts to be set out in an affidavit, which is made the ground work in this proceeding. *Webb v. Bowler*, 50 N. C. 362 (1858).

Attachment is the creature of local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. *Harris v. Balk*, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905).

Statutes Strictly Construed. — In 2 *Lewis's Sutherland on Statutory Construction* (2 Ed.), § 566, p. 1049, it is stated: "A party seeking the benefit of such a statute must bring himself strictly, not within the spirit, but within the letter; he can take nothing by intendment. . . . The remedy by attachment is special and extraordinary, and the statutory provisions for it must be strictly construed, and cannot have force in cases not plainly within their terms." And the decisions of this State are in full approval of this position. *State Bank v. Hinton*, 12 N. C. 397 (1828); *Skinner v. Moore*, 19 N. C. 138 (1836); *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996 (1912).

In *State Bank v. Hinton*, 12 N. C. 397 (1828), it was said by the court, in speaking of the attachment law, that "there is no law in the statute book which more im-

periously demands a strict construction; for the property of an absentee may be sold upon an attachment wrongfully sued out before he is appraised of the proceeding, and, if he then should discover that no bond and affidavit were taken and returned, his remedy must at best be very imperfect." *Leak v. Moorman*, 61 N. C. 168 (1867).

The provisions of the Code, authorizing the attachment of the property of a non-resident defendant upon constructive service of a summons by publication, have many of the features of the foreign attachment. Such proceeding is an extraordinary and summary remedy, and is in derogation of the common law and statute law of the United States, and cannot be recognized in a case commenced in a federal court. Even in a state court the plaintiff must strictly and technically perform all the conditions required by the statute entitling him to such remedy. Jurisdiction in such cases cannot be acquired or enlarged by implication and liberal construction. *Lackett v. Rumbaugh*, 45 F. 23 (1891).

Substantial Compliance.—Where, in a proceeding of attachment, it appears from

the whole record that the provisions of the statute have been substantially complied with, the action will not be dismissed nor the attachment dissolved. *Grant v. Burgwyn*, 79 N. C. 513 (1878); *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 38 S. E. 923 (1901); *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

The court will not be deprived of the jurisdiction which it has acquired by the levy of a writ of attachment by the fact that the affidavit may have been defective, or that the officer whose duty it is to issue the writ may have failed in some manner to observe all the requisite formalities. *Copper v. Reynolds*, 10 Wall. (77 U. S.) 308, 19 L. Ed. 931 (1870).

Proceeding Is Quasi in Rem.—Attachment of the property of nonresident defendants in this State is a proceeding quasi in rem, for the purpose of bringing him under the jurisdiction of the State court for the purpose of determining the controversy in the action brought against him, when properly constituted. *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718 (1927).

Applied in Whitaker v. Wade, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

§ 1-440.2. Actions in which attachment may be had.—Attachment may be had in any action the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, or in any action by a wife for alimony or for maintenance and support, but not in any other action. (1947, c. 693, s. 1.)

Editor's Note.—All of the cases in the following note were decided under superseded § 1-440, or under earlier statutes.

History of the Statute.—Under the Code of 1868, as originally enacted, attachment was allowed in actions on a contract for the recovery of money only, or in actions for wrongful conversion of personal property; and several decisions of the court, construing the first clause of the statute, held that an attachment was only permissible for breaches of contract involving the recovery of liquidated damages, or damages, which could be limited and defined by some standard or data contained in the contract itself. See *Price v. Cox*, 83 N. C. 261 (1880); *Wilson v. St. Louis Cook Mfg. Co.*, 88 N. C. 5 (1883). Shortly after these decisions were announced, the statute was amended so as to provide the remedy for breach of contract (express or implied), wrongful conversion of personal property, any other injury to personal property in consequence of negligence, fraud or other wrongful act. Code 1883, § 347. The legislature of 1893 (chapter 77) added "injuries to real property" to the section, and in 1901 there was another amendment adding,

"or any injury to the person, caused by negligence or other wrongful act." *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 65 S. E. 918 (1909).

In chapter 7 § 16 of the Rev. Code it was provided that an attachment would lie against the property of one who injured the person or property of another, and within three months thereafter absconded from the State. The attachment had to be issued within three months from the time of the injury. For cases under this old provision, see *Webb v. Bowler*, 50 N. C. 362 (1858); *Blankinship v. McMahon*, 63 N. C. 180 (1869).

Right Coextensive with Demand for Judgment in Personam.—The history of legislation as to attachments shows a legislative intent to broaden the right of this writ to make the same almost coextensive with any well-grounded demand for judgment in personam. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921). See *Tisdale v. Eubanks*, 180 N. C. 153, 104 S. E. 339 (1920).

Action for Unliquidated Damages.—Previous to 1893, in a number of cases arising under the section, it was held that the rem-

edy of attachment was confined to actions upon contracts in which the amount of damages could be specified in the affidavit, and that the remedy would not apply if the action be one for unliquidated damages. See *Price v. Cox*, 83 N. C. 261 (1880); *Wilson v. St. Louis Cook Mfg. Co.*, 88 N. C. 5 (1883); *Mullen v. Norfolk, etc., Canal Co.*, 114 N. C. 8, 19 S. E. 106 (1894). But since the 1893 amendment to the attachment statute the issuance of the writ has been upheld in actions for money, and for unliquidated damages in the cause specified, and for none other. *Winfrey v. Bagley*, 102 N. C. 515, 9 S. E. 198 (1889); *Long v. Home Ins. Co.*, 114 N. C. 465, 19 S. E. 347 (1894); *Judd v. Crawford Gold Min. Co.*, 120 N. C. 397, 27 S. E. 81 (1897); *Tisdale v. Eubanks*, 180 N. C. 153, 104 S. E. 339 (1920).

An attachment could be granted under superseded § 1-440 in an action for unliquidated damages before judgment. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Death by Wrongful Act. — The attachment statute (former §§ 1-440 through 1-471) is sufficiently comprehensive to include the action for "causing the death of another by wrongful act, neglect or default of another". *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

§ 1-440.3. Grounds for attachment.—In those actions in which attachment may be had under the provisions of § 1-440.2, an order of attachment may be issued when the defendant is

- (1) A nonresident, or
- (2) A foreign corporation, or
- (3) A domestic corporation, whose president, vice-president, secretary or treasurer cannot be found in the State after due diligence, or
- (4) A resident of the State who, with intent to defraud his creditors or to avoid service of summons,
 - a. Has departed, or is about to depart, from the State, or
 - b. Keeps himself concealed therein, or
- (5) A person or domestic corporation which, with intent to defraud his or its creditors,
 - a. Has removed, or is about to remove, property from this State, or
 - b. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, property. (1947, c. 693, s. 1.)

Editor's Note.—Most of the cases in the following note were decided under superseded § 1-441, of similar import to this section, or under earlier statutes.

Section Is Exclusive. — The ancillary writ of attachment may be issued only on one or more of the grounds specified by this section. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

Grounds Must Appear by Affidavit. — The grounds upon which an ancillary writ of attachment is issued must be made to

Slander. — The security of a person's good name and reputation is within his personal rights as a citizen, and slander thereof is an injury to his person, and would sustain a proceeding for an attachment within the intent and meaning of former § 1-440, as an "injury to the person by . . . wrongful act." *Tisdale v. Eubanks*, 180 N. C. 153, 104 S. E. 339 (1920).

An attachment in equity will lie against the principal, even though the remedy at law against his surety has not been exhausted. *Alexander v. Taylor*, 62 N. C. 36 (1866).

Injury to Plaintiff's Interest or Investment in Power Company. — An action is clearly one in which the writ of attachment is allowed where the wrong alleged is an injury by which the plaintiff's interest and investment in a power company has been wrongfully destroyed or very greatly impaired. *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 65 S. E. 918 (1909).

An action to cancel judgment of retraxit would not support the service of process by publication and attachment, since it was not one to recover a sum of money only nor damages for one or more of the causes of action enumerated in former § 1-440. *Stevens v. Cecil*, 216 N. C. 350, 4 S. E. (2d) 879 (1939).

appear by affidavit. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

Absence of Defendant.—It was not requisite under the former statute, and therefore need not be averred, that the defendant could not be found in the State in order to procure a warrant of attachment. *Luttrell v. Martin*, 112 N. C. 593, 17 S. E. 573 (1893).

When One Is a Nonresident. — Where one voluntarily removes from this to another state, for the purpose of discharging

the duties of an office of indefinite duration, which requires his continued presence there for an unlimited time, such a one is a nonresident of this State for the purpose of an attachment, and that notwithstanding he may occasionally visit this State, and that he may have the intent to return at some uncertain future time. *Wheeler v. Cobb*, 75 N. C. 21 (1876).

But the fact that a person leaves the State to seek work, for the purpose of prospecting with a view to change his residence if desirable, does not sustain an attachment on the ground that the defendant was a nonresident. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549 (1904).

Domicile is not determinative of the question whether one is a nonresident. Nor is the cause of the absence, such as severe illness, material if such absence prevents personal service of summons upon him during an indefinite period of time. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

One who has left the State for an indefinite time, his return depending upon a doubtful contingency, is a nonresident notwithstanding he may intend to return at some time in the future, and his motion made by special appearance to vacate the attachment on the ground of residence will

be denied. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

But if upon the levy of an attachment on his property such person promptly returns to the State, and thereby subjects himself to personal service of process, his motion to vacate the attachment on the ground that he is not a nonresident would seem generally to be well sustained. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

Fraudulent Intent Unnecessary. — In *Abrams v. Pender*, 44 N. C. 260 (1853), it was decided that, under the attachment statute as it then read, it was required that the removal of the defendant should have been fraudulent or with intent to evade the process before an attachment lay. But an attachment is now made a provisional remedy in the progress of a cause and can be sued out whenever the defendant is a nonresident regardless of intent. *Wheeler v. Cobb*, 75 N. C. 21 (1876).

Fraudulent Disposition of Property. — The statute authorizing a warrant of attachment where a fraudulent disposition of property is made as against creditors, relates to the intent with which it is disposed of and not to the manner in which the property is acquired. *Howland v. Marshall*, 127 N. C. 427, 37 S. E. 462 (1900).

§ 1-440.4. Property subject to attachment.—All of a defendant's property within this State which is subject to levy under execution, or which in supplemental proceedings in aid of execution is subject to the satisfaction of a judgment for money, is subject to attachment under the conditions prescribed by this article. (1947, c. 693, s. 1.)

Cross Reference. — As to exemption of earnings, see § 1-362.

Editor's Note.—Most of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 through 1-471, or under earlier statutes.

All property in this State, whether real or personal, tangible or intangible, owned by a nonresident defendant in an action to recover on any of the causes of action included within the provisions of the attachment statute, is liable to attachment. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 166 S. E. 79 (1949).

Meaning of "Property."—*Webb v. Bowler*, 50 N. C. 362 (1858) was an action where the validity of an attachment was in question, and it was held that the term "property" should be confined to tangible property, and that a false warranty or deceit in the sale of personal property was not an injury to the property of another, within the meaning of the statute. Since these decisions were rendered, however,

and probably in consequence of them, this restricted significance of the word "property," when used in statutes or the rule of interpretation on the question presented, has been altered by express enactment. See § 12-3. *Worth v. Knickerbocker Trust Co.*, 151 N. C. 191, 65 S. E. 918 (1909).

Only property which is subject to execution is attachable. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936), citing *Willis v. Anderson*, 188 N. C. 479, 124 S. E. 834 (1924).

Attachment may be levied on land as under execution, and whatever interest the debtor has subject to execution may be attached, but the debtor must have some beneficial interest in the land. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936), citing *Willis v. Anderson*, 188 N. C. 479, 124 S. E. 834 (1924).

Interest in Land under Spendthrift Trust Not Subject to Attachment.—Plaintiff attached property which had belonged to defendant's mother prior to her death. Thereafter the will was probated which de-

vised the property in trust for defendant under a spendthrift trust. It was held that defendant took nothing as heir at law of her mother, and her interest in the land under the spendthrift trust was not subject to attachment, and the fact that the attachment was attempted to be levied prior to the probate of the will created no lien on the land. *Chinnis v. Cobb*, 210 N. C. 104, 185 S. E. 638 (1936).

Possession of Goods.—As a general rule it matters not in whose possession the property is found, if the taking be otherwise rightful. *Livingston v. Smith*, 5 Pet. (30 U. S.) 90, 8 L. Ed. 57 (1831).

A defendant's property or choses in action in the hands of third persons may be attached. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Custody of the Law.—Property in custodia legis is not subject to levy under process which would have the effect of taking it out of his possession and control. *Gumbel v. Pitkin*, 124 U. S. 131, 8 S. Ct. 379, 31 L. Ed. 374 (1888).

Cash Deposited as Security in Lieu of Bond.—The right of a nonresident defendant in the cash voluntarily deposited by him as security in lieu of bond for his appearance to answer a criminal charge preferred against him is liable to garnishment; and the purposes for which the cash was deposited having been accomplished by defendant's appearing, and later giving a new recognizance for his appearance, the entire amount of the deposit is subject to the lien of the attachment. *White v. Ordille*, 229 N. C. 490, 50 S. E. (2d) 499 (1948).

Tax Books of Sheriff Not Liable.—Though a sheriff, who has settled for the taxes due on a tax list which have not been paid to him, may collect the same within the time allowed by law, yet the tax books, showing the debts thus due him, cannot be attached by a creditor to whom he is indebted. *Davie v. Blackburn*, 117 N. C. 383, 25 S. E. 321 (1895).

A distributive share in the hands of an administrator, due the wife of a nonresident debtor, can not be subjected to the

payment of the husband's debts in this State by means of an attachment in equity. *McLean v. McPhaul*, 59 N. C. 15 (1860).

Stock in Foreign and Domestic Corporations.—The intention of the legislature, as clearly expressed, in former § 1-441, was to authorize the attachment of stock in foreign corporations, and also in the case of individuals or domestic corporations which are removing their property from the State with the intent to defraud creditors, or doing any other act for which attachment would lie, and to authorize the attachment of stock in domestic corporations also. And former § 1-458 stated that "The rights or shares of the defendant in the stock of any association or corporation * * * are liable to be attached." *Parks-Cramer Co. v. Southern Exp. Co.*, 185 N. C. 428, 117 S. E. 505 (1923). As to attachment of stock in a foreign corporation, see 3 N. C. Law Rev. 103.

Property Absorbed by Nonresident Corporation.—Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company, the one continuing to do business here was subject to attachment under the provisions of former §§ 1-458, 1-459, 1-461 et seq., where the cause of action arose here; and, the fact that the certificates of stock were not physically in the jurisdiction of the courts of this State was immaterial. *Parks-Cramer Co. v. Southern Exp. Co.*, 185 N. C. 428, 117 S. E. 505 (1923).

Unpaid Balances Due to Corporation.—Under former § 1-458, the unpaid balances due a foreign corporation on subscriptions to its stock by subscribers residing in this State were property of such a corporation, and subject to attachment for the payment of its debts. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348 (1898).

§ 1-440.5. **By whom order issued; when and where; filing of bond and affidavit.**—(a) An order of attachment may be issued by

- (1) The clerk of the superior court in which the action has been, or is being, commenced, or by
- (2) The resident judge, the judge regularly holding the superior courts of the district, or any judge holding a term of superior court in the county in which the action has been, or is being, commenced.

(b) An order of attachment issued by a judge may be issued as follows:

- (1) The resident judge of the district, or the judge regularly holding the superior courts of the district, may issue the order in open court or in chambers, at term or in vacation, and within or without the district.

(2) Any other judge holding a term of superior court in the county may issue the order in open court.

(c) In those cases where the order of attachment is issued by the judge, such judge shall cause the bond required by § 1-440.10 and the affidavit required by § 1-440.11 to be filed promptly with the clerk of the superior court of the county in which the action is pending. (1947, c. 693, s. 1.)

Editor's Note. — All of the cases in the following note were decided under superseded § 1-443, of similar import to this section, or under earlier statutes.

The clerk only acts ministerially in issuing the process for attachment. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633 (1887).

Clerk May Grant When He Is Plaintiff. —A clerk of the superior court, upon making the necessary affidavit before some person authorized by law, may issue a warrant of attachment in an action in which he is plaintiff. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633 (1887).

Issuance of Blank Forms Not Permitted. —When an attachment form in blank, including a form for the affidavit, had been signed by the clerk and delivered to the attorney of the party seeking the attachment, upon condition that he properly fill out the

papers and give sufficient bond, the writ and the levy thereunder were both void, though subsequently approved by the clerk. *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996 (1912).

Clerk Can Grant Attachment Out of Term Time.—The clerk of the court, acting as and for the court, has authority out of term time to grant the warrant of attachment, and likewise to allow all proper amendments in that respect and connection. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889); *Howland v. Marshall*, 127 N. C. 427, 37 S. E. 462 (1900).

Appeal from Clerk's Decision. — From the decision of the clerk in granting a warrant of attachment an appeal lies to the judge. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889); *Howland v. Marshall*, 127 N. C. 427, 37 S. E. 462 (1900).

§ 1-440.6. Time of issuance with reference to summons or service by publication.—(a) The order of attachment may be issued

(1) In those cases where a summons is issued, at the time the summons is issued or at any time thereafter, or

(2) In those cases where service is by publication, at the time the order of publication is made or at any time thereafter.

(b) No order of attachment may be issued in any action after judgment in the principal action is had in the superior court. (1947, c. 693, s. 1.)

§ 1-440.7. Time within which service of summons or service by publication must be had.—(a) When an order of attachment is issued before the summons is served,

(1) If personal service within the State is to be had, such personal service must be had within thirty days after the issuance of the order of attachment;

(2) If such personal service within the State is not to be had,

a. Service of the summons outside the State, in the manner provided by § 1-104, must be had within thirty days after the issuance of the order of attachment, or

b. Service by publication must be commenced not later than the thirty-first day after the issuance of the order of attachment. If publication is commenced, such publication must be completed as provided by § 1-99, unless the defendant appears in the action or unless personal service is had on him within the State.

(b) Upon failure of compliance with the applicable provisions of subsection (a) of this section, either the clerk or the judge shall, upon the motion of the defendant or any other interested party, make an order dissolving the attachment, and the defendant shall have all the rights that would accrue to him under the pro-

visions of § 1-440.45, the same as if the principal action had been prosecuted to judgment and the defendant had prevailed therein. (1947, c. 693, s. 1.)

Cross Reference. — As to when service by publication can be resorted to, and for the meaning of “due diligence” in such cases, see § 1-98 and annotations thereunder.

Editor’s Note.—All of the cases in the following note, with the exception of the last case cited, were decided under superseded § 1-444, dealing with the same subject matter as this section, or under earlier statutes.

Main Action Commenced by Summons. —The warrant of attachment is only a provisional or ancillary remedy in and dependent upon a main action commenced by the issuing of a summons. *Lackett v. Rumbaugh*, 45 F. 23 (1891).

When Summons Unnecessary. — Under the former statute it was said that, in proper instances, where civil actions were commenced and service obtained by attachment of the defendant’s property and publication of a notice based upon the jurisdiction thus acquired, the issuance of a summons at the commencement of the action was unnecessary. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301 (1921). See *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906), citing and approving *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 38 S. E. 923 (1901), and overruling *McClure v. Fellows*, 131 N. C. 509, 42 S. E. 951 (1902).

The publication of summons and attachment was not irregular because commenced within thirty days from the time of issuing the summons. *Currie v. Golconda Mining, etc., Co.*, 157 N. C. 209, 72 S. E. 980 (1911).

Failure to Order or Make Service. — Where an affidavit, filed in an action wherein attachment was sought under the former statute against the property of a nonresident within the jurisdiction of the court, was sufficient for the clerk to order service of the summons by publication, but service had not been ordered or made, and

the cause had come up on the defendant’s special appearance and motion to dismiss on that ground, and pending the motion the plaintiff, upon an additional affidavit, without the knowledge of the judge, had obtained an order of publication from the clerk, it was held to be within the sound discretion of the judge to permit the publication of the summons to be proceeded with, and deny the defendant’s motion. *Jenette v. Hovey & Co.*, 182 N. C. 30, 108 S. E. 301 (1921).

Extension of Time.—In *Finch v. Slater*, 152 N. C. 155, 67 S. E. 264 (1910), it is held that where the court had acquired jurisdiction by attachment of property, the time for serving summons by publication, when it had not been properly made, could be extended in the discretion of the court. *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

Proceedings When Notice Not Duly Served.—Under the former statute it was held that if the notice was not duly served by the publication, it was error to discharge an attachment granted as ancillary to an action because of the insufficiency of the affidavit to obtain service of the summons by publication, for it was possible that the defect might be cured by amendments. *Branch v. Frank*, 81 N. C. 180 (1879); *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

The remedy was not to dismiss the attachment, but by ordering a republication, for, as the defendant was a nonresident, to dismiss the attachment might deprive the plaintiff of all remedy by the removal of the property before a new proceeding and attachment could be had. *Price v. Cox*, 83 N. C. 261 (1880); *Penniman v. Daniel*, 90 N. C. 154 (1884); *Penniman v. Daniel*, 93 N. C. 332 (1885); *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

Applied in *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

§ 1-440.8. General provisions relative to bonds.—(a) Any bond given pursuant to the provisions of this article shall be executed by the party required to furnish the bond and by

(1) A surety company authorized to do business in this State, as provided by § 109-17, or by

(2) One or more individual sureties, as may be required by the court.

(b) Each individual surety shall execute an affidavit, to be attached to the bond, stating that he is a resident of the State and that he is worth the amount specified in the bond exclusive of property exempt from execution and over and above all his liabilities.

(c) Any bond given pursuant to any provisions of this article shall be subject to the approval of the court.

(d) It is not a defense in an action on any bond given pursuant to this article that

- (1) The court had no jurisdiction to require or accept bond, or
- (2) The order of attachment was improperly granted, or
- (3) There was any other irregularity in the attachment proceeding. (1947, c. 693, s. 1.)

§ 1-440.9. Authority of court to fix procedural details.—The court of proper jurisdiction, before which any matter is pending under the provisions of this article, shall have authority to fix and determine all necessary procedural details in all instances in which the statute fails to make definite provision as to such procedure. (1947, c. 693, s. 1.)

Part 2. Procedure to Secure Attachment.

§ 1-440.10. Bond for attachment.—Before the court issues an order of attachment, the plaintiff must furnish a bond as follows:

- (1) The amount of the bond shall be such as may be fixed by the court issuing the order of attachment and shall be such as may be deemed necessary by the court in order to afford reasonable protection to the defendant, but shall not be less than two hundred dollars (\$200.00);
- (2) The condition of the bond shall be that
 - a. If the order of attachment is dissolved, dismissed or set aside by the court, or
 - b. If the plaintiff fails to obtain judgment against the defendant, the plaintiff will pay all costs that may be awarded to the defendant and all damages that the defendant may sustain by reason of the attachment, the surety's liability, however, to be limited to the amount of the bond. (1947, c. 693, s. 1.)

Cross Reference.—As to recovery on bond, see note to § 1-440.45.

Mistake in Signing Undertaking.—Under the former attachment statute it was held that where, by mistake, the surety on the undertaking of the plaintiff signed his name to the justification of the undertaking instead of to the undertaking itself, this was a valid and binding undertaking.

Boger v. Cedar Cove Lumber Co., 165 N. C. 557, 81 S. E. 784 (1914).

When Bond Sufficient.—Under the former statute, where an attachment was sued out against the owner of a vessel, it was held that a prosecution bond, made payable to the "owner" of the vessel by that description, was sufficient. *Bryan v. Steamer Enterprise*, 53 N. C. 260 (1860).

§ 1-440.11. Affidavit for attachment; amendment.—(a) To secure an order of attachment, the plaintiff, or his agent or attorney in his behalf, must state by affidavit

(1) In every case:

- a. The plaintiff has commenced or is about to commence an action, the purpose of which, in whole or in part, or in the alternative, is to secure a judgment for money, and the amount thereof,
- b. The nature of such action, and
- c. The ground or grounds for attachment (one or more of those stated in § 1-440.3); and

(2) In those cases described below, the additional facts indicated:

- a. If the action is based on breach of contract, that the plaintiff is entitled to recover the amount for which judgment is sought over and above all counterclaims known to him;
- b. If it is alleged as a ground for attachment that the defendant has done, or is about to do, any act with intent to defraud his creditors, the facts and circumstances supporting such allegation.

(b) A verified complaint may be used as the affidavit required by this section.

(c) The court, in its discretion, at any time before judgment in the principal action, may allow any such affidavit to be amended even though the original affidavit is wholly insufficient.

(d) An amendment of an insufficient affidavit of attachment relates to the beginning of the attachment proceeding, and no rights based on such irregularity can be required by any third party by any subsequent attachment intervening between the original affidavit and the amendment. (1947, c. 693, s. 1.)

I. In General.

II. Form and Sufficiency of Affidavit.

III. Amendment.

I. IN GENERAL.

Editor's Note. — All of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 through 1-471, or under earlier statutes.

Strict Construction.—The provisions of former § 1-441, relating to the same subject matter as this section, were to be strictly followed. *Leak v. Moorman*, 61 N. C. 168 (1867); *Spiers v. Halstead, etc., Co.*, 71 N. C. 209 (1874); *Wheeler v. Cobb*, 75 N. C. 21 (1876).

II. FORM AND SUFFICIENCY OF AFFIDAVIT.

Affidavit Necessary in Attachment.—In order for the valid issuance of an attachment from the superior court, it is necessary that the requisite facts be shown to the court by an affidavit of prescribed form and substance. *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996 (1912).

By Whom Made. — An affidavit in attachment may be made generally by the plaintiff, his agent or attorney. *Henrietta Min., etc., Co. v. Gardner*, 173 U. S. 123, 19 S. Ct. 327, 43 L. Ed. 637 (1899).

The affidavit to procure an attachment must be specific. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892), and must set forth one of the grounds recited in the statute. *Mullen v. Norfolk, etc., Canal Co.*, 114 N. C. 8, 19 S. E. 106 (1894).

Grounds of Belief Must Be Stated. — Where the plaintiff makes oath that he believes or apprehends the property will be removed, he must also state the grounds of apprehension. *Penniman v. Daniel*, 90 N. C. 154 (1884).

When the affidavit is that the defendants are "about to assign or dispose of their property with intent to defraud the plaintiffs," which is not the assertion of a fact, but necessarily of a belief merely, the grounds upon which such belief is founded must be set out so that the court may adjudge if they are sufficient. *Hughes v. Person*, 63 N. C. 548 (1869); *Gashine, etc., Co. v. Baer*, 64 N. C. 108 (1870); *Clark v. Clark*, 64 N. C. 150 (1870); *Penniman v.*

Daniel, 90 N. C. 154 (1884); *Judd v. Crawford Gold Min. Co.*, 120 N. C. 397, 27 S. E. 81 (1897). And if not set out the affidavit is fatally defective. *First Nat. Bank v. Tarboro Cotton Factory*, 179 N. C. 203, 102 S. E. 195 (1920).

Need Not Specifically Allege Jurisdiction of Court.—Where, in proceedings for attachment, it sufficiently appears of record that the court had jurisdiction of the subject matter, it is unnecessary that the affidavit of the attaching creditors specifically allege its jurisdiction. *Bacon v. Johnson*, 110 N. C. 114, 14 S. E. 508 (1892); *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912); *Davis v. Davis*, 179 N. C. 185, 102 S. E. 270 (1920); *County Sav. Bank v. Tolbert*, 192 N. C. 126, 133 S. E. 553 (1926).

Nor That Defendant Has Property in State. — It is not necessary that the affidavit upon which an attachment is sought should state that the defendant has property in this State. *Branch v. Frank*, 81 N. C. 180 (1879); *Parks v. Adams*, 113 N. C. 473, 18 S. E. 665 (1893); *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770 (1898), overruling *Spiers v. Halstead, etc., Co.*, 71 N. C. 209 (1874) and *Windley v. Bradway*, 77 N. C. 333 (1877).

When Made by Agent. — An affidavit made by an agent need not state why it is not made by the principal. *Bruff, etc., Co. v. Stern & Bro.*, 81 N. C. 183 (1879); *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970 (1892).

Examples of Sufficient Statement.—Affidavits for publication of the summons and notice of attachment are sufficient when they show that the defendant cannot, after due and diligent search, be found in this State, that he is a nonresident and has property here of which the court has jurisdiction, and that the plaintiff has a cause of action against the defendant, arising out of a contract by which he expressly promises to pay a specific sum to the plaintiff for services rendered at his request, which sum is still due and owing. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

An affidavit for an attachment was sufficient which stated that the defendant was a nonresident and had property in this State, or had removed, or was about to

remove some of his property from this State with intent to defraud his creditors. The statute put the modes in the alternative, and the plaintiff would succeed if he established either. *Penniman v. Daniel*, 90 N. C. 154 (1884).

In proceedings for attachment an affidavit is sufficient which sets out: 1st., that the defendant is indebted, etc.; 2d., that the defendant has departed from this State with intent, as the affiant is informed and believes, to avoid the service of summons. *Hess, etc., Co. v. Brower*, 76 N. C. 423 (1877).

Examples of Defective Statement. — An affidavit for a warrant of attachment, under former § 1-441, which stated "that the defendant is absent so that the ordinary process of law cannot be served upon him," without an averment that the absence "was with intent to defraud his creditors and to avoid the service of summons," was fatally defective. *Love & Co. v. Young*, 69 N. C. 65 (1873).

The affidavit, upon which a warrant of attachment has been issued, which alleges that the defendant is about to assign, dispose of and secrete money or goods with intent to defraud creditors, without setting forth the grounds upon which this belief is based, is fatally defective. *First Nat. Bank v. Tarboro Cotton Factory*, 179 N. C. 203, 102 S. E. 195 (1920).

Remedy When Affidavit Defective. — A plea in abatement was held to be the proper mode of taking advantage of a defect in the affidavit for an attachment. *Leak v. Moorman*, 61 N. C. 168 (1867).

Collateral Attack. — The validity of the affidavit cannot be collaterally attacked. *Wehrman v. Conklin*, 155 U. S. 314, 15 S. Ct. 129, 29 L. Ed. 167 (1894).

III. AMENDMENT.

Court Can Allow Amendment. — It is settled that an affidavit can be amended by leave of the court, granted in its discretion, even though the first affidavit was wholly insufficient. *Brown, etc., Co. v. Hawkins*,

65 N. C. 645 (1871); *Branch v. Frank*, 81 N. C. 180 (1879); *Bank v. Blossom*, 92 N. C. 695 (1885); *Penniman v. Daniel*, 93 N. C. 332 (1885); *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889); *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970 (1892).

No Appeal from Court's Order. — From the leave to amend the affidavit no appeal lies. *Lippard v. Roseman*, 72 N. C. 427 (1875); *Henry v. Cannon*, 86 N. C. 24 (1882); *Wiggins v. McCoy*, 87 N. C. 499 (1882); *Jarrett v. Gibbs*, 107 N. C. 303, 12 S. E. 272 (1890); *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970 (1892); *Cook v. New York Corundum Min. Co.*, 114 N. C. 617, 19 S. E. 664 (1894).

A plaintiff has a right to amend his affidavit as to mere matters of form, and if he is ready to swear to the amended affidavit it is error in the clerk to refuse it. *Palmer v. Bosher*, 71 N. C. 291 (1874).

When Clerk Denies Amendment. — Where the clerk refuses to allow an amendment he may, and should, state his reason for such refusal, even after appeal to the court in term. *Cushing v. Styron*, 104 N. C. 338, 10 S. E. 258 (1889).

Findings of Court Having Effect of Amendment. — An affidavit on attachment defective in failing to set forth the facts as to defendant's being about to leave the State, etc., may be amended by permission of court, and where the court has found with plaintiff upon conflicting oral evidence, his findings have the effect of an amendment allowed by him. *Thornburg v. Burton*, 197 N. C. 193, 148 S. E. 28 (1929).

Amendment Relates Back to Beginning. — An amendment of an insufficient affidavit in attachment relates back to the beginning of the proceedings, and no rights based on such irregularity can be acquired by third parties by subsequent attachments intervening between the original affidavit and the amendment. *Cook v. New York Corundum Min. Co.*, 114 N. C. 617, 19 S. E. 664 (1894).

§ 1-440.12. Order of attachment; form and contents.—(a) If the matters required by § 1-440.11 (a) are shown by affidavit to the satisfaction of the court and if the bond required by § 1-440.10 is furnished, the court shall issue an order of attachment which shall

- (1) Show the venue, the court in which the action has been, or is being, commenced, and the title of the action;
- (2) Run in the name of the State and be directed to the sheriff of a designated county;
- (3) State that an affidavit for the attachment of the defendant's property has been filed with the court in the action, that the required attachment bond has been executed and delivered to the court and that it

has been made to appear to the satisfaction of the court that the allegations of the plaintiff's affidavit for attachment are true;

- (4) Direct the sheriff to attach and safely keep all of the property of the defendant within the sheriff's county which is subject to attachment, or so much thereof as is sufficient to satisfy the plaintiff's demand, together with costs and expenses;
- (5) Direct that the order of attachment be returned to the clerk of the court in which the action is pending;
- (6) Show the date of issuance; and
- (7) Be signed by clerk or the judge issuing the order.

(b) The order of attachment shall not contain a return date, but shall be returned to the clerk as provided by § 1-440.16. (1947, c. 693, s. 1.)

Editor's Note.—All of the cases in the following note were decided under superseded § 1-447, relating to the warrant in attachment, or under earlier statutes.

To Whom Warrant Issued. — Former § 1-447 made a distinction between writs issuing from the superior court and the court of a justice of the peace, and in express terms required that writs of attachment from the superior courts should be addressed to the sheriff of the county, while writs issued by a justice of the peace were to be addressed to "the sheriff or any constable". By reason of the rule of strict construction (mentioned in the annotations under § 1-440.1), it was held that a writ of attachment issuing out of the superior court on causes within that jurisdiction must be addressed to the sheriff of the county. *Carson v. Woodrow*, 160 N. C. 143, 75 S. E. 996 (1912). As to order issued by justice under present statute, see § 1-440.49.

An irregularity in issuing a warrant of attachment to the constable or other lawful officer of the county, when the statute requires it to be issued to the sheriff, may be afterwards cured by an amendment of the court when it appears that the warrant was served by a deputy sheriff. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162 (1922).

An attachment issued by the clerk of a court for a sum within the jurisdiction of the court, and made returnable to the proper term of the court, would not be dismissed for want of form because directed "to any constable or other lawful officer to execute and return within thirty days (Sundays excepted)," when it appeared that it was executed by the sheriff. *Askew v. Stevenson*, 61 N. C. 288 (1867).

When Sheriff Is Defendant.—The words of former § 1-447, requiring that the warrant should direct the sheriff to attach "all the property of the defendant" did not, when the sheriff was the defendant, include his tax books showing debts due to him for taxes. *Davie v. Blackburn*, 117 N. C. 383, 23 S. E. 321 (1895).

Clerical Error in Warrant. — A warrant in attachment, in substantial conformity with the former statute, and, in fact executed by the deputy sheriff of the proper county, was valid, and would not be held otherwise when verified by a proper agent of the plaintiff, though by apparent clerical error it was stated in its beginning to have been made by a member of the plaintiff firm, the power of the trial judge to allow amendments being plenary under the provisions of § 1-165. *May Co. v. Menzies Shoe Co.*, 186 N. C. 144, 119 S. E. 227 (1923).

§ 1-440.13. Additional orders of attachment at time of original order; alias and pluries orders.—(a) At the time the original order of attachment is issued, or thereafter, one or more additional orders, at the request of the plaintiff, may be issued, and any such additional order may be directed to the sheriff of any county in which the defendant may have property.

(b) After the original order or orders have been returned, if no property or, in the opinion of the plaintiff, insufficient property has been attached thereunder, alias or pluries orders may be issued prior to judgment, at the request of the plaintiff, and such alias or pluries orders may be directed to the sheriff of any county in which the defendant may have property. (1947, c. 693, s. 1.)

§ 1-440.14. Notice of issuance of order of attachment when no personal service.—(a) When the original order of attachment is issued in an action in which an order is thereafter issued for service by publication of a notice

as provided by § 1-98, the order of publication shall direct that the published notice include notice of the issuance of the order of attachment.

(b) When the original order of attachment is issued after the order of publication is made, a notice of the issuance of the order of attachment shall be published once a week for four successive weeks in some newspaper published in the county in which the action is pending, such publication to be commenced within thirty days after the issuance of the order of attachment. Such notice shall show

- (1) The county and the court in which the action is pending,
- (2) The names of the parties,
- (3) The purpose of the action, and
- (4) The fact that on a date specified an order was issued to attach the defendant's property.

(c) If no newspaper is published in the county in which the action is pending, the notice

- (1) Shall be published once a week for four successive weeks in some newspaper published in the same judicial district, or
- (2) Shall be posted at the courthouse door in the county for thirty days.

(d) When an order of attachment is issued in an action in which service on the defendant is to be, or has been, had in the manner provided by § 1-104 in lieu of personal service on the defendant,

- (1) A notice of the issuance of the order of attachment shall also be served on the defendant in the same manner as is provided for service of notice by § 1-104, which notice shall show the same facts with reference to the attachment as are required by subsection (b) of this section, or
- (2) A notice of the issuance of the order of attachment shall be published in the manner provided by subsections (b) or (c) of this section. (1947, c. 693, s. 1.)

Cross Reference.—As to service by publication, see annotations under § 1-440.7 and under § 1-98.

Editor's Note.—All of the cases in the following note, with the exception of the last case cited, were decided under superseded § 1-448, dealing with the same subject matter as this section, or under earlier statutes.

Statement of Amount. — Under former § 1-448, which provided that when the summons in an attachment suit was to be served by publication, the publication should state the fact of the attachment, "the amount of the claims," and in a brief way the nature of the demand, an order and a publication based thereon which fail to state the amount of the plaintiff's claims were fatally defective. *Flint v. Coffin*, 176 F. 872 (1910).

In attachment the plaintiff can not recover an amount in excess of that stated in the summons. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

Defendant's Bond Considered as Waiver. —Where property has been levied on under the writ, a bond given by the defendants in discharge of the attachment as provided by former § 1-457 was considered equivalent to a personal appearance in the action and a waiver of the requirement

for further service of the summons. It amounted to a voluntary submission of the defendant's cause to the jurisdiction of the court. *Mitchell v. Elizabeth City Lumber Co.*, 169 N. C. 397, 86 S. E. 343 (1915).

Affidavit after Order.—Under the former statute it was held that the affidavit to obtain an order for the publication of a summons might be made after the order, provided the order remained in abeyance until the affidavit was filed. *Bank v. Blossom*, 92 N. C. 695 (1885).

Omission of Notice in Order of Publication.—Where notice of the attachment was omitted from the order of publication, but in the published notice the defendant was informed that an attachment had been issued against his property, to what court it was returnable, etc., it was held under the former statute that the court had power to amend the order of publication, so as to insert a requirement that notice be given of the attachment. *Bank v. Blossom*, 92 N. C. 695 (1885).

Publication for Five Weeks.—Where notice of an attachment and the summons were published in one notice for five weeks, it was held, a sufficient publication of the notice of the attachment under the former statute, but not of the summons. And the court had power to retain the action and

order a sufficient publication. *Bank v. Blossom*, 92 N. C. 695 (1885).

Applied in *Scott & Co. v. Jones*, 230 N. C. 74, 52 S. E. (2d) 219 (1949).

Part 3. Execution of Order of Attachment; Garnishment.

§ 1-440.15. Method of execution.—(a) The sheriff to whom the order of attachment is directed shall note thereon the date of its delivery to him and shall promptly execute it by levying on the defendant's property as follows:

- (1) The levy on real property shall be made as provided by § 1-440.17;
- (2) The levy on stock in a corporation shall be made as provided by § 1-440.19;
- (3) The levy on goods stored in a warehouse shall be made as provided by § 1-440.20;
- (4) The levy on tangible personal property in the possession of the defendant shall, except as provided in § 1-440.19, be made as provided by § 1-440.18;
- (5) The levy on tangible personal property belonging to the defendant but not in his possession, or on any indebtedness to the defendant, or on any other intangible personal property belonging to the defendant, shall, except as provided by §§ 1-440.19 and 1-440.20, be made as provided by § 1-440.25 relating to garnishment.

(b) The sheriff is not required to levy upon personal property before levying upon real property.

(c) In order for the sheriff to make any levy, it is not necessary for him to deliver to the defendant or any other person any copy of the order of attachment or any other process except in the case of garnishment as provided by § 1-440.25. (1947, c. 693, s. 1.)

§ 1-440.16. Sheriff's return. — (a) After the sheriff has executed an order of attachment, he shall promptly make a written return showing all property levied upon by him and the date of such levy. In such return, he shall describe the property levied upon in sufficient detail to identify the property clearly. The sheriff forthwith shall deliver the order of attachment, together with his return, to the court in which the action is pending.

(b) If garnishment process is issued, as provided by §§ 1-440.23 and 1-440.24, the sheriff shall include in his return a report of his proceedings with respect to such garnishment and shall return to the court the original process issued to the garnishee.

(c) If the sheriff makes no levy within ten days after the issuance of the order of attachment, he forthwith shall deliver to the court, in which the action is pending, the order, and any other process relating thereto, together with his return showing that no levy has been made and the reason therefor. (1947, c. 693, s. 1.)

§ 1-440.17. Levy on real property.—(a) In order to make a levy on real property, the sheriff need not go upon the land or take control over it, but he

- (1) Shall make an endorsement upon the order of attachment or shall attach thereto a statement showing that he thereby levies upon the defendant's interest in the real property described in such endorsement or statement, describing the real property in sufficient detail to identify it clearly, and
- (2) Shall, as promptly as practicable, certify such levy, and the names of the parties to the action, to the clerk of the superior court of the county in which the land lies.

(b) Upon receipt of the sheriff's certificate, the clerk shall dock the levy, as provided by § 1-440.33. (1947, c. 693, s. 1.)

The sheriff may make a valid levy under a warrant of attachment on real property without going on the property. The levy is made effective by the endorsement thereof on the execution or warrant of attachment. The jurisdiction of the court dates

from the levy, but the lien becomes effective when certified to the clerk and indexed. *Voehringer v. Pollock*, 224 N. C. 409, 30 S. E. (2d) 374 (1944).

Sufficiency of Description. — A levy on

land under an attachment is sufficient, if it gives such a description as will distinguish and identify the land. *Grier v. Rhyne*, 67 N. C. 338 (1872), decided under a former statute.

§ 1-440.18. Levy on tangible personal property in defendant's possession.—The sheriff shall levy on tangible personal property in the possession of the defendant by seizing and taking into his possession so much thereof as will be sufficient to satisfy the plaintiff's demands. (1947, c. 693, s. 1.)

§ 1-440.19. Levy on stock in corporation.—(a) The sheriff may levy, as on tangible property, on a share of stock in a corporation by seizing the certificate of stock

- (1) When the certificate is in the possession of the defendant, and
- (2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of stock, as is provided by the Uniform Stock Transfer Act or similar legislation.

(b) The sheriff may levy on a share of stock in a corporation by delivery of copies of the garnishment process to the proper officer or agent of such corporation, as set out in § 1-440.26,

- (1) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is not embodied in the certificate of stock, or
- (2) When, by the law of the state in which the corporation is incorporated, the property interest of the stockholder is embodied in the certificate of the stock, as is provided by the Uniform Stock Transfer Act or similar legislation, and

- a. Such certificate has been surrendered to the corporation which issued it, or
- b. The transfer of such certificate by the holder thereof has been restrained or enjoined.

(c) A restraining order or injunction against the transfer of a certificate of stock, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

As to attachment of stock owned by one foreign corporation in another foreign corporation under superseded § 1-459, see

Parks-Cramer Co. v. Southern Exp. Co., 185 N. C. 428, 117 S. E. 505 (1923).

§ 1-440.20. Levy on goods in warehouses.—(a) The sheriff may levy on goods delivered to a warehouseman for storage, by delivering copies of the garnishment process to the warehouseman, or to the proper officer or agent for the corporate warehouseman, as set out in § 1-440.26,

- (1) If a negotiable warehouse receipt has not been issued with respect thereto, or
- (2) If a negotiable warehouse receipt has been issued with respect thereto, and
 - a. Such receipt is seized, or
 - b. Such receipt is surrendered to the warehouseman who issued it, or
 - c. The transfer of such receipt by the holder thereof is restrained or enjoined.

(b) A restraining order or injunction against the transfer of a negotiable warehouse receipt, when proper in an attachment proceeding, may be granted by the clerk or judge pursuant to a motion in the cause to which the attachment is ancillary. (1947, c. 693, s. 1.)

§ 1-440.21. Nature of garnishment.—(a) Garnishment is not an independent action but is a proceeding ancillary to attachment and is the remedy for discovering and subjecting to attachment

- (1) Tangible personal property belonging to the defendant but not in his possession, and
- (2) Any indebtedness to the defendant and any other intangible personal property belonging to him.

(b) A garnishee is a person, firm, association, or corporation to which such a summons as specified by § 1-440.23 is issued. (1947, c. 693, s. 1.)

Editor's Note.—All of the cases in the following note were decided under superseded § 1-461, relating to proceedings against garnishee, or under earlier statutes.

Nature of Garnishment.—The essential service of foreign attachment laws is to reach and arrest the payment of what is due and might be paid to a nonresident to defeat his creditors. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

The proceeding by garnishment is designed to subject a debt due to the defendant, to the payment of the demand of his creditor, by investing the creditor with a judicial power to collect and apply the amount due. *Wanzer v. Truly*, 17 How. (58 U. S.) 584, 15 L. Ed. 216 (1854).

A garnishment is in effect a suit by the principal debtor, the defendant in the action, in the name of the plaintiff, and for his use and benefit, against the garnishee to recover the debt due to the plaintiff's debtor and apply it to the satisfaction of the plaintiff's demand. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

It arrests the property in the hands of the garnishee, interferes with the owner's or creditor's control over it, subjects it to the judgment of the court, and therefore has the effect of a seizure. *Miller v. United States*, 11 Wall. (78 U. S.) 268, 20 L. Ed. 135 (1870).

Proceeding in Rem.—In garnishment proceedings, whatever of substance there is must be with the debtor, he holding the res in his hands, giving character to the action as one in the nature of a proceeding in rem. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

What Law Governs.—To enable the judgment creditor to arrest the payment of what is due the judgment debtor, which might be paid so as to defeat the rights of the creditor, he must go to the domicile of his debtor, and can only do it under the laws and procedure in force there. It is a legal necessity and considerations of situs are somewhat artificial. *Chicago, etc., R. Co. v. Sturm*, 174 U. S. 710, 19 S. Ct. 797, 43 L. Ed. 1144 (1899).

Jurisdiction Necessary.—The court entertaining a garnishment must have some jurisdiction over the thing garnished. *Balk v. Harris*, 124 N. C. 467, 32 S. E. 799 (1899).

The obligation of the garnishee can be enforced by the courts of the foreign state after personal service of process therein, just as well as by courts of the domicile of the debtor. *Harris v. Balk*, 198 U. S. 215, 25 S. Ct. 625, 49 L. Ed. 1023 (1905).

Former § 1-461 applied alike to residents and nonresidents, persons and corporations, and it would not be declared unconstitutional in an action instituted long subsequent to its enactment. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Warrant Incidental to Original Action.—Want of authority in the justice to issue an original process to any county other than his own did not inhibit the running of the warrant of attachment to another county, or the service of a notice upon the garnishee to appear before the court to which the attachment was returnable to answer upon oath as provided by the former statute; for issuing the warrant was only incidental to the original action. *Baker, etc., Co. v. Belvin*, 122 N. C. 190, 30 S. E. 337 (1898); *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718 (1927).

Not Necessary to Bring Separate Action against Garnishee.—A judgment may be taken against a garnishee, who is found to be indebted to the debtor, in the action to which the garnishment proceeding is ancillary, and is not necessary to bring a separate action against such garnishee. *Baker, etc., Co. v. Belvin*, 122 N. C. 190, 30 S. E. 337 (1898). *Carmer v. Evers*, 80 N. C. 56 (1879), a case which held the opposite of this, discussed and overruled since it was decided under former law.

Plaintiff Substituted to Rights of Defendant against Garnishee.—A plaintiff in garnishment is, in his relation to the garnishee, substituted merely to the rights of his own debtor, and cannot enforce any greater claim against the garnishee than the debtor himself, if suing, would have

been entitled to recover. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

Bank May Be Garnishee. — A national bank may be proceeded against by garnishment to impound the proceeds of a draft in its hands. *Markham-Stephens Co. v. Richmond Co.*, 177 N. C. 364, 99 S. E. 17 (1919).

Where Bank a Mere Stakeholder. — Where the funds of a nonresident defendant are attached in the hands of a local bank, which is only an agency for collection, which position it alleges in its answer, and also alleges ownership of title by its forwarding bank, the position taken by the local bank is that of a mere stakeholder without interest, between two conflicting claimants, and it may successfully maintain that the forwarding bank be made a party to the action, and await the determination of this question in the action, in order to protect itself in the payment of the funds attached in its hands. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162 (1922).

Moneys Not Yet Due.—Under former § 1-461, moneys due by a garnishee, or goods in his hands at the time of appearance and answer, were held applicable to the debt, though not earned and due when he was summoned to answer. *Goodwin v. Claytor*,

137 N. C. 224, 49 S. E. 173 (1904).

Exemption of Earnings.—Section 1-362 provides that earnings of a debtor for his personal services for the 60 days next preceeding shall be exempt from execution. It was held that the exemption protects such earnings from seizure in garnishment. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

Same—Exemption Must Be Claimed. — When a man has earned wages they can be garnished as his property, if no personal exemption is claimed. *Pocomoke Guard Co. v. Colwell*, 177 N. C. 218, 98 S. E. 535 (1919).

Amounts Due Corporation from Unpaid Stock Subscriptions. — A corporation was held a necessary party to an attachment proceeding to subject the amounts due it from unpaid subscriptions to its stock to the payment of its debts. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348 (1898).

Where one contracted with a dentist for a set of artificial teeth for his wife, and paid him full consideration, and the husband afterwards absconded before the teeth were furnished, the dentist was not liable as garnishee to a creditor for the value of the teeth. *Cherry v. Hooper*, 52 N. C. 82 (1859).

§ 1-440.22. **Issuance of summons to garnishee.**—(a) A summons to garnishee may be issued

- (1) At the time of the issuance of the original order of attachment, by the court making such order, or
- (2) At any time thereafter prior to judgment in the principal action, by the court in which the action is pending.

(b) At the request of the plaintiff, such summons to garnishee shall, at either such time, be issued to each person designated by the plaintiff as a garnishee. (1947, c. 693, s. 1.)

Personal Service Necessary.—It was held that superseded § 1-461, relating to garnishments, evidently contemplated personal service, as no provision was made for a constructive service of the summons; and the statute had always been strictly construed. *Parker v. Scott*, 64 N. C. 118 (1870).

Warrant Running beyond Limit of

County Where Action Brought. — Under former § 1-461, it was held that, the issuance of a warrant of attachment by a justice of the peace being only incidental to the relief sought in the original action, the warrant in garnishment might run beyond the limit of the county wherein the action was brought. *Mohn v. Cressey*, 193 N. C. 568, 137 S. E. 718 (1927).

§ 1-440.23. **Form of summons to garnishee.**—The summons to garnishee shall be substantially in the following form:

State of North Carolina

..... County

In the Superior Court

.....

Plaintiff,

vs.

.....

Defendant,

and

.....

Garnishee.

}

Summons to Garnishee

To, Garnishee:

You are hereby summoned, as a garnishee of the defendant,, and required, within twenty days after the service of this summons upon you, to file a verified answer in the Office of the Clerk of the Superior Court of the above named county, at, North Carolina, showing—

- (1) Whether, at the time of the service of this summons upon you, or at any time since then until the date of your answer, you were indebted to the defendant or had any property of his in your possession and, if so, the amount and nature thereof; and
- (2) Whether, according to your knowledge, information or belief, any other person is indebted to the defendant or has any property of the defendant in his possession and, if so, the name of each such person.

In case of your failure to file such answer a conditional judgment will be rendered against you for the full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as will be sufficient to cover the plaintiff's costs.

This the day of, 19...

.....

(Here designate Clerk Superior Court or Judge.)

(1947, c. 693, s. 1.)

§ 1-440.24. **Form of notice of levy in garnishment proceeding.**—The notice of levy to be served on the garnishee shall be substantially in the following form:

State of North Carolina

..... County

In the Superior Court

.....

Plaintiff,

vs.

.....

Defendant,

and

.....

Garnishee.

}

Notice of Levy

To, Garnishee:

By virtue of the authority contained in an order of attachment issued by the Superior Court of County and directed to me, I hereby levy upon any and all property that you have or hold in your possession for the account, use, or benefit of the defendant, and upon all debts owed by you to the defendant.

You are notified that a lien is hereby created on all the tangible property of the

defendant in your possession, and that if you surrender the possession of, or transfer to anyone, any property belonging to the defendant, or if you pay any debt you owe the defendant, unless the same is delivered or paid to me or to the court for such proper disposition as the court may determine, you will be subject to punishment as for contempt, and that judgment may be rendered against you for the value of such property not exceeding the full amount of plaintiff's claim and costs of the action.

This the day of, 19...

.....
Sheriff of County.

(1947, c. 693, s. 1.)

§ 1-440.25. Levy upon debt owed by, or property in possession of, the garnishee.—The levy in all cases of garnishment shall be made by delivering to the garnishee, or a process agent authorized by him or expressly or impliedly authorized by law, or some representative of a corporate garnishee designated by § 1-440.26, a copy of each of the following:

- (1) The order of attachment,
- (2) The summons to garnishee, and
- (3) The notice of levy.

(1947, c. 693, s. 1.)

§ 1-440.26. To whom garnishment process may be delivered when garnishee is corporation.—(a) When the garnishee is a domestic corporation, the copies of the process listed in § 1-440.25 may be delivered to the president or other head, secretary, cashier, treasurer, director, managing agent or local agent of the corporation.

(b) When the garnishee is a foreign corporation, the copies of the process listed in § 1-440.25 may be delivered only to the president, treasurer or secretary thereof personally and while such officer is within the State, except that

- a. If the corporation has property within this State, or
- b. If the cause of action arose in this State, or
- c. If the plaintiff resides in this State,

the copies of the process may be delivered to any of the persons designated in subsection (a) of this section.

(c) A person receiving or collecting money within this State on behalf of a corporation is deemed to be a local agent of the corporation for the purpose of this section. (1947, c. 693, s. 1.)

§ 1-440.27. Failure of garnishee to appear.—(a) When a garnishee, after being duly summoned, fails to file a verified answer as required, the clerk of the court shall enter a conditional judgment for the plaintiff against the garnishee for the full amount for which the plaintiff shall have prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) The clerk shall thereupon issue a notice to the garnishee requiring him to appear not later than ten days after the date of service of the notice, and show cause why the conditional judgment shall not be made final. If, after service of such notice, the garnishee fails to appear within the time named and file a verified answer to the summons to the garnishee, or if such notice cannot be served upon the garnishee because he cannot be found within the county where the original summons to such garnishee was served, then in either such event, the clerk shall make the conditional judgment final. (1947, c. 693, s. 1.)

§ 1-440.28. Admission by garnishee; set-off; lien.—(a) When a garnishee admits in his answer that he is indebted to the defendant, or was indebted to the defendant at the time of service of garnishment process upon him

or at some date subsequent thereto, the clerk of the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) The amount which the garnishee admits that he owes the defendant or has owed the defendant at any time from the date of the service of the garnishment process to the date of answer by the garnishee, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(b) When a garnishee admits in his answer that he has in his possession personal property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, the clerk of the court shall enter judgment against the garnishee requiring him to deliver such property to the sheriff, and upon such delivery the garnishee shall be exonerated as to the property so delivered.

(c) When a garnishee admits in his answer that, at or subsequent to the date of the service of the garnishment process upon him, he had in his possession property belonging to the defendant, with respect to which the garnishee does not claim a lien or other interest, but that he does not have such property at the time of his answer, the clerk of the court shall at a hearing for that purpose determine, upon affidavits filed, the value of such property, unless the plaintiff, the defendant and the garnishee agree as to the value thereof, or unless, prior to the hearing, a jury trial thereon is demanded by one of the parties. The clerk shall give the parties such notice of the hearing as he may deem reasonable and by such means as he may deem best.

(d) When the value of the property has been determined as provided in subsection (c) of this section the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) An amount equal to the value of the property in question, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs.

(e) When a garnishee alleges in his answer that the debt or the personal property due to be delivered by him to the defendant will become payable or deliverable at a future date, and the plaintiff, within twenty days thereafter, files a reply denying such allegation, the issue thereby raised shall be submitted to and determined by a jury. If it is not denied that the debt owed or the personal property due to be delivered to the defendant will become payable or deliverable at a future date, or if it is so found upon the trial, judgment shall be given against the garnishee which shall require the garnishee at the due date of the indebtedness to pay the plaintiff such an amount as is specified in subsection (a) of this section, or at the deliverable date of the personal property to deliver such property to the sheriff in order that it may be sold to satisfy the plaintiff's claim.

(f) In answer to a summons to garnishee, a garnishee may assert any right of set-off which he may have with respect to the defendant in the principal action.

(g) With respect to any property of the defendant which the garnishee has in his possession, a garnishee, in answer to a summons to garnishee, may assert any lien or other valid claim amounting to an interest therein. No garnishee shall be compelled to surrender the possession of any property of the defendant upon which the garnishee establishes a lien or other valid claim amounting to an interest therein, which lien or interest attached or was acquired prior to service of the summons to garnishee, and such property only may be sold subject to the garnishee's lien or interest. (1947, c. 693, s. 1.)

§ 1-440.29. Denial of claim by garnishee; issues of fact.—(a) In addition to any other instances when issues of fact arise in a garnishment proceeding, issues of fact arise

- (1) When a garnishee files an answer such that the court cannot determine therefrom whether the garnishee intends to admit or deny that he is indebted to, or has in his possession any property of, the defendant, or
- (2) When a garnishee files an answer denying that he is indebted to, or has in his possession any property of, the defendant, or was indebted to, or had in his possession any property of, the defendant at the time of the service of the summons upon him or at any time since then, and the plaintiff, within twenty days thereafter, files a reply alleging the contrary.

(b) When a jury finds that the garnishee owes the defendant a specific sum of money or has in his possession property of the defendant of a specific value, or owed the defendant a specific sum of money or had in his possession property of the defendant of a specific value at the time of the service of the summons upon him or at any time since then, the court shall enter judgment against the garnishee for the smaller of the two following amounts:

- (1) The amount specified in the jury's verdict, or
- (2) The full amount for which the plaintiff has prayed judgment against the defendant, together with such amount as in the opinion of the clerk will be sufficient to cover the plaintiff's costs. (1947, c. 693, s. 1.)

Editor's Note.—All of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 through 1-471, or under earlier statutes.

Jury Trial.—Under former § 1-463, relating to trial of issues in garnishment proceedings, the plaintiff in garnishment proceedings, upon the suggestion that he wished to traverse the return of the garnishee, was entitled, without any formal or verified statement, to have the issue tried by a jury. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

Where Principal Defendant Denies Ownership.—The judgment against a nonresident debtor being exhausted by a sale of the property attached, a nonresident defendant in attachment proceedings, who denied ownership of the attached property, could not be injured by the judgment, and hence, was held not entitled, under the former statute, to have an issue submitted as to the title to the property. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770 (1898).

Where Garnishee Asserts Ownership in Another.—The requirement of former § 1-463, dealing with the trial of issues in garnishment proceedings, that an issue should be made up and determined by the jury where the garnishee in attachment denied owing the principal defendant, was to be construed with § 1-73, requiring the making of all necessary parties to a full determination of the controversy; and when the garnishee took the position of a mere stakeholder and set up in his answer that another, not a party to the action, was

the owner of the funds attached, and asked that such other person be brought in so as to protect it, the garnishee, in the payment of the funds under an order of the court, the other person should be made a party, by direct service of process, if found within the jurisdiction, or by publication. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162 (1922).

No Personal Judgment against Nonresident Defendant.—In garnishment proceedings under the former statute against a nonresident defendant, service being had by publication, no jurisdiction was acquired to support a personal judgment against the defendant. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

Effect of Judgment against Nonresident Defendant and Garnishee.—Where service of summons was had by publication on a nonresident of the State, and a debt due the defendant was garnished under the former statute, the plaintiff did not lose any lien on the debt by taking a judgment against the defendant and the garnishee. *Goodwin v. Claytor*, 137 N. C. 224, 49 S. E. 173 (1904).

Order Applying Collections Made to Judgment against Principal Defendant.—Under the former statute, where judgment was given against a garnishee in an action against the debtor, it was held proper to make an order applying the collections made on such judgment to the judgment obtained, or to be obtained, against the debtor. *Baker, etc., Co. v. Belvin*, 122 N. C. 190, 30 S. E. 337 (1898).

§ 1-440.30. Time of jury trial.—All issues arising under § 1-440.28 or § 1-440.29 shall, when a jury trial is demanded by any party, be submitted to and

determined by a jury at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

§ 1-440.31. Payment to defendant by garnishee.—Any garnishee who shall pay to the defendant any debt owed the defendant or deliver to the defendant any property belonging to the defendant, after being served with garnishment process, and while the garnishment proceeding is pending, shall not thereby relieve himself of liability to the plaintiff. (1947, c. 693, s. 1.)

§ 1-440.32. Execution against garnishee.—(a) Pursuant to a judgment against a garnishee, execution may be issued against such garnishee prior to judgment against the defendant in the principal action. The court may issue such execution without notice or hearing. All property seized pursuant to such execution shall be held subject to the order of the court pending judgment in the principal action.

(b) The court, pending judgment in the principal action, may permit the property to remain in the garnishee's possession upon the garnishee's giving a bond in the same manner and on the same conditions as is provided by § 1-440.39 with respect to the discharge of an attachment by the defendant. (1947, c. 693, s. 1.)

There was no distinction between an execution on an ordinary judgment issued under § 1-305, and an execution on a judgment against a garnishee issued under former § 1-461. They were both judgments and sections to be construed in *pari materia*. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Execution may be issued against garnishees prior to final judgment against defendant, and the property held subject to the orders of the court pending final judgment.

Newberry v. Meadows Fertilizer Co., 206 N. C. 182, 173 S. E. 67 (1934), decided under former § 1-461.

Without Notice or Hearing.—Where judgment has been regularly entered against certain garnishees in proceedings under former § 1-440, the clerk of the superior court could issue execution on the judgment against the garnishees without notice or a hearing under former § 1-461 and § 1-305. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Part 4. Relating to Attached Property.

§ 1-440.33. When lien of attachment begins; priority of liens.—(a) Upon securing the issuance of an order of attachment, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the *lis pendens* docket.

(b) When the clerk receives from the sheriff a certificate of levy on real property as provided by § 1-440.17, the clerk shall promptly note the levy on his judgment docket and index the same. When the levy is thus docketed and indexed,

- (1) The lien attaches and relates back to the time of the filing of the notice of *lis pendens* if the plaintiff has prior to the levy caused notice of the issuance of the order of attachment to be properly entered on the *lis pendens* docket of the county in which the land lies, as provided by subsection (a) of this section.
- (2) The lien attaches only from the time of the docketing of the certificate of levy if no entry of the issuance of the order of attachment has been made prior to the levy on the *lis pendens* docket of the county in which the land lies.

(c) A levy on tangible personal property of the defendant in the hands of the garnishee, when made in the manner provided by § 1-440.25, creates a lien on the property thus levied on from the time of such levy.

(d) If more than one order of attachment is served with respect to property in possession of the defendant or is served upon a garnishee, the priority of the order of the liens is the same as the order in which the attachments were levied, subject

to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(e) If two or more orders of attachment are served simultaneously, liens attach simultaneously, subject to the provisions of subsection (b) of this section, relating to the time when a lien of attachment begins with respect to real property.

(f) If the funds derived from the attachment of property on which liens become effective simultaneously are insufficient to pay the judgments in full of the simultaneously attaching creditors who have liens which began simultaneously, such funds are prorated among such creditors according to the amount of the indebtedness of the defendant to each of them, respectively, as established upon the trial.

(g) If more than one order of attachment is served on a garnishee, the court from which the first order of attachment was issued shall, upon motion of the garnishee or of any of the attaching creditors, make parties to the action all of the attaching creditors, who are not already parties thereto in order that any questions of priority among the attaching creditors may be determined in that action and in that court. (1947, c. 693, s. 1.)

Cross Reference.—As to filing of lis pendens when notice required by superseded § 1-449, relating to execution, levy and lien in attachment proceedings, had been given, see note to § 1-116.

Editor's Note.—All of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 to 1-471, or under earlier statutes.

Lien Enforceable against Subsequent Purchasers.—When the officer had complied with the provisions of former § 1-449, relating to execution, levy and lien of attachments, the plaintiffs had a lien on such property, which was enforceable against all subsequent purchasers from the defendant. *Newberry v. Meadows Fert. Co.*, 203 N. C. 350, 166 S. E. 79 (1932).

Debt Owed by City to Principal Defendants.—In attachment proceedings under a former statute an examination of the officials of a city alleged to be indebted to defendants operated as a lien on anything owing by the city to defendants, as of the day when the copy of the warrant of attachment was delivered; and thereby prevented any alterations of the state of

accounts between defendants and the city. *Carmer v. Evers*, 80 N. C. 56 (1879).

Property of Garnishee.—Under former § 1-461, it was held that no lien attached to any specific property of the garnishee until the issuance of execution on the judgment and proceedings to enforce such execution. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 166 S. E. 79 (1932).

Exemptions.—Under a former statute it was held that property seized under attachment was only a legal deposit in the hands of the sheriff to abide the event of the action, and after judgment against the defendant, he was entitled to the same exemptions in the property attached as he would have been had there been no attachment. *State v. Rhyne*, 80 N. C. 183 (1879).

Homestead.—The lien of an attachment levied under the former statute upon land of a nonresident debtor was paramount to the right of a homestead therein acquired by the debtor by becoming a citizen of the State prior to the rendition of judgment in the action. *Watkins v. Overby*, 83 N. C. 165 (1880).

§ 1-440.34. Effect of defendant's death after levy.—(a) In case of the death of the defendant, after the issuance of an order of attachment and after a levy is made thereunder but before service of summons is had or before an appearance is entered in the principal action, the levy shall remain in force

(1) If the cause of action set forth by the plaintiff in the principal action is one which survives, and

(2) If service is completed on the personal representative of the defendant within three months from the date of his qualification.

(b) If a levy has been made upon real property and the defendant dies before such real property is sold pursuant to the attachment, the lien of the attachment shall continue but the judgment may be enforced only through the defendant's personal representative in the regular course of administration. (1947, c. 693, s. 1.)

§ 1-440.35. Sheriff's liability for care of attached property; ex-

pense of care.—The sheriff is liable for the care and custody of personal property levied upon pursuant to an order of attachment just as if he had seized it under execution. Upon demand of the sheriff, the plaintiff shall advance to the sheriff from time to time such amount as may be required to provide the necessary care and to maintain the custody of the attached property. The expense so incurred in caring for and maintaining custody of attached property shall be taxed as part of the costs of the action. (1947, c. 693, s. 1.)

Part 5. Miscellaneous Procedure Pending Final Judgment.

§ 1-440.36. Dissolution of the order of attachment.—(a) At any time before judgment in the principal action, a defendant whose property has been attached may specially or generally appear and move, either before the clerk or the judge, to dissolve the order of attachment.

(b) When the defect alleged as grounds for the motion appears upon the face of the record, no issues of fact arise, and the motion is heard and determined upon the record.

(c) When the defect alleged does not appear upon the face of the record, the motion is heard and determined upon the affidavits filed by the plaintiff and the defendant, unless, prior to the actual commencement of the hearing, a jury trial is demanded in writing by the plaintiff or the defendant. Either the clerk or the judge hearing and determining the motion to dissolve the order of attachment shall find the facts upon which his ruling thereon is based. If a jury trial is demanded by either party, the issues involved shall be submitted and determined at the same time the principal action is tried, unless the judge, on motion of any party for good cause shown, orders an earlier trial or a separate trial. (1947, c. 693, s. 1.)

Editor's Note.—All of the cases in the following note, with the exception of the case cited in the first two paragraphs, were decided under the former attachment statute, superseded §§ 1-440 to 1-471, or under earlier statutes.

Remedy in This Section Is Not Exclusive.—When the defendant contests the grounds on which the writ issued, this section provides a ready means of attack upon the writ without awaiting the trial of the main issue. But this remedy is not exclusive. He may make the necessary allegations in his answer by way of defense and await the trial. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948). See § 1-440.41.

The jury having found that the attachment was wrongfully issued, it was proper for the court to dissolve the attachment and discharge the defendant's surety from liability. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

Vacation without Undertaking.—An attachment will be vacated by the judge without any undertaking on the part of the defendant, if on its face it appears to have been issued irregularly, or for a cause insufficient in law, or false in fact. *Bear v. Cohen*, 65 N. C. 511 (1871).

Clerk Has Jurisdiction.—The clerk of the superior court has jurisdiction to va-

cate an attachment. *Palmer v. Boshier*, 71 N. C. 291 (1874).

Motion out of Term.—It would be a great hardship upon a defendant whose property had been seized under an irregular attachment if he were prohibited from having it set aside until the regular term of the court, which might be nearly six months after the seizure, hence he may move to vacate before the return term. *Palmer v. Boshier*, 71 N. C. 291 (1874).

Motion May Be Made by One of Several Defendants.—Any one of several defendants whose property has been attached has such an interest in the action as to maintain a motion to vacate the attachment. *Luff v. Levey*, 203 N. C. 783, 166 S. E. 922 (1932).

Failure of Defendant to Move to Vacate.—The proper publication of summons for a nonresident defendant whose property has been attached gives the defendant notice that he can vacate the warrant if insufficient, and upon his failing to move to vacate the process he will not be held to be prejudiced by a subsequent judgment. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

Attachment Vacated When Defendant Bankrupt.—Where the defendant was adjudged a bankrupt, that was held to be sufficient ground for vacating an attach-

ment levied upon his property. *Mixer v. Oil, etc., Co.*, 65 N. C. 552 (1871); *Ward v. Hargett*, 151 N. C. 365, 66 S. E. 340 (1909).

Where It Appears from Pleadings That Action Must Fail. — The trial judge may vacate an attachment pending trial where it plainly appears from the pleadings that the action of the plaintiff must fail. *Knight v. Hatfield*, 129 N. C. 191, 39 S. E. 807 (1901).

Where Funds Attached Held upon Express Trust.—Where in an action against a foreign fraternal insurance society, the funds in the hands of a collector were attached and the society claimed that such funds were held upon an express trust for the benefit of the widows and orphans of the deceased members, and were not subject to attachment, the society was entitled to raise such a question by motion to vacate the attachment. *Brenizer v. Royal Arcanum*, 141 N. C. 409, 53 S. E. 835 (1906).

When Attachment Not Discharged.—A warrant of attachment cannot be discharged upon the special appearance of the defendant when the grounds for his motion involved the finding of facts such as he has no interest in. *Foushee v. Owen*, 122 N. C. 360, 29 S. E. 770 (1898).

Same — Insufficient Affidavit. — It is error to discharge an attachment, granted as ancillary to an action, because of the insufficiency of the affidavit to obtain service of the summons by publication, for it is possible that the defect may be cured by amendment. *Branch v. Frank*, 81 N. C. 180 (1879); *Price v. Cox*, 83 N. C. 261 (1880).

Hence, where the application to vacate an attachment is to the clerk before the sitting of the court to which the summons is made returnable, a further order of publication to cure a defective service may be obtained upon an affidavit to the court without discharging the attachment. *Peniman v. Daniel*, 90 N. C. 154 (1884).

Validity of warrant of attachment is determined upon facts alleged in the original affidavit and existing at the time when the proceeding is instituted, not upon new matter which may have afterwards transpired. *Devries & Co. v. Summit*, 86 N. C. 126 (1882).

Court May Find Facts.—In attachment and other ancillary proceedings it is competent for the court to find the facts from the affidavits and other evidence; and a party consenting to this mode of trial cannot afterwards demand a jury trial. *Pasour v. Lineberger*, 90 N. C. 159 (1884).

An appeal lies from the refusal to dismiss an attachment. *Sheldon v. Kivett*, 110 N. C. 408, 14 S. E. 970 (1892); *Fertilizer Co. v. Grubbs*, 114 N. C. 470, 19 S. E. 597 (1894); *Judd v. Crawford Gold Mining Co.*, 120 N. C. 397, 27 S. E. 81 (1897).

Appeal Takes Case from Jurisdiction of Court Below. — Where an appeal is taken from a refusal to discharge an attachment, the court below cannot in the meantime allow a motion "to dismiss" the same to be entered, for the appeal takes the case out of its jurisdiction. *Pasour v. Lineberger*, 90 N. C. 159 (1884).

When Facts Must Be Set Out.—The superior court judge is not required to set out the facts upon which he has vacated an attachment levied on the defendant's property, unless the party, appealing and complaining of the ruling of law, requests him to find the facts necessary to give him the benefit of his exceptions. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008 (1912).

When Findings of Fact Not Reviewable.—On appeal it will be presumed that the superior court judge found facts sufficient to support his order vacating an attachment on the debtor's property, when they do not appear of record; and any facts found by him, so appearing, are not reviewable. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008 (1912).

The findings of fact of the clerk of the superior court, on a motion to vacate an attachment, supported by the evidence and approved by the judge, are not subject to review on appeal to the Supreme Court. *Brann v. Hanes*, 194 N. C. 571, 140 S. E. 292 (1927).

Decision is Res Judicata.—A decision on a motion to vacate an attachment is res judicata until reversed. *Roulhac v. Brown*, 87 N. C. 1 (1882); *Pasour v. Lineberger*, 90 N. C. 159 (1884); *Morganton Manufacturing, etc., Co. v. Lumber Co.*, 177 N. C. 404, 99 S. E. 104 (1919).

Proceedings upon Vacating Attachment.—In an action under the former statute it was said that when the court vacated the attachment and taxed the plaintiffs with the costs of the attachment proceedings, and then gave judgment in favor of the plaintiffs for the debt and the costs of the action other than the costs awarded to the defendant, its jurisdiction and power were exhausted. Nothing else could be done except, perhaps, to make an order for the return of the property seized under the attachment if the provision in the former statute requiring the return of the property was not self-executing (*Devries & Co. v.*

Summit, 86 N. C. 126 (1882)), and such an order was necessary. The general practice was to insert such a direction to the sheriff in the order vacating the attachment.

Mahoney v. Tyler, 136 N. C. 40, 48 S. E. 549 (1904), citing Jackson, etc., Co. v. Burnett, 119 N. C. 195, 25 S. E. 868 (1896).

§ 1-440.37. **Modification of the order of attachment.**—At any time before judgment in the principal action, the defendant may apply to the clerk or the judge for an order modifying the order of attachment. Such motion shall be heard upon affidavits. If the order is modified, the court making the order of modification shall make such provisions with respect to bonds and other incidental matters as may be necessary to protect the rights of the parties. (1947, c. 693, s. 1.)

§ 1-440.38. **Stay of order dissolving or modifying an order of attachment.**—Whenever a plaintiff appeals from an order dissolving or modifying an order of attachment, such order shall be stayed and the attachment lien with respect to all property theretofore attached shall remain in effect until the appeal is finally disposed of. In order to protect the defendant in the event that an order dissolving or modifying an order of attachment is affirmed on appeal, the court from whose order the appeal is taken may, in its discretion, require the plaintiff to execute and deposit with the clerk an additional bond with sufficient surety and in an amount deemed adequate by the court to indemnify the defendant against all losses which he may suffer on account of the continuation of the lien of the attachment pending the determination of the appeal. (1947, c. 693, s. 1.)

§ 1-440.39. **Discharge of attachment upon giving bond.**—(a) Any defendant whose property has been attached may move, either before the clerk or the judge, to discharge the attachment upon his giving bond for the property attached. If no prior general appearance has been made by such defendant, such motion shall constitute a general appearance.

(b) The court hearing such motion shall make an order discharging such attachment upon such defendant's filing a bond as follows:

- (1) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of a greater value than the amount claimed by the plaintiff, the court shall require a bond in double the amount of the judgment prayed for by the plaintiff, and the condition of such bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff the amount of the judgment and all costs that the defendant may be ordered to pay, the surety's liability, however, to be limited to the amount of the bond.
- (2) If it is made to appear to the satisfaction of the court by affidavit that the property attached is of less value than the amount claimed by the plaintiff, the court shall, upon affidavits filed, determine the value thereof and shall require a bond in double the amount of such value, and the condition of the bond shall be that if judgment is rendered against the defendant, the defendant will pay to the plaintiff an amount equal to the value of such property.

(c) If a bond is filed as provided in subsection (b) of this section, all property of such defendant then remaining in the possession of the sheriff pursuant to such attachment, including, but not by way of limitation, money collected and the proceeds of sales, shall be delivered to the defendant and shall thereafter be free from the attachment.

(d) The discharge of an attachment as provided by this section does not bar the defendant from exercising any right provided by §§ 1-440.36, 1-440.37 or 1-440.40. (1947, c. 693, s. 1.)

Cross Reference. — As to recovery on § 1-440.46.

bond, under former statutes, see note to **Editor's Note.**—All of the cases in the

following note were decided under superseded §§ 1-455 through 1-457, which provided for vacation of an attachment upon defendant's giving an undertaking, or under earlier statutes of similar import.

Property Retained in Custody unless Replevied.—Under the former statute the property attached remained in the custody of the court to await the determination of the action unless replevied. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

By giving the undertaking in the manner provided by former § 1-457, the debtor could procure the release of the attachment. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

Bond in Lieu of Attachment Lien.—Where attachment had been levied on the defendant's property necessary for the prosecution of his business, and upon his giving bond, he or his receiver was permitted by the court to continue operations, the giving of the bond was in lieu of the lien acquired in attachment, and analogous to the proceedings in discharge authorized by former §§ 1-456 and 1-457. *Martin v. McBryde*, 182 N. C. 175, 108 S. E. 739 (1921).

When Undertaking Unnecessary.—The undertaking required in former § 1-457 was not necessary when the warrant on its face appeared to have been issued irregularly, or for a cause insufficient in law or false in fact. *Bear v. Cohen*, 65 N. C. 511 (1871); *Devries & Co. v. Summit*, 86 N. C. 126 (1882).

When an attachment on the debtor's property had been vacated by the superior court judge, the defendant was not required to give the undertaking under former § 1-457 to regain possession of the property. *Coharie Lumber Co. v. Buhmann*, 160 N. C. 385, 75 S. E. 1008 (1912).

Effect of Undertaking as Waiver or Estoppel.—Giving the undertaking by defendant under former § 1-457 was equivalent to a general appearance in the action, and waived certain irregularities. It estopped the defendant from denying ownership of the property levied on, but not from traversing the truth of the allegation on which the attachment was based. Giving the undertaking did not waive the validity of the statutory ground of attachment. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

Hearing as to Validity of Ground of Attachment.—When defendant gave the undertaking under former § 1-457 the matter of the validity of statutory ground on which attachment was procured might be

heard before the trial of the main issue, but, if demand was made, it might be heard before the trial of the merits or it might be tried with the main issue. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

Payment to Defendant of Proceeds of Sale.—The sales of property mentioned in former §§ 1-456 and 1-468, relating to payment to the defendant of the proceeds of sale, had reference to those made before the attachment was vacated, as, for instance, sales made under the order of the court when the property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549 (1904).

Restitution of Property.—Former § 1-456, providing for the restitution of property upon an order dissolving the attachment, did not apply to cases where there had been a sale or transfer of the property by the defendant to the plaintiff after the levy of the attachment. *Jackson, etc., Co. v. Burnett*, 119 N. C. 195, 25 S. E. 868 (1896).

Notwithstanding the dissolution of an attachment, the plaintiff, who claimed that the property has been transferred to him by the defendant after the levy of the warrant, was entitled to have submitted to the jury an issue as to the ownership of the property. *Jackson, etc., Co. v. Burnett*, 119 N. C. 195, 25 S. E. 868 (1896).

Refusal of Sheriff to Deliver Property.—If the sheriff failed or refused to deliver the property after discharge of the attachment as provided in former § 1-456, the defendant could perhaps apply to the court and obtain an order requiring him to do so, or could sue the sheriff and his sureties for the default, but the plaintiff would not be liable. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549 (1904).

Discharge of Surety.—When defendant in attachment entered a general appearance and traversed the allegations of fraudulent concealment of his property upon which the attachment was based, and gave bond to retain possession of the property attached, and upon the trial the issue as to fraud was found in his favor, the surety on the bond was discharged from liability, and it was not necessary that a motion to vacate the attachment should have been previously made. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

When the surety signed a bond under

former § 1-457, it was held that he entered into the obligation with reference to the cause as it then stood, so when a new element of liability was introduced by an

amendment, the surety was discharged. *Rushing v. Ashcraft*, 211 N. C. 627, 191 S. E. 332 (1937).

§ 1-440.40. Defendant's objection to bond or surety.—(a) At any time before judgment in the principal action, on motion of the defendant, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of the plaintiff.

(b) At any time before judgment in the principal action the defendant may except to any surety upon any bond given by the plaintiff pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings. (1947, c. 693, s. 1.)

Cross Reference. — As to appeal from order of clerk denying motion to increase security, see notes to §§ 1-274 and 1-275.

Vacation in Case Increased Bond Not Filed. — The judge of the superior court had the power to order the plaintiff to give further security or an increased bond, under former § 1-469, relating to motions to

vacate the attachment or increase the security, but he could not add a condition to the order that the attachment be vacated ipso facto if the increased bond was not filed by a certain time. The plaintiff would be given a reasonable time for filing the bond. *Luff v. Levey*, 203 N. C. 783, 166 S. E. 922 (1932).

§ 1-440.41. Defendant's remedies not exclusive.—The exercise by the defendant of any one or more rights provided by §§ 1-440.36 through 1-440.40 does not bar the defendant from exercising any other rights provided by those sections. (1947, c. 693, s. 1.)

Stated in *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

§ 1-440.42. Plaintiff's objection to bond or surety; failure to comply with order to furnish increased or new bond.—(a) At any time before judgment in the principal action, on motion of the plaintiff, the clerk or judge may, if he deems it necessary in order to provide adequate protection, require an increase in the amount of the bond previously given by or required of any defendant, garnishee or intervenor.

(b) At any time before judgment in the principal action the plaintiff may except to any surety upon any bond given by any defendant, garnishee or intervenor pursuant to the provisions of this article, in which case the surety shall be required to justify, and the procedure with respect thereto shall be as is prescribed for the justification of bail in arrest and bail proceedings.

(c) Upon failure of a defendant, garnishee or intervenor to comply with an order requiring an increase in the amount of a bond previously given, or upon failure to comply with an order requiring a new bond when the surety on the previous bond is unsatisfactory, the court may, in addition to any other action with respect thereto, issue an order of attachment directing the sheriff to seize and take into his possession property released upon the giving of the previous bond, if the person failing to comply with the order still has possession of the same. Such property when retaken into his possession by the sheriff shall be subject to all the provisions of this article relating to attached property. (1947, c. 693, s. 1.)

§ 1-440.43. Remedies of third person claiming attached property or interest therein.—Any person other than the defendant who claims property which has been attached, or any person who has acquired a lien upon or an interest in such property, whether such lien or interest is acquired prior to or subsequent to the attachment, may

(1) Apply to the court to have the attachment order dissolved or modified,

or to have the bond increased, upon the same conditions and by the same methods as are available to the defendant, or

- (2) Intervene and secure possession of the property in the same manner and under the same conditions as is provided for intervention in claim and delivery proceedings. (1947, c. 693, s. 1.)

Cross Reference.—As to interpleader in claim and delivery, see § 1-482 and note.

Editor's Note.—All of the cases in the following note were decided under superseded § 1-471, which was substantially similar to paragraph (2) of this section, or under earlier statutes of similar import.

Remedies of Claimant. — Under the former statutes, one whose property had been attached by a sheriff, under a warrant issued in an action to which he was not a party, could intervene or interplead in the action, and demand judgment that he was the owner of the property, and an order directing the sheriff to release the property under former § 1-471. Or he could bring an action against the sheriff and the sureties on his official bond for the property or for damages for its conversion. *Stein v. Cozart*, 122 N. C. 280, 30 S. E. 340 (1898). Or he could bring an action against the plaintiffs at whose instance the warrant was issued, and the property wrongfully seized, joining the sheriff as a defendant or not as he saw fit; if the sheriff had taken an indemnity bond, he could sue the obligor and the sureties on such bond. *Martin v. Buffalo*, 128 N. C. 305, 38 S. E. 902 (1901); *Gay v. Mitchell*, 146 N. C. 509, 60 S. E. 426 (1908); *Tyler v. Mahoney*, 168 N. C. 237, 84 S. E. 362 (1915); *Tatham v. Dehart*, 183 N. C. 657, 112 S. E. 430 (1922); *Flowers v. Spears*, 190 N. C. 747, 130 S. E. 710 (1925).

Where Defendant Held Property as Agent. — Where the evidence tended to show that a defendant held property levied on as agent for another, such third person should be allowed to be made a party.

Farmers' Bank, etc., Co. v. Murphy, 189 N. C. 479, 127 S. E. 527 (1925).

Separate Trial. — In attachment under the former statute a separate trial for the intervenor was discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

Burden of Proving Title. — In attachment the burden was on the intervenor to establish title to the property. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

Objection to Irregularity of Attachment Proceedings.—Under the former statute it was held that parties who intervened in attachment proceedings could not be heard to object to the irregularity of the same, that being a matter between the parties to the main action. *Cook v. New York Condominium Min. Co.*, 114 N. C. 617, 19 S. E. 664 (1894).

An intervenor in an action wherein attachment on the defendant's property had been issued, who claimed a prior lien by reason of a former order of court in another and independent proceeding, became party to the action and could not successfully attack the validity of the proceedings in attachment, and the question of priority was left to be determined in the action. *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921).

Under the former statute an intervenor had no right to interfere in the action between the original parties, since he was interested only as to the title to the property. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

§ 1-440.44. When attached property to be sold before judgment.—

(a) The sheriff shall apply to the clerk or to the judge for authority to sell property, or any share or interest therein, seized pursuant to an order of attachment,

(1) If the property is perishable, or

(2) If the property is not perishable, but

a. Will materially deteriorate in value pending litigation, or

b. Will likely cost more than one-fifth of its value to keep pending a final determination of the action, and

c. Is not discharged from the attachment lien in the manner provided by § 1-440.39 within ten days after the seizure thereof.

(b) If the court so orders, the property described in subsection (a) of this section shall thereupon be sold under the direction of the court unless the discharge of the same is secured by the defendant or other person interested therein, in the manner provided by § 1-440.39, prior to such sale. The proceeds of such sale shall

be liable for any judgment obtained in the principal action and shall be retained by the sheriff to await such judgment. (1947, c. 693, s. 1.)

Sale of Third Party's Goods. — Where an attachment was levied upon the goods of a third party which, being perishable, were sold by the sheriff, and the third party interpleaded in the action and recovered judgment, the costs and expenses of the attachment, sale, etc., were not properly chargeable against the fund arising from such sale. *Haywood v. Hardie*, 76 N. C. 384 (1877), decided under a former stat-

ute similar to this section.

An intervener obtaining the possession of property attached by giving a replevy bond could not sell part of the property, such sale not being made as provided by superseded § 1-454, similar to this section, and claim the right to pay for the part sold and return the balance thereof. *Bulluck v. Haley*, 198 N. C. 355, 151 S. E. 731 (1930).

Part 6. Procedure after Judgment.

§ 1-440.45. When defendant prevails in principal action.—(a) If the defendant prevails in the principal action, or if the order of attachment is for any reason dissolved, dismissed or set aside, or if service is not had on the defendant as provided by § 1-440.7,

- (1) The defendant shall be entitled to have delivered to him
 - a. All bonds taken for his benefit whether filed in the proceedings or taken by an officer, and
 - b. The proceeds of any sales and all money collected, and
 - c. All attached property remaining in the officer's hands, and
- (2) Any garnishee shall be entitled to have vacated any judgment theretofore taken against him.

(b) Either the clerk or the judge shall have authority, upon motion of the defendant or any garnishee, to make any such order as may be necessary or proper to carry out the provisions of subsection (a) of this section.

(c) Upon judgment in his favor in the principal action, the defendant may thereafter, by motion in the cause, recover on any bond taken for his benefit therein, or he may maintain an independent action thereon. (1947, c. 693, s. 1; 1951, c. 837, s. 8.)

Editor's Note.—The 1951 amendment rewrote subsection (c).

Most of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 through 1-471, or under earlier statutes.

Prior to 1947, there was no provision in this article for the assessment of damages in the original action against the plaintiff and his surety for the wrongful issuance of a warrant of attachment. The defendant was compelled to pursue his remedy by independent action after the groundlessness of the action or the ancillary writ was judicially determined. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

Claim on Bond May Not Be Heard at Original Hearing.—Subsection (c) of this section does not mean that defendant's claim against plaintiff's bond may be heard and damages assessed at the original hearing. It provides instead that such damages are to be assessed in the same action, at the election of the defendant, after judgment on the main issue. Defendant's cause of action on the bond is bottomed on the wrongful issuance of the writ. The ground-

lessness of the writ is an essential element of his right to damages and this cannot completely exist or appear until that fact is judicially determined either by judgment vacating the writ or judgment against the plaintiff in the main action. Then only does defendant's cause of action on the bond arise and become complete. His proper remedy is by motion in the cause after judgment. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

Remedy Is by Motion after Judgment or Subsequent Independent Action. — Where it is determined upon the trial of the main issue that plaintiff's averment upon which attachment was issued was false, defendant may have damages assessed for the wrongful attachment either upon motion in the cause after judgment or by subsequent independent action. *Whitaker v. Wade*, 229 N. C. 327, 49 S. E. (2d) 627 (1948).

When Limitations Begin to Run on Action on Bond.—In an action to recover on the bond given by the creditor and his surety in attachment proceedings for a wrongful levy therein, the statute of limitations began to run from the rendition of

the judgment and not from the time the property was replevied. The recovery of the judgment in the former action was the condition authorizing the suit, and a vacation of the attachment. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481 (1912).

Misjoinder of Principal and Surety.—An action would not be dismissed for a misjoinder of parties where the plaintiff was suing, in the same action, the principal and surety on an attachment bond given under the former statute. The remedy was by motion to have the causes divided. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481 (1912).

Creditor Not Liable on Bond for Sheriff's Failure.—An attaching creditor under the former statute was not liable on his bond for the failure of the sheriff to perform his duty relative to the attached property. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549 (1904).

Recovery of Expenses Incurred by Defendant in Procuring Bond.—In an action to recover on an attachment bond given under the former statute for the wrongful levy therein, damages might be awarded for the reasonable expense the plaintiff,

who was the defendant in the attachment proceedings, had incurred in procuring the undertaking he had given to obtain the release of the property attached. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481 (1912).

Traveling Expenses and Value of Time.—Damages could not be recovered in an action for a wrongful levy in attachment under the former statute for railroad and traveling expenses, and the value of the plaintiff's time in procuring the release of his property. *Smith v. American Bonding Co.*, 160 N. C. 574, 76 S. E. 481 (1912).

Delivery of Property and Proceeds of Sales.—The sales of property mentioned in former § 1-468, requiring delivery of property or proceeds of sale to defendant upon his recovery, referred to those before the attachment was vacated, as for instance sales made under the order of the court when property was perishable. The sheriff had no right, after the attachment had been vacated, to sell any property seized by him, as it then became his duty to deliver at once to the defendant all property in his hands. *Mahoney v. Tyler*, 136 N. C. 40, 48 S. E. 549 (1904).

§ 1-440.46. When plaintiff prevails in principal action.—(a) If judgment is entered for the plaintiff in the principal action, the sheriff shall satisfy such judgment out of money collected by him or paid to him in the attachment proceeding or out of property attached by him as follows:

- (1) After paying the costs of the action, he shall apply on the judgment as much of the balance of the money in his hands as may be necessary to satisfy the judgment.
- (2) If the money so applied is not sufficient to pay the judgment in full, the sheriff shall, upon the issuance of an execution on the judgment, sell sufficient attached property, except debts and evidences of indebtedness to satisfy the judgment.
- (3) While the judgment remains unsatisfied, and notwithstanding the pendency of the sale of any personal or real property as provided by paragraph (2) of this subsection, the sheriff shall collect and apply on the judgment any debts or evidences of indebtedness attached by him.
- (4) If, after the expiration of six months from the docketing of the judgment, the judgment is not fully satisfied, the sheriff shall, when ordered by the clerk or judge, as provided in subsection (b) of this section, sell all debts and notes and other evidences of indebtedness remaining unpaid in his hands, and shall apply the net proceeds thereof, or as much thereof as may be necessary, to the satisfaction of the judgment. To forestall the running of the statute of limitations, earlier sale may be ordered in the discretion of the court.

(b) In order to secure the sale of the remaining debts and evidences of indebtedness as provided in subsection (a) (4) of this section, the plaintiff may move therefor, either before the clerk or the judge, and shall submit with his motion

- (1) His affidavit setting forth fully the proceedings had by the sheriff since the service of the attachment, listing or describing the property attached, and showing the disposition thereof, and

- (2) The affidavit of the sheriff that he has endeavored to collect the debts or evidences of indebtedness and that there remains uncollected some part thereof.

Upon the filing of such motion, the court to which the motion is made shall give the defendant or his attorney such notice of the hearing thereon as the court may deem reasonable, and by such means as the court may deem best. Upon the hearing, the court may order the sheriff to sell the debts and other evidences of indebtedness remaining in his hands, or may make such other order with respect thereto as the court may deem proper.

(c) In case of the sale of a share of stock of a corporation or of property in a warehouse for which a negotiable warehouse receipt has been issued, the sheriff shall execute and deliver to the purchaser a certificate of sale therefor, and the purchaser shall have all the rights with respect thereto which the defendant had.

(d) Upon judgment in his favor in the principal action, the plaintiff is entitled to judgment on any bond taken for his benefit therein.

(e) When the judgment and all costs of the proceedings have been paid, the sheriff, upon demand of the defendant, shall deliver to the defendant the residue of the attached property or the proceeds thereof. (1947, c. 693, s. 1; 1951, c. 837, s. 9.)

Editor's Note. — The 1951 amendment changed the designation of former subsection (d) to (e), and inserted present subsection (d).

All of the cases in the following note were decided under the former attachment statute, superseded §§ 1-440 through 1-471, or under earlier statutes.

Property Held Until Final Judgment.—The first paragraph of former § 1-466, which was similar to the first paragraph of this section, indicated that the property was held until final judgment and the sheriff could collect from a garnishee against whom judgment was entered. *Newberry v. Meadows Fertilizer Co.*, 206 N. C. 182, 173 S. E. 67 (1934).

Property in Possession of Third Party.—Where a person in possession of property was not a party to an attachment suit brought under the former statute, the plaintiff, in addition to a judgment for his debt, was not entitled to a judgment for such property, but must proceed under former § 1-466. *Electric Co. v. Engineering Co.*, 128 N. C. 199, 38 S. E. 831 (1901).

Judgment against Nonresident.—No judgment in personam may be entered or enforced against a nonresident who has not been personally served with summons. *Johnson v. Whilden*, 166 N. C. 104, 81 S. E. 1057 (1914).

Where Nonresident Had No Actual Notice.—A nonresident defendant in attachment proceedings under the former statute, against whom judgment had been rendered under service of summons by publication, and who had not had actual notice of the action until after the judgment had been rendered, could, as a matter of right upon showing that he had a good and meritori-

ous defense, have the judgment vacated by motion within the statutory period, and he could avail himself of any defense he originally had. *Page v. McDonald*, 159 N. C. 38, 74 S. E. 642 (1912).

Power and Duty of Sheriff.—The attachment is simply a levy before judgment, and upon execution issuing on a judgment it is the duty of the sheriff to sell the attached property. *Gamble v. Rhyne*, 80 N. C. 183 (1879); *Farmers Manufacturing Co. v. Steinmetz*, 133 N. C. 192, 45 S. E. 552 (1903); *Morganton Mfg., etc., Co. v. Lumber Co.*, 177 N. C. 404, 99 S. E. 104 (1919).

Former § 1-466 gave an express direction to the sheriff to sell the property previously levied on by him under the attachment, and invested him with as much power and authority to act in the premises as if an execution, in the form of a venditioni exponas, had been issued to him, specially commanding him to sell the particular property. *Electric Co. v. Engineering Co.*, 128 N. C. 199, 38 S. E. 831 (1901); *Chemical Co. v. Sloan*, 136 N. C. 122, 48 S. E. 577 (1904); *May v. Getty*, 140 N. C. 310, 53 S. E. 75 (1905); *Morganton Mfg., etc., Co. v. Lumber Co.*, 177 N. C. 404, 99 S. E. 104 (1919).

Exemptions after Judgment.—Property seized under attachment is only a legal deposit in the sheriff to abide the event of the action, and after judgment against the defendant, he is entitled to the same exemptions in the property attached as he would have been had there been no attachment. *Gamble v. Rhyne*, 80 N. C. 183 (1879).

Sale Passes Only Right of Defendant.—A sale under an execution issuing upon a judgment on an attachment only passed the right of the defendant in attachment.

Electric Co. v. Engineering Co., 128 N. C. 199, 38 S. E. 831 (1901).

Necessity for Separate Action on Undertaking.—Under the former statute it was held that by consent a surety on an undertaking on attachment could come in and the matter of the validity of the grounds of attachment be determined in one action; otherwise a separate action must be brought on the undertaking. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928).

No summary judgment against the surety on the undertaking under former § 1-457 could be rendered. *Bizzell v. Mitchell*, 195 N. C. 484, 142 S. E. 706 (1928); *Hoft v. Coastwise Shipping, etc., Co.*, 215 N. C. 690, 3 S. E. (2d) 20 (1939).

Surety Concluded from Asserting Insufficiency of Bond.—Where judgment by default final had been rendered against the principal debtor and the surety on an attachment bond given in the action in the form required by former § 1-457 to secure whatever judgment might be rendered, and the property attached had accordingly been retained by the debtor, the surety was concluded from asserting the insufficiency of the bond in not having another surety thereon, as the statute required, when the bond was given and accepted as he had intended, and he had not excepted thereto. *Thompson v. Dillingham*, 183 N. C. 566, 112 S. E. 321 (1922).

Part 7. Attachments in Justice of the Peace Courts.

§ 1-440.47. Powers of justice of the peace; procedure.—(a) A justice of the peace has the same powers with respect to attachment proceedings in actions of which he has jurisdiction which a clerk or judge of the superior court has with respect to attachment proceedings in actions of which the superior court has jurisdiction.

(b) The procedure with respect to attachment in courts of justices of the peace shall conform as nearly as practicable to the procedure of the superior court, and the statutes relating to attachment in the superior court shall be in effect and shall govern the procedure in so far as it is practicable to apply them except as otherwise provided in §§ 1-440.48 through 1-440.56 of this article. (1947, c. 693, s. 1.)

Wrongful Issue of Attachment by Justice.—An attachment wrongfully issued from the justice's court against a citizen of the State, transiently absent, is remedied by recordari. *Merrell v. McHone*, 126 N. C. 528, 36 S. E. 35 (1900), decided under superseded § 1-451, relating to warrant in attachment issued by justice of the peace.

Jurisdiction to Try Interplea to Determine Title to Property.—Attachment pro-

ceedings relating to personal property, being only ancillary to the main action, a justice of the peace may entertain and try an interplea to determine the title, although the value of the property exceeds \$50. *Grambling, etc., & Co. v. Dickey*, 118 N. C. 986, 24 S. E. 671 (1896), decided under superseded § 1-471, relating to intervention in attachment.

§ 1-440.48. Return of order of attachment in justice of the peace courts.—The order of attachment shall not contain a return date but shall be returned to the justice of the peace who issued it. Such return must meet the requirements with respect to the return of orders of attachment issued in the superior court, as provided by § 1-440.16. (1947, c. 693, s. 1.)

§ 1-440.49. To whom order issued by justice of the peace is directed.—An order of attachment issued by a justice of the peace may be directed to any constable or other lawful officer of a county, who shall have the same powers and duties with respect thereto which the sheriff has with respect to an order of attachment issued by the superior court. (1947, c. 693, s. 1.)

§ 1-440.50. Issuance of order by justice of the peace to another county.—When a justice of the peace issues an order of attachment to a county other than his own, such order may not be served in such county unless there is endorsed on or attached to the order the certificate of the clerk of the superior court of the justice's county certifying that the justice issuing the order is a justice of the peace and that the signature on the order is in the handwriting of

the justice. It is the duty of the clerk of the superior court to issue such certificate upon application and the payment of the fee therefor. (1947, c. 693, s. 1.)

§ 1-440.51. Notice of attachment in justice of the peace courts when no personal service.—When an order of attachment is issued by a justice of the peace and there is no personal service of the summons on the defendant against whom the attachment is issued, notice of the attachment need not be published in a newspaper, but, between the issuance of the order and the trial of the principal action, notice of the attachment must be posted for thirty days at the county courthouse door. Such notice shall state:

- (1) The county and the township and the name of the justice of the peace before whom the action is pending,
- (2) The names of the parties,
- (3) The purpose of the action, and
- (4) The fact that on a date specified an order of attachment was issued against the defendant. (1947, c. 693, s. 1.)

Warrant and Summons Distinguished.—Superseded § 1-448, relating to service and content of notice of attachment, provided that in attachment proceedings in a justice's court, advertisement in a newspaper should not be necessary, but advertisement at the courthouse door and four other public places in the county for four successive weeks should be sufficient publication, both as to the summons and warrant of attachment. It was said that this permitted the incorporation of the warrant of attachment to be made in the summons, not the summons in the warrant. The summons was an official process, and must be signed and issued by the justice of the peace, whether its service was to be made personally or by publication, while the warrant, if not incorporated in the summons as above provided, was not official and might be signed by the plaintiff himself, and if not taken

out at the time of issuing the summons, had to be served separately. *Ditmore v. Goins*, 128 N. C. 325, 39 S. E. 61 (1901).

Section 7-136 Held Inapplicable.—Under the former statute it was held that, in attachment and publication on a nonresident defendant before a justice of the peace, where the defendant's property within the jurisdiction of the court had been levied on, a summons was not required; and therefore the requirements of § 7-136, that the summons must be made returnable not more than thirty days after its issuance, were inapplicable. *Best v. British, etc., Mortg. Co.*, 128 N. C. 351, 38 S. E. 923 (1901), affirmed in *Grocery Co. v. Collins Bag Co.*, 142 N. C. 174, 55 S. E. 90 (1906), and *Currie v. Golconda Min., etc., Co.*, 157 N. C. 209, 72 S. E. 980 (1911). *Mills v. Hansel*, 168 N. C. 651, 85 S. E. 17 (1915).

§ 1-440.52. Allowance of time for attachment and garnishment procedure in justice of the peace courts.—In order that sufficient time may be allowed in any action before a justice of the peace for the parties to exercise such rights with respect to attachment and garnishment as are hereinbefore provided for, within the same periods of time as are allowed therefor in the superior court, the justice of the peace before whom the principal action has been, or is being, commenced has all such powers with respect to fixing the time for the defendant to appear and answer, granting continuances and fixing the time for the trial, as may be necessary or proper for that purpose, notwithstanding the provisions of §§ 7-136 and 7-149, Rule 15. (1947, c. 693, s. 1.)

§ 1-440.53. Certificates of stock and warehouse receipts; restraint of transfer not authorized in justice of the peace courts.—Nothing in this article is intended to authorize any justice of the peace to restrain or enjoin the transfer of a certificate of stock or a warehouse receipt. (1947, c. 693, s. 1.)

§ 1-440.54. Procedure in justice of the peace courts when land attached.—(a) Upon securing the issuance of an order of attachment by a justice of the peace, a plaintiff may cause notice of the issuance of the order to be filed with the clerk of the court of any county in which the plaintiff believes that the defendant has real property which is subject to levy pursuant to such

order of attachment. Upon receipt of such notice the clerk shall promptly docket the same on the *lis pendens* docket.

(b) A justice of the peace has no authority to issue an execution to sell real property attached in any action commenced in his court. Whenever in any such action real property has been attached, the justice of the peace, upon rendering judgment in the principal action, shall deliver to the clerk of the superior court of his county a copy of the judgment rendered by him together with the original order of attachment.

(c) If judgment was rendered against the defendant whose property was attached, the clerk shall docket the judgment and shall thereupon issue execution directing the sale of the real property attached as shown by the officer's return made pursuant to § 1-440.17, or so much thereof as may be necessary to satisfy the judgment. If judgment was not rendered against the defendant whose property was attached, the clerk shall make an entry on his judgment docket showing the discharge of the attachment.

(d) Notwithstanding the lack of authority of the justice of the peace to issue an execution to sell real property, the levy of the attachment issued by him on real property constitutes a lien on such property, but only under the conditions provided by § 1-440.33. (1947, c. 693, s. 1.)

Attachment issued by a justice creates a lien from its levy, and not merely from docketing of the judgment in the superior court. *Morefield v. Harris*, 126 N. C. 626,

36 S. E. 125 (1900), decided under superseded § 1-453, relating to justice's attachment against land.

§ 1-440.55. Trial of issue of fact in justice of the peace court.—When an issue of fact is raised pursuant to the provisions of § 1-440.28 or § 1-440.29, the justice of the peace may try such issue unless a jury trial is demanded. If a jury trial is demanded, proceedings with respect thereto shall be conducted as in other jury trials before a justice of the peace. (1947, c. 693, s. 1.)

§ 1-440.56. Jurisdiction with respect to recovery on bond in justice of the peace court.—Notwithstanding the provisions of § 1-440.45(c), the defendant may recover on the plaintiff's bond in the principal action in a court of the justice of the peace only when the amount of the bond does not exceed two hundred dollars (\$200.00). (1947, c. 693, s. 1.)

Part 8. Attachment in Other Inferior Courts.

§ 1-440.57. Jurisdiction of inferior courts not affected.—Nothing in this article shall be construed to change in any manner the jurisdiction of any court inferior to the superior court with respect to attachment. (1947, c. 693, s. 1.)

Part 9. Superseded Sections.

§§ 1-441 to 1-471: Superseded by Session Laws 1947, c. 693, codified as §§ 1-440.1 to 1-440.57.

ARTICLE 36.

Claim and Delivery.

§ 1-472. Claim for delivery of personal property.—The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons or at any time before answer, claim the immediate delivery of the property as provided in this article. (C. C. P., s. 176; Code, s. 321; Rev., s. 790; C. S., s. 830.)

In General. — Strictly speaking, there is no such action under the Code as "claim and delivery." The action is for the recovery of a specific chattel, and the delivery of the chattel is a provisional remedy,

ancillary, but not essential to such action. If the plaintiff see fit, delivery of the chattel may be waived, and the action prosecuted to recover possession of the chattel, as in the old action of detinue, or to re-

cover the value of the property, as in trover or trespass. *Jarman v. Ward*, 67 N. C. 32 (1872); *Allsbrook v. Shields*, 67 N. C. 333 (1872); *Hopper v. Miller*, 76 N. C. 402 (1877); *Wilson v. Hughes*, 94 N. C. 182 (1886).

Founded on Right to Possession. — Replevin (and the action of claim and delivery is but a longer name for the same thing) is founded on the right of the plaintiff to the possession of the property. If the defendant also claims the possession, the main issue is on that right, and the party establishing it will have judgment to retain or be restored to the possession, as the case may be. *Holmes v. Godwin*, 69 N. C. 467 (1873).

A Substitute for Common-Law Remedies. — Under this section the action of "claim and delivery" is a substitute for the action of replevin, if a bond is given by the plaintiff: if not, it is a substitute for the action of detinue or trover. *Jarman v. Ward*, 67 N. C. 32 (1872); *Hopper v. Miller*, 76 N. C. 402 (1877).

An Ancillary Remedy.—Under the State Constitution, Art. IV, § 1, there is but one form of action in civil cases. In that, many ancillary remedies may be asked, i. e., Arrest and Bail, Claim and Delivery, Injunction, Attachment, and Appointment of Receivers. These need not be asked, even if the party is entitled to them, *Wilson v. Hughes*, 94 N. C. 182 (1886), and if they are improperly asked they are simply denied or dismissed, but that does not affect the action itself, which goes on if the plaintiff is entitled to any other remedy. *DeLoatch v. Coman*, 90 N. C. 186 (1884); *Morris v. O'Briant*, 94 N. C. 72 (1886); *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916 (1895).

Adopted from New York Code. — This statutory remedy is adopted from the Code of New York. *Manix v. Howard*, 82 N. C. 125 (1880).

Statute Must Be Followed. — To entitle a party to maintain an action for claim and delivery of personal property, there must be a compliance with all the requisites specified in this and the following section. *Hirsh v. Whitehead & Co.*, 65 N. C. 516 (1871).

Object Is to Recover Specific Property. —The recovery of the thing itself, and not damages in lieu thereof, is the primary object of the suit, and the value is given only as an alternative when delivery of the specific property can not be had. *Hendley v. McIntyre*, 132 N. C. 276, 43 S. E. 824 (1903).

Who May Bring the Action. — One in

the rightful possession of property as bailee can maintain an action of claim and delivery against a wrongdoer who is depriving him of possession. *Hopper v. Miller*, 76 N. C. 402 (1877).

Same—Tenant.—The crop produced by a tenant being vested in the lessor until the rents shall be paid, he can maintain an action for recovery of an undivided portion thereof, and it is not necessary that he shall specifically designate in his complaint, or affidavit in claim and delivery, such undivided part. *Boone v. Darden*, 109 N. C. 74, 13 S. E. 728 (1891).

But one tenant in common of personal property may not maintain claim and delivery against a third person in possession without the other owners, it being required that the claimant show sole ownership. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276 (1926).

Same—Landlord.—Where, in a contract between the landlord and tenant, no time was fixed for the division of the crops, the landlord was not obliged to wait until the whole crop had been gathered, but had a right to bring his action for the possession of the crop before it was fully harvested. *Rich v. Hobson*, 112 N. C. 79, 16 S. E. 931 (1893). But see *State v. Copeland*, 86 N. C. 692 (1882); *Jordan v. Bryan*, 103 N. C. 59, 9 S. E. 135 (1889).

Same—Mortgagee. — After default and refusal to surrender possession to the mortgagee, the mortgagee becomes, in law, the absolute owner of the mortgaged property, though the mortgagor has the right to redeem, until the property is sold; and the mortgagee is entitled to the same remedy against him for the possession that he would have against any other person who has the possession of his property. *Kiser & Co. v. Blanton*, 123 N. C. 400, 31 S. E. 878 (1898).

Same—Assignee of Chattel Mortgage.—The assignee of a chattel mortgage may maintain proceedings in claim and delivery for the possession of the mortgaged property or for its value, etc., in his own name and right, after the note secured by the mortgage is overdue and remains unpaid. *Johnson v. Bray*, 174 N. C. 176, 93 S. E. 728 (1917).

Against Party in Possession.—An action for the possession of property must be brought against the party in possession. *Haughton v. Newberry*, 69 N. C. 456 (1873); *Webb v. Taylor*, 80 N. C. 305 (1879); *Moore v. Brady*, 125 N. C. 35, 34 S. E. 72 (1899); *General Motors Accept. Corp. v. Waugh*, 207 N. C. 717, 178 S. E. 85 (1935).

Claim and delivery is not maintainable against one who has neither possession nor control of the property sought to be recovered, but who has sold and delivered it to another party. *Webb v. Taylor*, 80 N. C. 305 (1879), citing *Jones v. Green*, 20 N. C. 488 (1839); *Charles v. Elliott*, 20 N. C. 606 (1839); *Slade v. Washburn*, 24 N. C. 414 (1842); *Foscue v. Eubank*, 32 N. C. 424 (1849); *Haughton v. Newberry*, 69 N. C. 456 (1873).

Recovery of Title Deed.—Claim and delivery will lie for the recovery of a title deed if the controversy does not involve the determination of the title to the land conveyed by it. *Pasterfield v. Sawyer*, 132 N. C. 258, 43 S. E. 799 (1903).

Where Crops Removed.—The action will lie where the crops are removed from the land leased. *Livingston v. Farish*, 89 N. C. 140 (1883).

Crops on Wife's Land.—Claim and delivery will not lie for crops produced on wife's land, under a crop lien given by husband without her consent. *Rawlings v. Neal*, 126 N. C. 271, 35 S. E. 597 (1900).

Where Nature of Goods Changed.—If a person bestows his labor upon the property of another, thereby changing it into another species of article (as if corn be made into whiskey, prior to prohibition acts, etc.), the property is changed, and the owner of the original material cannot recover the article in its altered condition, but is only entitled to its value in the shape in which it was taken from him. *Potter v. Mardre*, 74 N. C. 36 (1876).

Statute of Limitations Applies.—The three-year statute of limitations in § 1-52 is also applicable to an action of claim and delivery. Hence where a note was given in payment for personal property and the statute of limitations had run on the note

no action of claim and delivery could be maintained. *Lester Piano Co. v. Loven*, 207 N. C. 96, 176 S. E. 290 (1934).

Jurisdiction of Justice.—Where plaintiff, in an action before a justice of the peace to recover \$75 due for rent, alleged that defendant wrongfully detained the crop on which the rent was a lien, and incidentally asked for a delivery of the crop which was not alleged to be worth "not more than fifty dollars," the justice of the peace was not deprived of jurisdiction by such allegation and prayer. *Hargrove v. Harris*, 116 N. C. 418, 21 S. E. 916 (1895).

Trial by Jury.—Where the evidence is conflicting as to the plaintiff's sole ownership of the personal property in claim and delivery, the question is one for the jury. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276 (1926).

Judgment.—Where claim and delivery is brought to get possession of property for the purpose of selling it, according to the terms of a contract, to pay an indebtedness, and all parties interested are before the court and the amount due ascertained, the plaintiff upon recovering holds as a trustee, and a judgment, directing an adjustment of all the equities involved in order that the matter may be determined, is the proper one to be rendered; and if possession of the property cannot be had, then the judgment should be in the alternative. *Austin v. Secrest*, 91 N. C. 214 (1884).

In claim and delivery the judgment should be for the delivery of the property or its value. *Oil Co. v. Grocery Co.*, 136 N. C. 354, 48 S. E. 781 (1904).

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621 (1928); *C. I. T. Corp. v. Watkins*, 208 N. C. 448, 181 S. E. 270 (1935).

§ 1-473. Affidavit and requisites.—Where a delivery is claimed, an affidavit must be made before the clerk of the court in which the action is required to be tried or before some person competent to administer oaths, by the plaintiff, or some one in his behalf, showing—

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is lawfully entitled to its possession by virtue of a special property therein, the facts in respect to which must be set forth.

2. That the property is wrongfully detained by the defendant.

3. The alleged cause of the detention, according to his best knowledge, information and belief.

4. That the property has not been taken for tax, assessment or fine, pursuant to a statute; or seized under an execution or attachment against the property of the plaintiff; or, if so seized, that it is, by statute, exempt from such seizure; and,

5. The actual value of the property. (C. C. P., s. 177; 1881, c. 134; Code, s. 322; Rev., s. 791; C. S., s. 831.)

Broad Language.—The words of this section are as broad as can well be imag-

ined, and include every case, with four specified exceptions, where the plaintiff makes

an affidavit that he is entitled to the possession of certain personal property, and that it is wrongfully detained by the defendant, and gives the "undertaking". *Jones v. Ward*, 77 N. C. 337 (1877).

Under this section there is no limitation or restriction put upon the plaintiff, who seeks to recover personal property and have the same immediately delivered to him, except that the same has not been taken for tax assessments or fines pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, or, if seized, that it is by statute exempt from such seizure. The language of the Code is immensely broader in its scope than the language of the Revised Statutes on the subject in hand. *Mitchell v. Sims*, 124 N. C. 411, 32 S. E. 735 (1899).

Rights Conferred. — Under this section when the immediate delivery of the property is sought, the broad language of the statute gives the right to the claimant, upon his executing the bond required by law, to take the property from the possession of any person, even from an officer of the law. *Mitchell v. Sims*, 124 N. C. 411, 32 S. E. 735 (1899).

When Section Applies. — It is only in cases when the plaintiff seeks to have the property delivered to him *instantly*, and to have the possession pending the action, as in the old action of *replevin*, that the affidavit and undertakings are required. *Jar-*

man v. Ward, 67 N. C. 32 (1872).

Affidavit Essential. — The affidavit required by the Code is indispensable to maintain claim and delivery. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620 (1900).

Affidavit Must Comply with Section. — In making the affidavit this section must be strictly followed. *Hirsh v. Whitehead*, 65 N. C. 516 (1871).

Plaintiff Should State Interest. — It seems that the plaintiff should set forth his special interest in the property. *Cooper v. Evans*, 174 N. C. 412, 93 S. E. 897 (1917).

Affidavit Made "Per" Another. — In claim and delivery of personal property, an affidavit made by plaintiff "per" another is sufficient. *Spencer v. Bell*, 109 N. C. 39, 13 S. E. 704 (1891).

Deputy Can Take Affidavit. — The deputy of the clerk of the superior court is authorized to take the affidavit of the plaintiff and to order the seizure of personal property in an action of claim and delivery. *Jackson v. Buchanan*, 89 N. C. 74 (1883).

Burden of Proof. — In claim and delivery proceedings the burden is on the plaintiff to establish a cause of action. *Smith v. Cook*, 196 N. C. 558, 146 S. E. 229 (1929).

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-474. **Order of seizure and delivery to plaintiff.**—The clerk of the court shall, thereupon, and upon the giving by the plaintiff of the undertaking prescribed in the succeeding section, by an indorsement in writing upon the affidavit, require the sheriff of the county where the property claimed is located, to take it from the defendant and deliver it to the plaintiff. (C. C. P., s. 178; Code, s. 323; Rev., s. 792; C. S., s. 832.)

Summons Necessary. — In an action for the claim and delivery of personal property, the issuing of a summons is necessary to give the clerk jurisdiction to make the order to the sheriff, requiring him to take such property and deliver the same to the plaintiff, and an order to that effect without such summons is no justification to the sheriff or the defendant for any action in the premises. *Potter v. Mardre*, 74 N. C. 56 (1876).

A Ministerial Act. — "In issuing the order, the clerk does not represent the court, whose officer he is, and as in numerous cases he is authorized to do, under the statute, but he performs a ministerial act; peremptorily enjoined, and exercises a function belonging to the office." *Jackson v. Buchanan*, 89 N. C. 74 (1883).

Same — Deputy Can Make Order. — It

was held in *Jackson v. Buchanan*, 89 N. C. 74 (1883), that the clerk of the superior court, in making the order of seizure of property in the provisional remedy of claim and delivery, only does a ministerial and not a judicial act or service, and therefore a deputy clerk might make such order. *Evans v. Etheridge*, 96 N. C. 42, 1 S. E. 633 (1887).

Plaintiff Must Continue the Action. — In an action of claim and delivery it is not competent to the plaintiff, after the property is put into his possession by process of law, to move to dismiss the action and fail to file a complaint, thereby raising no issue and depriving the defendant of an opportunity to assert his right. *Manix v. Howard*, 82 N. C. 125 (1880).

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-475. Plaintiff's undertaking.—The plaintiff must give a written undertaking payable to the defendant, executed by one or more sufficient sureties, approved by the sheriff, to the effect that they are bound in double the value of the property, as stated in the affidavit for the prosecution of the action, for the return of the property to the defendant, with damages for its deterioration and detention if return can be had, and if for any cause return cannot be had, for the payment to him of such sum as may be recovered against the plaintiff for the value of the property at the time of the seizure, with interest thereon as damages for such seizure and detention. (C. C. P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C. S., s. 833.)

Cross Reference.—As to the judgment in an action for the recovery of personal property, see § 1-230.

Judgment Should Be in Alternative.—A judgment on the forthcoming bond in claim and delivery proceedings should be in the alternative for the return of the property, or, if that cannot be had, for its value with damages. *Grubbs v. Stephenson*, 117 N. C. 66, 23 S. E. 97 (1895).

Value Ascertained.—For the benefit of the sureties upon the undertaking the value of the property at the time of seizure should also be ascertained, as they are liable for such value, not exceeding the indebtedness secured. *Griffith v. Richmond*, 126 N. C. 377, 35 S. E. 620 (1900).

Where, in claim and delivery proceedings, the vendor of the property, who had retained title until the notes for its purchase should be paid, intervened and was adjudged to be entitled to the property, the plaintiff (purchaser from the vendee), who had given bond for the return of the property to the defendant, if so adjudged, is entitled to have its value ascertained and should be adjudged to pay that amount, not exceeding, however, the balance due the vendor. *Barrington v. Skinner*, 117 N. C. 47, 23 S. E. (1895).

Measure of Damages Where Property Can Not Be Returned.—Where defendant recovers judgment and the property cannot be returned to him, the measure of dam-

ages is the value of the property at the time of its seizure, and an instruction that defendant, from whom an automobile had been taken in claim and delivery by the assignor of a chattel mortgage thereon, would be entitled to recover, if plaintiff's seizure of the property were wrongful, the amount paid on the purchase price of the car less the value of the use obtained from the car by defendant, is held error. *C. I. T. Corp. v. Watkins*, 208 N. C. 448, 181 S. E. 270 (1935).

The plaintiff and surety are not liable where sheriff seized and retained certain property not specified or described in the affidavit. *Williams v. Perkins*, 192 N. C. 175, 134 S. E. 417 (1926).

Voluntary Nonsuit by Plaintiff.—Where the plaintiff has taken a voluntary nonsuit after the property had been taken in claim and delivery and therein sold, the defendant in that action may maintain an independent action for damages, against the plaintiff in the former action and the surety on his bond, given in conformity with this section, wherein nominal damages at least are recoverable, with actual damages for the value of the property at the time of the seizure under claim and delivery. *Davis Bros. Co. v. Wallace*, 190 N. C. 543, 130 S. E. 176 (1925).

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-476. Sheriff's duties.—Upon the receipt of the order from the clerk with the plaintiff's undertaking, the sheriff shall forthwith take the property described in the affidavit, if it is in the possession of the defendant or his agent, and retain it in his custody. He shall also, without delay, serve on the defendant a copy of the affidavit, notice, and undertaking, by delivering the same to him personally, if he can be found, or to his agent, from whose possession the property is taken; or, if neither can be found, by leaving them at the usual place of abode of either, with some person of suitable age and discretion. (C. C. P., s. 179; Code, s. 324; 1885, c. 50; Rev., s. 793; C. S., s. 834.)

Sheriff Acts Officially.—The sheriff or his deputy is not the agent of the party who sued out the claim and delivery, but he is an officer to carry out the mandate of the court. *Williams v. Perkins*, 192 N. C.

175, 134 S. E. 417 (1926).

Action against Sheriff.—Where the sheriff has wrongfully seized certain personal property of the defendant in claim and delivery, not described therein as the subject

of such seizure, the defendant may maintain an independent action for damages against the sheriff. *Williams v. Perkins*, 192 N. C. 175, 134 S. E. 417 (1926).

Quoted in *General Motors Accept. Corp.*

v. Waugh, 207 N. C. 717, 178 S. E. 85 (1935).

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-477. Exceptions to undertaking; liability of sheriff.—The defendant may, within three days after the service of a copy of the affidavit and undertaking, notify the sheriff personally, or by leaving a copy at his office in the county seat of the county, that he excepts to the sufficiency of the sureties. If he fails to do so, he is deemed to have waived all objection to them. When the defendant excepts, the sureties must justify on notice, in like manner as upon bail on arrest. The sheriff is responsible for the sufficiency of the sureties until the objection to them is either waived as above provided, or until they justify, or until new sureties are substituted and justify. If the defendant excepts to the sureties he cannot reclaim the property as provided in the succeeding section. (C. C. P., s. 180; Code, s. 325; Rev., s. 794; C. S., s. 835.)

Sheriff Liable as Surety.—In delivering property to a defendant, when seized in claim and delivery proceedings without taking a proper undertaking and requiring the same to be justified, a sheriff becomes liable as a surety thereon. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106 (1893).

Same—Measure of Damages.—In such case the measure of liability is the delivery of the property to the plaintiff (if such delivery be adjudged), with the damages for its deterioration, or (failing delivery) the value of the property; and to subject the sheriff as surety, it is necessary to show that execution has been returned unsatisfied. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106 (1893).

Same — What Plaintiff Must Prove.—Where plaintiff, in an action against a

sheriff to recover damages for his failure to take a proper undertaking for the return of property seized by him at the instance of the plaintiff and adjudged to be returned, failed to show that execution issued for the property and against the sureties on the undertaking had been returned unsatisfied, he failed to show, and can not recover, actual damage against such sheriff. *Wells v. Bourne*, 113 N. C. 82, 18 S. E. 106 (1893).

When Objection Must Be Made.—The objection that what purports to be the undertaking of the plaintiff, in such action, was not properly executed, comes too late when made at the trial term. *Spencer v. Bell*, 109 N. C. 39, 13 S. E. 704 (1891).

Cited in *McKinney v. Sutphin*, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-478. Defendant's undertaking for replevy.—At any time before the delivery of the property to the plaintiff, the defendant may, if he does not except to the sureties of the plaintiff, require the return thereof, upon giving to the sheriff a written undertaking, payable to the plaintiff, executed by one or more sufficient sureties, to the effect that they are bound in double the value of the property, as stated in the affidavit of the plaintiff, for the delivery thereof to the plaintiff, with damages for its deterioration and detention, and the costs, if delivery can be had, and if delivery cannot be had, for the payment to him of such sum as may be recovered against the defendant for the value of the property at the time of the wrongful taking or detention, with interest thereon, as damages for such taking and detention, together with the costs of the action. If a return of the property is not so required, within three days after the taking and service of notice to the defendant, it must be delivered to the plaintiff, unless it is claimed by an interpleader.

The defendant's undertaking shall include liability for costs, as provided in this section, only where the undertaking is given in actions instituted in the superior court. (C. C. P., s. 181; Code, s. 326; 1885, c. 50, s. 2; Rev., s. 795; 1911, c. 17; C. S., s. 836.)

Cross Reference.—As to judgment in an action for the return of personal property, see § 1-230.

Liability of Surety.—The principle, applying to ordinary contracts, that a surety

is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of this section, where the defendant retains possession of the prop-

erty the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508 (1923).

Where, in claim and delivery, the defendant pleads that he became possessed of the property under a contract of sale, upon the facts being so found by the jury (the property having been sold under an order of the court pendente lite), judgment should be rendered against the sureties to the defendant's undertaking for the penalty of the bond, to be discharged upon the payment of the contract price with interest and cost, less the payments by the defendant. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745 (1892).

The liability of the surety on a replevin bond in claim and delivery is not required to be determined in a separate action. *Federal Finance, etc., Co. v. Teeter*, 196 N. C. 232, 145 S. E. 8 (1928).

Same—Debt Recovered.—The sureties to an undertaking, on behalf of the defendant, in claim and delivery are not liable for any debt which the plaintiff may recover in the action. *Hall v. Tillman*, 103 N. C. 276, 9 S. E. 194 (1889).

Liability Where Bond Voluntary.—Where an action of claim and delivery is instituted in a court inferior to the superior court, the defendant is not required by this section to give bond for the payment by him of the costs of the action, if a judgment adverse to him is rendered in the action. However, when, the bond is so conditioned, the bond is not for that reason void and unenforceable against either the defendant or his surety. In the absence of fraud, mistake, or other matters entitling them or either of them to equitable relief, both the defendant and his surety are bound according to the terms of the bond, which they executed voluntarily. *Wright v. Nash*, 205 N. C. 221, 171 S. E. 48 (1933).

The recovery against the surety can in no event exceed the penalty of the bond. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451 (1931).

Summary Judgment against Sureties.—Summary judgment may be rendered against the defendant's sureties on an undertaking to retain the property in an action of claim and delivery, but the judgment must be such as is authorized by this section, and § 1-230. *Hall v. Tillman*, 103 N. C. 276, 9 S. E. 194 (1889).

Form of Judgment against Surety.—Where the defendant in claim and delivery replevies the property, giving bond for the retention to cover loss in the action, the form of the judgment against the surety on the bond should be for the full amount of the bond, to be discharged upon return of the property and the payment of damages and costs recovered by the plaintiff. *Boyd v. Walters*, 201 N. C. 378, 160 S. E. 451 (1931).

Sureties' Defenses.—The surety on a replevin bond in claim and delivery, under the requirements of this section that the property shall be delivered to the plaintiff, or, if it cannot be, the value at the time it was delivered to the defendant, etc., may not, upon adjudication in plaintiff's favor, set up the defense that it had been taken by another, or prevented by the act of God, or that another than the plaintiff had a superior title to the property by mortgage or otherwise. *Garner v. Quakenbush*, 188 N. C. 180, 124 S. E. 154 (1924).

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. *Wallace & Sons v. Robinson*, 185 N. C. 530, 117 S. E. 508 (1923).

Recovery of Costs.—The language of this section is not so explicit as that of the original section of the Code, but it is fairly susceptible of the interpretation that the entire costs of prosecuting the action involving the title to the property should be recovered by a plaintiff who prevails against the defendant and the sureties on the bond. *Hall v. Tillman*, 110 N. C. 220, 14 S. E. 745 (1892).

Quoted in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928); *McCormick v. Crotts*, 198 N. C. 664, 153 S. E. 152 (1930).

§ 1-479. Qualification and justification of defendant's sureties.—The qualification of the defendant's sureties, and their justification, is as prescribed in respect to bail upon an order of arrest. The defendant's sureties, upon notice to the plaintiff of not less than two nor more than six days, shall justify

before the court, a judge or justice of the peace, and upon this justification the sheriff must deliver the property to the defendant. The sheriff is responsible for the defendant's sureties until justification is completed or expressly waived, and he may retain the property until that time; but if they, or others in their place, fail to justify at the time and place appointed, he must deliver the property to the plaintiff. (C. C. P., ss. 182, 183; Code, ss. 327, 328; Rev., ss. 796, 797; C. S., s. 837.)

Cross References. — As to qualifications of bail in arrest and bail, see § 1-423. As to justification, see § 1-424.

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-480. Property concealed in buildings.—If the property, or any part of it, is concealed in a building or enclosure, the sheriff shall publicly demand its delivery. If it is not delivered he must cause the building or enclosure to be broken open, and take the property into his possession. If necessary, he may call to his aid the power of his county, and if the property is upon the person the sheriff or other officer may seize the person, and search for and take it. (C. C. P., s. 184; Code, s. 329; Rev., s. 798; C. S., s. 838.)

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-481. Care and delivery of seized property.—When the sheriff has taken property, as provided in this article, he must keep it in a secure place, and deliver it to the party entitled thereto, upon receiving his lawful fees for taking and his necessary expenses for keeping it. (C. C. P., s. 185; Code, s. 330; Rev., s. 799; C. S., s. 839.)

Expenses of Seizing Included in Costs.— 523, 7 S. E. 1011 (1913).

It is proper to allow in the bill of costs the expense of seizing and caring for the property. **Cited in** McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928).

§ 1-482. Property claimed by third person; proceedings. — When the property taken by the sheriff is claimed by any person other than the plaintiff or defendant the claimant may intervene upon filing an affidavit of his title and right to the possession of the property, stating the grounds of such right and title, and upon his delivering to the sheriff an undertaking in an amount double the value of the property specified in his affidavit, for the delivery of the property to the person entitled to it, and for the payment of all such costs and damages as may be awarded against him, this undertaking to be executed by one or more sufficient sureties, accompanied by their affidavits that they are each worth double the value of the property. A copy of this undertaking and accompanying affidavit shall be served by the sheriff on the plaintiff and defendant at least ten days before the return day of the summons in the action, when the court trying it shall order a jury to be impaneled to inquire in whom is the right to the property specified in plaintiff's complaint. The finding of the jury is conclusive as to the parties then in court, and the court shall adjudge accordingly, unless it is reversed upon appeal. In a court of a justice of the peace he may try such issue unless a jury is demanded, and then proceedings are to be conducted in all respects as in jury trials before justices of the peace. In a court of a justice of the peace an intervener shall not be required to serve on the plaintiff and defendant the affidavits and bonds required by this section, ten days before return day; but if said bond and affidavit are filed by any person owning the property when such case is called for trial, he shall be allowed to intervene: Provided that this section shall not be construed to prevent any such intervener or third person from intervening and asserting his claim to the property, or any part thereof, without giving bond as herein required, where such intervener or other third person does not ask for possession of the property

pending the trial of the issue. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; C. C. P., s. 186; Code, s. 331; Rev., s. 800; 1913, c. 188; C. S., s. 840; 1933, c. 131.)

Cross Reference. — As to bringing in third parties in general, see § 1-73.

Editor's Note. — The original section required that the undertaking be in double the value of the property stated in the plaintiff's affidavit, while the 1933 amendment required double the value as stated in the intervenor's affidavit. This was probably intended to apply where the intervening claimant does not demand all the property involved or its value has depreciated, and not to allow his statement of the value generally to control as against the security which the plaintiff has been required to give. 11 N. C. Law Rev. 217.

Purpose. — Is it not the purpose of the section to allow one interpleading to come into the action in its course, allege and prove his title and right of possession of the property upon their real merits, and, if he shall succeed, take it without the delay and expense incident to a separate and independent action that otherwise he might be forced to bring? This seems to us to be the just and reasonable view, and the one that harmonizes with well-settled principles of the law applicable. *Claywell v. McGimpsey*, 15 N. C. 89 (1833); *Churchill v. Lee*, 77 N. C. 341 (1877); *Hudson v. Wetherington*, 79 N. C. 3 (1878); *Wallace Bros. v. Robeson*, 100 N. C. 206, 2 S. E. 650 (1888).

Right to Intervene Well Settled. — The right of an outside claimant to intervene is well settled by precedent. *McKesson v. Mendenhall*, 64 N. C. 286 (1870); *Toms v. Warson*, 66 N. C. 417 (1872); *Clemmons v. Hampton*, 70 N. C. 534 (1874); *Bruff v. Stern*, 81 N. C. 183 (1879); *Sims v. Goettle Brothers*, 82 N. C. 269 (1880).

Intervenor Restricted to Question of Title. — It is well settled that in an action involving the title to property an interpleader is restricted to the issue as to his title or claim to the property, and cannot raise or litigate questions or rights which do not affect such titles. *McLean v. Douglas*, 28 N. C. 233 (1846); *Dawson v. Thigpen*, 137 N. C. 462, 49 S. E. 959 (1905).

In a proceeding under this section the intervenor is not called on or required, and indeed he is not permitted to question the validity of the plaintiff's claim against the defendant, nor to file any answer thereto which denies or tends to deny its validity. On the contrary, the intervenor, has himself become the actor in the suit, and, on authority, is restricted to the issue whether his claim of right and title is superior to that of the original plaintiff. *Cotton Mills*

v. Weil, 129 N. C. 452, 40 S. E. 218 (1901); *Maynard v. Ins. Co.*, 132 N. C. 711, 44 S. E. 405 (1903); *Mitchell v. Talley*, 182 N. C. 683, 109 S. E. 882 (1921); *Hill v. Patillo*, 187 N. C. 531, 122 S. E. 306 (1924).

Intervenor Must Prove Title. — In proceedings in attachment one who interpleads under this section is an actor upon whom rests the burden of proving his title to the property he claims. And this is so, although the property was in his possession when seized by the sheriff. *Wallace Bros. v. Robeson*, 100 N. C. 206, 2 S. E. 650 (1888); *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

Appearance Waives Objections. — A party to an action is deemed to have waived his right to object to the sufficiency of an affidavit of an attorney for an interpleader or intervenor, as not having been made in accordance with the requirements of our statute, by appearing at the taking of depositions in his behalf and cross-examining his witness. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276 (1926).

Voluntary Recognition of Jurisdiction. — Where the court has allowed a third party to interplead and ordered him to be made a party to the action, an appearance of an original party to the action must first attack the validity of the order, if he so desires, and a voluntary recognition that the court has acquired jurisdiction of a party is conclusive. *Allen v. McMillan*, 191 N. C. 517, 132 S. E. 276 (1926).

Separate Trial. — A separate trial for the intervenor is discretionary with the trial judge. *Cotton Mills v. Weil*, 129 N. C. 452, 40 S. E. 218 (1901).

Three Years Delay by Intervenor. — In an action for the possession of personal property, under this section, a third party claiming such property loses his right to be made a party to the suit after a lapse of three years from the filing of his affidavit and his motion to allow him to interplead. *Clemmons v. Hampton*, 70 N. C. 534 (1874).

Surety Cannot Interplead. — Where the defendant in claim and delivery proceedings consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, when they have not offered to interplead and claim the property in the manner prescribed by this section. *McDonald v. McBryde*, 117 N. C. 125, 23 S. E. 103 (1895).

Nonsuit by Plaintiff. — In an action to

recover possession of personal property, where the defendant has replevied the property and a third person has interpleaded, the plaintiff may take a nonsuit, but the action goes on for the interpleader. *Dawson v. Thigpen*, 137 N. C. 462, 49 S. E. 959 (1905).

Jurisdiction of Justice of the Peace.—A justice of the peace may entertain and try an interplea to determine the title although the value of the property exceeds \$50. *Grambling v. Dickey*, 118 N. C. 986, 24 S. E. 671 (1896).

When Garnishee Bank a Mere Stakeholder.—Where funds of a nonresident defendant are attached in a local bank that maintains the position of a mere stakeholder, and alleges ownership of its forwarding bank, and asks that the forwarding bank be made a party to the action, the forwarding bank, when brought in, may make its own claim of title and thus cure the defect, if any, in the proceedings in this respect, it being a matter of procedure. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162 (1922).

Same—No Bond Required.—The bond required of an intervener by this section,

has no application in attachment where the garnishee bank holding the funds attached does so as a stakeholder, not claiming them, but only seeks to hold the same for the adjudication of the court between two conflicting claimants. *Temple v. Eades Hay Co.*, 184 N. C. 239, 114 S. E. 162 (1922).

Husband and Wife.—Where the plaintiffs attach property and bring action against a husband and wife to have a deed from the husband to the wife set aside and to subject the property attached to the payment of the judgment, the wife has a right to set up her claim to the property attached, and the refusal of the trial court to require her to give an interpleader bond under this section is not error. *Unaka, etc., Nat. Bank v. Lewis*, 201 N. C. 148, 139 S. E. 312 (1931).

Applied in General Motors Accept. Corp. v. Waugh, 207 N. C. 717, 178 S. E. 85 (1935).

Cited in McKinney v. Sutphin, 196 N. C. 318, 145 S. E. 621 (1928); *Francis v. Mortgage Security Corp.*, 198 N. C. 734, 153 S. E. 317 (1930).

§ 1-483. **Delivery of property to intervener.**—Upon the filing by the claimant of the undertaking set forth in § 1-482, the sheriff is not bound to keep the property, or to deliver it to the plaintiff; but may deliver it to the claimant, unless the plaintiff executes and delivers to him a similar undertaking to that required of claimant; and notwithstanding such claim, when so made, the sheriff may retain the property a reasonable time to demand such indemnity. (1793, c. 389, s. 3, P. R.; R. C., c. 7, s. 10; Code, s. 332; Rev., s. 801; C. S., s. 841.)

Purpose of Section.—This section is intended only for the benefit of the sheriff, and to enable him to protect himself against the claim of the third party, by taking from the plaintiff an indemnity against such claim before he delivers the property to him. It does not amount, on the part of the third claimant, to becoming a party to the action, it is not a necessary step in

that direction, and the third claimant may become a party under § 1-73 without having made and served such affidavit. *Clemmons v. Hampton*, 70 N. C. 534 (1874).

Sheriff Must Take Security.—Under this section the property is not to be delivered to the intervener by the sheriff until the security is given. *Bear v. Cohen*, 65 N. C. 511 (1871).

§ 1-484. **Sheriff to return papers in ten days.**—The sheriff must return the undertaking, notice and affidavit, with his proceedings thereon, to the court in which the action is pending within ten days after taking the property mentioned therein. (C. C. P., s. 187; Code, s. 133; Rev., s. 802; C. S., s. 842.)

ARTICLE 37.

Injunction.

§ 1-485. **When temporary injunction issued.**—A temporary injunction may be issued by order in accordance with the provisions of this article. The order may be made by any judge of the superior court in the following cases, and shall be issued by the clerk of the court in which the action is required to be tried:

1. When it appears by the complaint that the plaintiff is entitled to the relief

demand, and this relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which, during the litigation, would produce injury to the plaintiff; or,

2. When, during the litigation, it appears by affidavit that a party thereto is doing, or threatens or is about to do, or is procuring or suffering some act to be done in violation of the rights of another party to the litigation respecting the subject of the action, and tending to render the judgment ineffectual; or,

3. When, during the pendency of an action, it appears by affidavit of any person that the defendant threatens or is about to remove or dispose of his property, with intent to defraud the plaintiff. (C. C. P., ss. 188, 189; Code, ss. 334, 338; Rev., s. 806; C. S., s. 843.)

I. General Consideration.

II. Nature.

III. Grounds of Relief.

A. Character of Relief in General.

B. Availability of Other Relief.

C. Application of Section.

I. GENERAL CONSIDERATION.

Effect upon Prior Law.—This section is merely a statutory recognition of the abolition of the distinction between special and common injunctions, a distinction existing under the old practice. Since the adoption of the Code all injunctions are simply ancillary proceedings and are not available to anyone the basis of whose claims for such relief does not come within at least one of the enumerated classes of this section. *Person v. Person*, 154 N. C. 453, 70 S. E. 752 (1911). Under the existing procedure issuance of an injunction presupposes, as an essential requisite, the pendency of an action which is receiving or will receive a judicial determination. *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235 (1913).

Restraint Sought Must Be Germane to Subject of Action.—This section does not permit injunction to issue when the restraint sought is not germane to the subject of the action. *Jackson v. Jernigan*, 218 N. C. 401, 5 S. E. (2d) 143 (1939).

Restraining Order and Injunction Distinguished.—This section in no wise abolishes the distinction between restraining orders and injunctions. The distinctive features between these remedial agencies remain and are respected to the utmost extent by the courts. A restraining order can be issued in any cause by any judge of the superior court anywhere in the State, and made returnable at any time within twenty days, at any place, before a judge residing in or assigned to or holding by exchange the courts within the district in which the county where the cause is pending is situated; but a perpetual injunction can be granted only in the county where the cause is pending, and by the judge who tries the cause at the final hearing. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519

(1893). See also *Kinston v. Wooten*, 150 N. C. 295, 63 S. E. 1061 (1909).

An injunction may be granted by a judge outside the county in which the main cause is pending since this is an ancillary proceeding not involving the merits of the cause. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893). This principle was recognized and applied in *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897), a case in which the validity of a judgment obtained in special proceedings was contested on the grounds that it was entered outside of the county in which the main action was litigated.

Mandamus and Mandatory Injunction Distinguished.—In North Carolina, where both legal and equitable jurisdiction is vested in the same court, there is very little difference in its practical results between proceedings in mandamus and mandatory injunction, the former is permissible when the action is to enforce performance of duties existent for the benefit of the public, and the latter is confined usually to causes of an equitable nature, and to the enforcement of rights which solely concerns individuals. *Clinton Dunn Tel. Co. v. Carolina Tel., etc., Co.*, 159 N. C. 9, 74 S. E. 636 (1912).

Good Faith and Reasonable Diligence Necessary.—Before injunctive relief will be granted it is necessary that the plaintiff show his good faith and reasonable diligence in instituting his action, *Jones v. Commissioners*, 107 N. C. 248, 12 S. E. 69 (1890), and such facts exhibited by the plaintiff must constitute a substantial cause of action. *Moore v. Silver Valley Min. Co.*, 104 N. C. 534, 10 S. E. 679 (1889).

Constitutional Provisions.—The constitutional prohibition of trial of "issues of fact" by the Supreme Court extends to issues of fact as heretofore understood, and does not hinder that tribunal from trying such questions of fact as may be involved in a consideration of the propriety of continuing or vacating an order of a provisional injunction. *Heilig v. Stokes*, 63 N. C. 612 (1869).

Increasing Bond. — Under this section the garnishees may be restrained and enjoined from making further payments on their indebtedness to the defendant, until the final determination of the action, but the defendant and the garnishees may move that the bond required of the plaintiffs shall be increased in amount, to the end that said defendant and the garnishees shall be fully protected against loss or damage resulting from the injunction. *Newberry v. Meadows Fert. Co.*, 203 N. C. 330, 166 S. E. 79 (1932).

Cited in *Collins v. North Carolina State College*, 198 N. C. 337, 151 S. E. 646 (1930); *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409 (1934); *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

II. NATURE.

Extraordinary and Provisional Remedy. — Although the specific details for the granting of injunctions are set out in the section, an injunction is still regarded as an extraordinary and provisional remedy, recourse to which may only be had by a party who has exhausted all available remedies. *Chambers v. Penland*, 78 N. C. 53 (1878); or unless it be made to appear that the party will suffer irreparable injury unless such relief is granted. *Fink v. Stewart*, 94 N. C. 484 (1886).

Equitable Remedy. — Injunction, being equitable in its nature and origin, must be administered upon equitable principles, except in so far as it may come within some plain statutory provision. *Person v. Leary*, 127 N. C. 114, 37 S. E. 149 (1900).

Remedy Only in Foreign Courts. — Formerly a court of equity would grant an injunction where otherwise the party seeking it would be driven to the courts of another state for the purpose of obtaining it. *Hauser v. Mann*, 5 N. C. 410 (1810); *Richardson v. Williams*, 56 N. C. 116 (1856).

Power of Courts. — The section tends greatly to enlarge the power of the court to grant equitable relief, especially since the granting of the temporary injunction, herein provided, may be accompanied with the appointment of a receiver when necessary for the protection of the subject matter of the action. *Roper Lumber Co. v. Wallace*, 93 N. C. 22 (1885).

III. GROUNDS OF RELIEF.

A. Character of Relief in General.

An injunction can only operate in personam and unless jurisdiction of the party can be acquired, the attempted procedure is a nullity; and upon this principle proceedings to restrain the negotiation of a note in the hands of a holder, a nonresident

and beyond the borders of the State, should be dismissed. *Warlick v. Reynolds*, 151 N. C. 606, 66 S. E. 657 (1910); *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235 (1913).

B. Availability of Other Relief.

In General. — It is well established that when proper relief can otherwise be had then no injunction will be issued, and where a party can obtain his relief by a motion in the original action he will not be permitted later to institute a new and independent action for the purpose of obtaining an injunction. *Faison v. McIlwaine*, 72 N. C. 312 (1875).

Irreparable Injury. — The rule in regard to the granting of an injunction on the ground that the injury complained of is irreparable in its nature is a strict one. The plaintiff must clearly show that the injury is peculiar in nature, one that cannot be repaired, put back again, or atoned for in damages. *Bond v. Wool*, 107 N. C. 139, 12 S. E. 281 (1890); *Goldsboro Lumber Co. v. Hines Bros. Lumber Co.*, 127 N. C. 130, 37 S. E. 152 (1900). See also, *McKesson v. Hennessee*, 66 N. C. 473 (1872). As to allegations of insolvency when injury is irreparable, see note to § 1-486.

Where Execution Improperly or Prematurely Issued. — Where there has been an improper or premature execution by the clerk, the injured party's remedy is the perfection of his appeal and notice thereof which will have the effect of staying the proceedings, and an injunction will not be granted in such case. *Bryan v. Hubbs*, 69 N. C. 423 (1873).

Where it is shown that injury will result from the issuance of an irregular execution, the proper remedy is by motion to set aside and not injunction. *Foard v. Alexander*, 64 N. C. 69 (1870).

C. Application of Section.

Criminal Law. — The courts cannot enjoin the enforcement of the criminal law, nor can the validity of an ordinance be tested by an injunction. *Paul v. Washington*, 134 N. C. 363, 47 S. E. 793 (1904).

Act Already Committed. — An injunction will not issue to restrain an act which has already been committed. *Yount v. Setzer*, 155 N. C. 213, 71 S. E. 209 (1911).

Wasteful or Wrongful Disposition of Property of Dissolved Corporation. — The court, upon the dissolution of a corporation, has full control over the property of such corporation, and if necessary for the protection of such property, an injunction may be properly issued. *State v. Roanoke Nav. Co.*, 84 N. C. 705 (1881).

Wasteful Destruction by Personal Representative. — A temporary injunction restraining the disposition of assets in this State of an estate administered on in another state, in which the administrator is alleged to have committed a devastavit, was properly continued in their action to the hearing of the cause. *Coleman v. Howell*, 131 N. C. 125, 42 S. E. 555 (1902).

Utility Companies and Municipal Corporations. — The section applies equally as

well whether the parties litigants be public service or municipal corporations or individuals. See *Merrick v. Intramontaine R. Co.*, 118 N. C. 1081, 24 S. E. 667 (1896); *Griffin v. Goldsboro Water Co.*, 122 N. C. 206, 30 S. E. 319 (1898); *Woodley v. Carolina Tel. etc., Co.*, 163 N. C. 284, 79 S. E. 598 (1913).

As to enjoining continuing trespass, see § 1-486 and note thereto.

§ 1-486. **When solvent defendant restrained.**—In an application for an injunction to enjoin a trespass on land it is not necessary to allege the insolvency of the defendant when the trespass complained of is continuous in its nature, or is the cutting or destruction of timber trees. (1885, c. 401; Rev., s. 807; C. S., s. 844.)

Irreparable Injury. — The cases are in accord in holding that if the injury which the plaintiff is sustaining or is about to sustain is an irreparable one so that there can be no sufficient recompense in money, then the plaintiff need not, in his pleadings, allege the insolvency of the defendant, but if the injury is an ordinary one which may be atoned for in money, then the plaintiff, in order to secure a temporary injunction, must allege the defendant's insolvency, for otherwise he has an adequate remedy in an action for damages. *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19 (1888); *Stewart v. Munger*, 174 N. C. 402, 93 S. E. 927 (1917).

Continuing Trespass.—Where it appears that the facts of the case are in dispute and the trespass by the defendant would be continuous, and would produce injury to the plaintiff, a restraining order should issue to the hearing, *Sutton v. Sutton*, 161 N. C. 665, 77 S. E. 838 (1913), and, because of this section, it is unnecessary in such case to allege the insolvency of the defendant, *Cobb v. Atlantic, etc., R. Co.*, 172 N. C. 58, 89 S. E. 807 (1916). The same principle is applicable where the plaintiff shows apparent title to the lands and satisfies the court that his claim for injunctive relief is made in good faith. *Lodge v. Ijames*, 156 N. C. 159, 72 S. E. 204 (1911).

When relief is sought against a continuing trespass, a restraining order may properly issue without allegation of insolvency; and this ancillary remedy may be available in an action where the title to land is at

issue, but may not be used as an instrument to settle a dispute as to the possession, or to effect an ouster. *Young v. Pittman*, 224 N. C. 175, 29 S. E. (2d) 551 (1944).

Effect upon Discretionary Power of the Court. — The construction placed on this section does not deprive the courts of their discretionary power to require a bond to secure the plaintiff against damages, or to appoint a receiver, where there is a bona fide contention as to the title to lands or timber trees thereon. *Stewart v. Munger*, 174 N. C. 402, 93 S. E. 927 (1917).

Continuance to Hearing.—When a continuous trespass is sought to be enjoined, and the rights of the parties require the determination of the jury upon conflicting evidence, and irreparable injury for the continued trespass will likely follow, the courts will ordinarily continue the cause to the hearing to prevent further litigation, cost, and trouble, when no harm thereby can be done, irrespective of the solvency of the alleged trespasser. *Norfolk So. R. Co. v. Rapid Transit Co.*, 195 N. C. 305, 141 S. E. 882 (1928).

Destruction of Trees. — Allegations that defendant is insolvent and is cutting down timber trees on plaintiff's land and hauling them off and threatens to continue to do so, to the irreparable damage of the plaintiff, is sufficient to authorize the appointment of a receiver, and since the enactment of this section, it is not necessary to allege the insolvency of the defendant. *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701 (1897).

§ 1-487. **Timber lands, trial of title to.**—In all actions to try title to timber lands and for trespass thereon for cutting timber trees, when the court finds as a fact that there is a bona fide contention on both sides based upon evidence constituting a prima facie title, no order shall be made pending such action, permitting either party to cut said timber trees, except by consent, until the title to said land or timber trees is finally determined in the action. In all cases

where the title to any timber or trees, or the right to cut and remove the same during a term of years, is claimed by any party to such action, and the fee of the soil or other estate in the land by another, whether party to the action or not, the time within which such timber or trees may be cut or removed by the party claiming the same, and all other rights acquired in connection therewith, shall not be affected or abridged, but the running of the term is suspended during the pendency of the action. (1901, c. 666, s. 1; 1903, c. 642; Rev., s. 808; C. S., s. 845.)

Purpose of Section.—The primary object of this section is to throw a greater safeguard around the rights of the litigating parties and to preserve the timber upon the lands in dispute, until the rights of the respective parties can be adjudicated. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796 (1905).

Constitutional Provisions.—Although the time for cutting the timber trees was extended with the enactment of this section, it is now settled that the section does not interfere with any vested right within the meaning of the constitutional provision prohibiting such interference. *Riley & Co.*

v. Carter, 165 N. C. 334, 81 S. E. 414 (1914).

Plaintiff Must Show a Bona Fide Claim.

—The plaintiff, in order to prevent a dissolution of the injunction obtained against the defendant, must show (1) a bona fide claim to the lands, and (2) that such claim is based upon evidence constituting a prima facie title. *Moore v. Fowle*, 139 N. C. 51, 51 S. E. 796 (1905).

Applied in *Chandler v. Cameron*, 227 N. C. 233, 41 S. E. (2d) 753 (1947).

Cited in *Lawhon v. McArthur*, 213 N. C. 260, 195 S. E. 786 (1938).

§ 1-488. When timber may be cut.—In any action specified in § 1-487, when the judge finds as a fact that the contention of either party is not in good faith and is not based upon evidence constituting a prima facie title, upon motion of the other party, who may satisfy the court of the bona fides of his contention and who may produce evidence showing a prima facie title, the court may allow such party to cut the timber trees by giving bond as required by law. Nothing in this section affects the right of appeal, and when any party to such action has been enjoined, a sufficient bond must be required to cover all damages that may accrue to the party enjoined by reason of the injunction as now required by law. (1901, c. 666, ss. 2, 3; Rev., s. 809; C. S., s. 846.)

Essential Elements.—Under this section the plaintiff must not only show (a) that his claim is made in good faith and (b) that he has a prima facie title thereto, but the court must be able to find as a fact, (c) that the claim of the adverse party is not made in good faith. When relief is sought under this provision all these conditions must be complied with. *Johnson v. Duval*, 135 N. C. 642, 47 S. E. 611 (1904). See *Chandler v. Cameron*, 227 N. C. 233, 41 S. E. (2d) 753 (1947).

Injunction Granted Where Contention

Bona Fide.—This section was not intended to be a substitute for the preceding sections, and when the court fails to find, in the light of all the evidence, that there is not a bona fide contention, then it should grant an injunction under §§ 1-486, 1-487. *Kelly v. Enterprise Lumber Co.*, 157 N. C. 175, 72 S. E. 957 (1911).

Cited in *Lawhon v. McArthur*, 213 N. C. 260, 195 S. E. 786 (1938).

§ 1-489. Time of issuing.—The injunction may be granted at the time of commencing the action, or at any time afterwards, before judgment, upon its appearing satisfactorily to the judge, by the affidavit of the plaintiff, or of any other person, that sufficient grounds exist therefor. A copy of the affidavit must be served with the injunction. (C. C. P., s. 190; Code, s. 339; Rev., s. 810; C. S., s. 847; 1943, c. 543.)

Editor's Note.—The 1943 amendment substituted the words "at the time of commencing the action, or at any time afterwards" for the words "when or at any time after commencing the action," formerly appearing in the first sentence of this section.

Section Construed Strictly.—This section has received a strict construction and a compliance with the procedural steps is mandatory, and is not subject to waiver by agreement of the parties. *Taylor v. Boone*, 172 N. C. 93, 89 S. E. 1065 (1916).

Requisites—(a) Affidavit.—Where there

is a failure to serve a copy of the affidavit with the injunction, and the judge does not allow such service to be thereafter made, the injunction will be dissolved. *Taylor v. Boone*, 172 N. C. 93, 89 S. E. 1065 (1916).

Same—(b) Summons. — An injunction granted before the issuing of the summons in action is premature, since by the express provision of the section an injunction can only be granted at the commencement of

the action, (or sometime thereafter). *Trexler v. Newsom*, 88 N. C. 13 (1883); *Horne v. Commissioners*, 122 N. C. 466, 29 S. E. 581 (1898). But if the defendant goes to trial after the summons has been irregularly issued, and answers the plaintiff's complaint, he is held to have waived the irregularity. *Heilig v. Stokes*, 63 N. C. 612 (1869).

§ 1-490. Not issued for longer than twenty days without notice.—No restraining order, or order to stay proceedings, for a longer time than twenty days shall be granted by a judge out of court, except upon due notice to the adverse party; but the order shall continue and remain in force until vacated after notice, to be fixed by the court, of not less than two nor more than ten days. (C. C. P., s. 345; Code, s. 346; 1905, c. 26; Rev., s. 811; C. S., s. 848.)

Cross Reference. — See note under § 27-29.

Old Procedure Retained. — The Code does not change the mode of setting aside an irregular execution; it must still be done by a motion in the cause, and an injunction, where necessary, must be obtained in like manner. *Foard v. Alexander*, 64 N. C. 69 (1870).

Effect of Issuance for More than Twenty Days without Notice. — An order to stay proceedings, made, without notice, by a judge out of court for a longer time than twenty days, is irregular and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. *Foard v. Alexander*, 64 N. C. 69 (1870).

§ 1-491. Issued after answer, only on notice.—An injunction shall not be allowed after the defendant has answered, except upon notice, or upon an order to show cause; but in such case the defendant may be restrained until the decision of the judge granting or refusing the injunction. (C. C. P., s. 191; Code, s. 340; Rev., s. 812; C. S., s. 849.)

When Special Notice Required.—Special notice of motions for injunctions is only required when made or to be heard out of term; but in such cases, if the opposing party voluntarily appears, in person or by attorney, he will be ordinarily deemed to have waived notice. In cases other than

these, the principle that one who has been duly made party to a pending action is bound to take notice of all motions, orders, etc., made during term time, applies with full force and no further notice is required. *Hemphill v. Moore*, 104 N. C. 378, 10 S. E. 313 (1889).

§ 1-492. Order to show cause.—If the judge deems it proper that the defendant, or any of several defendants, should be heard before granting an injunction, an order may be made requiring cause to be shown, at a specified time and place, why the injunction should not be granted; and the defendant may, in the meantime, be restrained. (C. C. P., s. 193; Code, s. 342; Rev., s. 813; C. S., s. 850.)

Service upon Corporation.—Ordinarily a corporation before the grant of injunction has a right to service of an order to show cause upon some officer or agent, but if the officers or agents keep themselves out of the way for the express purpose of avoiding such a service, it cannot justly com-

plain if the service on its attorney is made the equivalent of that which its agents by their wrongful acts have made impossible. See *Eureka Lake, etc., Canal Co. v. Yuba County*, 116 U. S. 410, 6 S. Ct. 429, 29 L. Ed. 671 (1886).

§ 1-493. What judges have jurisdiction.—The judges of the superior court have jurisdiction to grant injunctions and issue restraining orders in all civil actions and proceedings. A judge holding a special term in any county may grant an injunction, or issue a restraining order, returnable before himself, in any case which he has jurisdiction to hear and determine under the commis-

sion issued to him, and the same is returnable as directed in the order. (1876-7, c. 223, ss. 1, 2; 1879, c. 63, ss. 1, 3; Code, s. 335; Rev., s. 814; C. S., s. 851.)

Restraining Orders.—The general jurisdiction of restraining orders and injunctions is vested in the judges of the superior courts. Any judge of such court may issue a restraining order in any cause and anywhere in the State. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893).

Where a restraining order is made returnable before a judge assigned to the district at a place outside of the district and after the courts were over, but before the end of the term of the assignment, such judge has jurisdiction to hear the application and to grant injunction until the hearing. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

Where an action to try title is pending, a judge of the superior court has judicial power to issue an order restraining a party from further action as proceeding to obtain possession against a tenant of the adverse party. *Massengill v. Lee*, 228 N. C. 35, 44 S. E. (2d) 356 (1947).

§ 1-494. Before what judge returnable.—All restraining orders and injunctions granted by any of the judges of the superior court, except one holding a special term in any county, shall be made returnable before the resident judge of the district, or the judge assigned to the district, or holding by exchange the courts of the district where the civil action or special proceeding is pending, within twenty days from date of order. If the judge before whom the matter is returned fails, for any reason, to hear the motion and application, or to continue them to some other time and place, any judge resident in, or assigned to hold the courts of, some adjoining district may hear and determine the said motion and application, after giving ten days' notice to the parties interested in the application or motion, upon its being satisfactorily shown to him by affidavit or otherwise that the judge before whom the matter was returnable failed to act upon or to continue the same to some other time and place. This removal continues in force the motion and application theretofore granted, till they can be heard and determined by the judge having jurisdiction. (1876, c. 223, s. 2; 1879, c. 63, ss. 2, 3; 1881, c. 51; Code, s. 336; Rev., s. 815; C. S., s. 852.)

Restraining Order.—A restraining order for a period of twenty days can be made returnable anywhere in the State. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893).

Failure of Judge to Hear Motion.—Where the judge to whom the motion is returnable fails to hear it, the judge of the adjoining district can hear it upon ten days' notice to the parties. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893).

Judge Holding Special Term.—A judge

Perpetual Injunction.—A perpetual injunction must be granted only in the county in which the cause is pending. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893). See also, *Ledbetter v. Pinner*, 120 N. C. 455, 27 S. E. 123 (1897).

Motions for Receiver.—Motions for the appointment of a receiver may be made before the resident judge of the district, or one assigned to the district or one holding the courts thereof by exchange, at the option of the mover. *Corbin v. McGowan*, 83 N. C. 28 (1880).

Appointment of Receiver by County Court.—A general county court is without jurisdiction to appoint a receiver for a judgment debtor having property in another county against whom judgment is rendered in the county court. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936).

Cited in *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409 (1934).

holding a special term cannot make a restraining order returnable before himself where the summons is returnable to a term of court beginning after the special term. *Royal v. Thornton*, 150 N. C. 293, 63 S. E. 1040 (1909).

Perpetual Injunctions.—See § 1-493.

Receivers.—See note to § 1-493.

Cited in *Ward v. Agrillo*, 194 N. C. 321, 139 S. E. 451 (1927); *Hopkins v. Swain*, 206 N. C. 439, 174 S. E. 409 (1934).

§ 1-495. Stipulation as to judge to hear.—By a stipulation in writing, signed by all the parties to an application for an injunction order, or their attorneys, to the effect that the matter may be heard before a judge designated in the stipulation, the judge before whom the restraining order is returnable by law, or who is by law the judge to hear the motion for an injunction order,

shall, upon receipt of the stipulation forward it and all the papers to the judge designated, whose duty it then is to hear and decide the matter, and return all the papers to the court out of which they issued, the necessary postage or expressage money to be furnished to the judge. (1883, c. 33; Code, s. 337; Rev., s. 816; C. S., s. 853.)

Stipulation of Parties. — Agreement in writing by all parties concerned as to what judge of the superior court shall hear the motion is allowed under this section. *Hamilton v. Icard*, 112 N. C. 589, 17 S. E. 519 (1893); *Crabtree v. Scheelky*, 119 N. C. 56, 25 S. E. 707 (1896).

Same — Duty of Judge Designated. — When the parties have thus stipulated as

to what judge shall hear the motion, it is the duty of such judge, if he has before him all the facts, to hear and determine the case, and it is error to continue the injunction. *Cooper v. Cooper*, 127 N. C. 490, 37 S. E. 492 (1900).

Applied in *Forester v. North Wilkesboro*, 206 N. C. 347, 174 S. E. 112 (1934).

§ 1-496. **Undertaking.**—Upon granting a restraining order or an order for an injunction, the judge shall require as a condition precedent to the issuing thereof that the clerk shall take from the plaintiff a written undertaking, with sufficient sureties, to be justified before, and approved by, the clerk or judge, in an amount to be fixed by the judge, to the effect that the plaintiff will pay to the party enjoined such damages, not exceeding an amount to be specified, as he sustains by reason of the injunction, if the court finally decides that the plaintiff was not entitled to it. (C. C. P., s. 192; Code, s. 341; Rev., s. 817; C. S., s. 854.)

Section Mandatory. — The provision in this section that the plaintiff in injunction give bond is mandatory, the amount fixed by the judge, conclusive of the extent of the liability thereon, the procedure being for the defendant to move to have the amount increased when he so desires, or thinks it necessary for his protection. *James v. Withers*, 114 N. C. 474, 19 S. E. 367 (1894); *McAden v. Watkins*, 191 N. C. 105, 131 S. E. 375 (1926).

Burden of Proof as to Amount.—Before judgment can be given upon an injunction bond, the party alleging that he had been damaged by reason of said injunction must establish the quantum of damages sustained. *Hyman v. Devereux*, 65 N. C. 588 (1871). And this amount does not include the personal expenses in attending the hearing. *Midgett v. Vann*, 158 N. C. 128, 73 S. E. 801 (1912). For full discussion as to attorneys' fees, see *Hyman v. Devereux*, 65 N. C. 588 (1871).

Effect of Failure to Require Bond.—The validity of an injunction is not affected by a failure to require an indemnity bond to accompany it; nor is a party for that reason justified in disobeying the mandate, but if aggrieved, his remedy is in a motion to dissolve. *Young v. Rollins*, 90 N. C. 125 (1884).

Effect of Filing Defective Bond. — Failure to give the required undertaking is merely an irregularity which will be cured by a subsequent execution thereof. *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701 (1897).

Failure to give the required undertaking under this section is merely an irregularity, which will be cured by the subsequent execution thereof. *Standard Bonded Warehouse Co. v. Cooper*, 30 F. (2d) 842 (1929), citing *McKay v. Chapin*, 120 N. C. 159, 26 S. E. 701 (1897).

Where Money Deposited without Sureties.—Where an injunction is issued under an order that the plaintiff shall give an undertaking with sufficient sureties in a certain sum, it seems that a deposit in money of the sum named will be sufficient, but whether so or not the giving by the plaintiff of the required undertaking before the hearing of a motion to vacate the injunction for the want of it, will supply the alleged defect, and prevent the injunction from being vacated on that account. *Richards v. Baurman*, 65 N. C. 162 (1871).

Undertaking Given Prior to Injunction. — Where an undertaking has been given before the issue of a restraining order, it is not necessary for the court, on the return of the order to show cause and upon continuing the injunction to the trial, to require a new undertaking from the plaintiff unless it be shown that the bond already given is insufficient. *Preiss v. Cohen*, 112 N. C. 278, 17 S. E. 520 (1893).

In an action to abate a public nuisance plaintiff relator is not required to give an undertaking, the provisions of this section not being applicable. *Carpenter v. Boyles*, 213 N. C. 432, 196 S. E. 850 (1938).

Procedure under Section.—It is not contemplated, under this section, that a sep-

arate action shall be brought upon an injunction bond but the damages sustained by reason of an injunction shall be ascertained by proper proceedings in the same action, and may be by reference or otherwise as the judge shall direct. *North Carolina Gold, etc., Co. v. North Carolina*

Ore, etc., Co., 79 N. C. 48 (1878). See also, *Crawford v. Pearson*, 116 N. C. 718, 21 S. E. 561 (1895); *Nansemond Timber Co. v. Rountree*, 122 N. C. 45, 29 S. E. 61 (1898).

Cited in *Gruber v. Ewbanks*, 199 N. C. 335, 154 S. E. 318 (1930).

§ 1-497. Damages on dissolution.—A judgment dissolving an injunction carries with it judgment for damages against the party procuring it and the sureties on his undertaking without the requirement of malice or want of probable cause in procuring the injunction, which damages may be ascertained by a reference or otherwise, as the judge directs, and the decision of the court is conclusive as to the amount of damages upon all the persons who have an interest in the undertaking. (Code, s. 341; 1893, c. 251; Rev., s. 818; C. S., s. 855.)

Want of Probable Cause. — Prior to the 1893 amendment it was an essential element of the defendant's recovery on the plaintiff's indemnity bond that he be able to prove malice or want of probable cause in the institution of the injunction proceedings. *Burnett v. Nicholson*, 79 N. C. 548, (1878). Under the section as it now stands it is no longer necessary to allege want of probable cause. *Crawford v. Pearson*, 116 N. C. 718, 21 S. E. 561 (1895).

Injunction Sought with Malice. — The preceding section, requiring a bond in an injunction to cover the defendant's dam-

ages, and this section, providing for the recovery thereof in the same action, do not limit the remedy to that action, in the event the injunction was sought with malice and without probable cause; and defendant has the right therein to elect between this remedy and that by independent action, without limiting his recovery to an action on the bond when the damages sought are in excess of that amount. *Shute v. Shute*, 180 N. C. 386, 104 S. E. 764 (1920).

Cited in *Gruber v. Ewbanks*, 199 N. C. 335, 154 S. E. 318 (1930).

§ 1-498. Issued without notice; application to vacate.—If the injunction is granted without notice, the defendant, at any time before the trial, may apply, upon notice to be fixed by the court of not less than two nor more than ten days, to the judge having jurisdiction, to vacate or modify the same, if he is within the district or in an adjoining district, but if out of the district and not in an adjoining district, then before any judge who is at the time in the district, and if there is no judge in the district, before any judge in an adjoining district. The application may be made upon the complaint and the affidavits on which the injunction was granted, or upon the affidavits on the part of the defendant, with or without answer. If no such application is made, the injunction continues in force until such application is made and determined by the judge, and a verified answer has the effect only of an affidavit. (C. C. P., s. 195; Code, s. 344; 1905, c. 26; Rev., s. 819; C. S., s. 856.)

Section Mandatory. — The requirement of notice to the defendant is essential to the validity of the proceedings, and where an injunction has been granted without such notice the injunction will be vacated. *Armstrong v. Kinsell*, 164 N. C. 125, 80 S. E. 235 (1913).

Vacation or Modification of Injunction. — A judge may at the instance of the defendant modify an injunction previously granted without giving notice to the plaintiff, but in such case he must found his action merely upon the complaint, and cannot consider the answer or affidavits on the part of the defendant. *Sledge v. Blum*, 63 N. C. 374 (1869).

A superior court judge assigned to a district has, during the period of assignment,

jurisdiction of all "in chambers" matters arising in the district, including restraining orders and injunctions, and he may, in an adjoining district, vacate or modify a temporary injunction issued without notice. *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

Answer Treated in Affidavit. — The answer under the present practice, in an application to vacate an injunction, is itself but an affidavit when verified and the plaintiff may introduce other affidavits to support the allegations in his complaint; such a verified answer is not conclusive but has only the effect of an affidavit. *Blackwell Durham Tobacco Co. v. McElwee*, 94 N. C. 429 (1886).

After the answer and all the affidavits

have been filed, if it appears to the court that the plaintiff's whole equity is denied and his case is fully met, the injunction will not be continued to the final hearing. *Rigsbee v. Durham*, 98 N. C. 81, 3 S. E. 749 (1887). See *Cooper v. Cooper*, 127 N. C. 490, 37 S. E. 492 (1900).

However, where it appears from the affidavits that there is probable cause or it can reasonably be seen that the plaintiff will be able to make out his case at the final

hearing, then the injunction will be continued. *Seip v. Wright*, 173 N. C. 14, 91 S. E. 359 (1917).

Time within Discretion of Judge.—The time, when the affidavits of defendants should be filed and the granting of continuance in injunction cases, is largely within the discretion of the judge. *Tobacco Growers Co-op. Ass'n v. Harvey & Son Co.*, 189 N. C. 494, 127 S. E. 545 (1925).

§ 1-499. When opposing affidavits admitted.—If the application is made upon affidavits on the part of the defendant, the plaintiff may oppose the same by affidavits or other proof, in addition to those on which the injunction was granted. (C. C. P., s. 196; Code, s. 345; Rev., s. 820; C. S., s. 857.)

Original Affidavits Supported by Counter Affidavits.—When the defendant, in an application for a provisional remedy, meets the plaintiff's allegations by counter affidavits, it is competent for the plaintiff to support his original affidavits by others to the same effect and in reply to those offered by the defendants. *Young v. Rollins*, 85 N. C. 485 (1881).

Defective Affidavit Made Sufficient by Counter Affidavit.—Where the plaintiff's first affidavit is insufficient in form, and objection is made thereto by the defendant,

the replying affidavit by the plaintiff will cure the objectionable consequence of the defects contained in the original affidavit. *Clark v. Clark*, 64 N. C. 150 (1870).

Sufficiency of Verification.—An affidavit, upon which an application for a provisional remedy is based, is sufficiently verified when made before a commissioner for this State resident in another state and authenticated by his official signature and seal. *Young v. Rollins*, 85 N. C. 485 (1881).

Stated in Reidsville v. Slade, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

§ 1-500. Restraining orders and injunctions in effect pending appeal; indemnifying bond.—Whenever a plaintiff shall appeal from a judgment rendered at chambers, or in term, either vacating a restraining order theretofore granted, or denying a perpetual injunction in any case where such injunction is the principal relief sought by the plaintiff, and where it shall appear that vacating said restraining order or denying said injunction will enable the defendant to consummate the threatened act, sought to be enjoined, before such appeal can be heard, so that the plaintiff will thereby be deprived of the benefits of any judgment of the Supreme Court, reversing the judgment of the lower court, then in such case the original restraining order granted in the case shall in the discretion of the trial judge be and remain in full force and effect until said appeal shall be finally disposed of: Provided, the plaintiff shall forthwith execute and deposit with the clerk a written undertaking with sufficient surety, approved by the clerk or judge, in an amount to be fixed by the judge to indemnify the party enjoined against all loss, not exceeding an amount to be specified, which he may suffer on account of continuing such restraining order as aforesaid, in the event that the judgment of the lower court is affirmed by the Supreme Court. (1921, c. 58; C. S., s. 858(a).)

Discretion of Court Not Reviewable.—Where an appeal has been taken from a judgment of the superior court judge, vacating a restraining order upon the county board of education from transferring a public school from one district to another, a supplementary order providing for the payment of the teachers pending the ap-

peal is within the sound discretion of the trial judge, and not reviewable. *Clark v. McQueen*, 195 N. C. 714, 143 S. E. 528 (1928).

Cited in Boyd v. Brooks, 197 N. C. 644, 150 S. E. 178 (1929); *Reidsville v. Slade*, 224 N. C. 48, 29 S. E. (2d) 215 (1944).

ARTICLE 38.

Receivers.

§ 1-501. **What judge appoints.**—Any judge of the superior court with authority to grant restraining orders and injunctions has like jurisdiction in appointing receivers, and all motions to show cause are returnable as is provided for injunctions. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 846; C. S., s. 859.)

Cross References.—As to corporate receivers, see §§ 55-147 to 55-157. As to compensation of receivers, see annotations under § 55-155. As to receiver of ward's estate, see § 33-53. As to what judges have jurisdiction to grant restraining orders and injunctions, see § 1-493. As to receiver in supplemental proceedings, see § 1-363 et seq.

In General. — The provisions of this section and § 1-485, in express terms invest the court with very large and comprehensive powers to protect the rights and prevent the perpetration, or the continuance, of wrong in respect to the subject matter of the action, and to take charge of and protect the property in controversy both before and after judgment, by injunctions and through receivers, pending the litigation; they facilitate and enlarge the authority of the courts in the exercise of these remedial agencies, and do not in any degree abridge the exercise of like general powers that appertain to courts of equity to grant the relief specified, or to grant perpetual injunctions in proper cases, and the like relief. *Roper Lumber Co. v. Wallace*, 93 N. C. 22 (1885).

Purpose. — It is perfectly manifest that this section, with a view to prevent the inconvenience of parties, intended to fix the place where, rather than the persons before whom, such orders should be made returnable, and that the judges were denominated in the order in which we find them because it was supposed that one or the other of them would at all times be within the district of the action. *Galbreath v. Everett*, 84 N. C. 546 (1881).

An Inherent Power.—The power to appoint a receiver is necessarily inherent in a court which possesses equitable jurisdiction. *Skinner v. Maxwell*, 66 N. C. 45 (1872).

Discretion of Judge. — The appointment of a receiver is not a matter of positive right, but rests in the sound legal discretion of the judge, who will take into consideration the nature of the property and the effect of granting or refusing such an application upon the material interests of the respective parties to the controversy. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E.

360 (1896).

Same—Necessary Number.—The court should not appoint more receivers than are necessary. *Battery Park Bank v. Western Carolina Bank*, 126 N. C. 531, 36 S. E. 39 (1900).

Necessity that Judge "Find the Facts." — Upon an application for an injunction and receiver it is not necessary for the judge to "find the facts" further than to examine the affidavits and determine whether sufficient cause is shown for the ancillary relief. *City Nat. Bank v. Bridgers*, 114 N. C. 381, 19 S. E. 642 (1894), citing *Jones v. Boyd*, 80 N. C. 258 (1879).

Effect on Both Parties Considered. — It is the duty of the court, in passing upon a motion for an injunction or the appointment of a receiver, to consider the consequences of such action upon both parties. *Venable v. Smith*, 98 N. C. 523, 4 S. E. 514 (1887), citing *Hanna v. Hanna*, 89 N. C. 68 (1883). See also, *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19 (1888).

Order without Prejudice.—Where it appears from verified pleadings that there is a bona fide controversy between the parties, the mortgagor's order temporarily restraining the foreclosure of the mortgage is properly continued to the final hearing, without prejudice to the right of the mortgagees to move for the appointment of a receiver. *Bennett v. Mortgage Service Corp.*, 206 N. C. 902, 173 S. E. 22 (1934).

What Judge Appoints. — Ordinarily the motion for a receiver must be made before the resident judge of the district, or one assigned to the district or holding the courts thereof by exchange, at the option of the mover. *Corbin v. Berry*, 83 N. C. 28 (1880); *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Or, at most, in analogy to the granting of restraining orders, if the motion for a temporary receiver is granted by any other judge than one of those just named, the order must be made returnable before one of such judges. *Galbreath v. Everett*, 84 N. C. 546 (1881); *Hamilton v. Icard*, 119 N. C. 589, 17 S. E. 519 (1893); *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Clerk Cannot Appoint.—The clerk can-

not appoint a receiver as that power is reserved to the judge alone. *Parks v. Sprinkle*, 64 N. C. 637 (1870).

Operation and Effect of Appointment. — The utmost effect of his appointment is to put the property from that time into his custody as an officer of the court for the benefit of the party ultimately proved to be entitled but not to change the title, or even the right of possession in the property. *Quincy, etc., R. Co. v. Humphreys*, 145 U. S. 82, 12 S. Ct. 787, 36 L. Ed. 632 (1892).

An Officer of Court. — A receiver is an officer of the court, and his possession of the property is the possession of the court. He holds it as a custodian until the rightful claimant is ascertained by the court, and then for such claimant. *Battle v. Davis*, 66 N. C. 252 (1872).

Nature of Office.—A receiver derives his authority from the act of the court appointing him, and not from the act of the parties at whose suggestion or by whose consent he is appointed. He is the right arm of the jurisdiction invoked. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 S. Ct. 1013, 34 L. Ed. 341 (1890).

Powers and Duties. — A receiver is an officer of the court and subject to its directions and orders. He has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court. *Stuart v. Boulware*, 133 U. S. 78, 10 S. Ct. 242, 33 L. Ed. 568 (1890).

Title Relates Back. — “The title of the receiver dated back to the time of granting the order, even though preliminary conditions must be performed, and he remains out of possession pending such performance.” *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Place of Hearing.—The hearing as to a receiver may be held outside of the county where the main action is pending. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

The interest of the owner is in no wise changed by the appointment of a receiver. The legal title and possession are held by him for the owner and the property is to be administered under the orders of the court. *Southern Pants Co. v. Rochester German Ins. Co.*, 159 N. C. 78, 74 S. E. 812 (1912).

Necessary Allegations. — Where the appointment of a receiver is sought as an ancillary remedy the plaintiffs must allege and show that they are entitled to the main relief, and must then show their equity

entitling them to the ancillary relief in aid of their main relief. *Witz, etc., Co. v. Gray*, 116 N. C. 48, 20 S. E. 1019 (1895).

Security Omitted.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536 (1880).

Matter of Record.—The appointment of receivers is matter of record, and should be shown by the record. *Person v. Leary*, 126 N. C. 504, 36 S. E. 35 (1900).

Conflict of Concurrent Jurisdictions. — The court which first obtains jurisdiction is entitled to retain it without interference, and cannot be deprived of its rights to do so because it may not have first obtained physical possession of the property in dispute. *Moran v. Sturges*, 154 U. S. 256, 14 S. Ct. 1019, 38 L. Ed. 981 (1894).

Priority Where Two Receivers Appointed.—The test of jurisdiction in a case of two receivers being appointed is not the first issuing of the summons, nor the first preparation and verification of the papers, which are the acts of the parties, nor which receiver first took possession, but which court is first “seized of jurisdiction” by making an order upon legal proceedings exhibited before it. *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Same — Date Determines. — Priority as between receivers is determined by reference to the date of appointment since the court will not permit both to act. *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Same—Same—Fractions of a Day. — Where proper proceedings for the appointment of a receiver are begun in two different courts and a different receiver is appointed in each case, the court, in determining the priority of appointment as between the receivers, will take notice of fractions of a day. *Worth v. Piedmont Bank*, 121 N. C. 343, 28 S. E. 488 (1897).

Complaint Should Be Verified. — The practice of appointing a receiver upon an unverified complaint and without notice to creditors and other persons interested, is not commended. *Fisher v. Trust Co.*, 138 N. C. 91, 50 S. E. 592 (1905).

Proof of Appointment of Foreign Receivers. — Persons suing as receivers of a foreign court should, on their appointment being denied, prove the same by a certified copy of the decree dissolving the corporation and appointing them. *Person v. Leary*, 127 N. C. 114, 37 S. E. 149 (1900).

Quoted in Essex Inv. Co. v. Pickelsimer, 210 N. C. 541, 187 S. E. 813 (1936); Na-

tional Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Cited in Hopkins v. Swain, 206 N. C. 439, 174 S. E. 409 (1934).

§ 1-502. In what cases appointed.—A receiver may be appointed—

1. Before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court.

2. After judgment, to carry the judgment into effect.

3. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment debtor refuses to apply his property in satisfaction of the judgment.

4. In cases provided in chapter entitled Corporations in the article Receivers; and in like cases, of the property within this State of foreign corporations.

The article Receivers, in the chapter entitled Corporations, is applicable, as near as may be, to receivers appointed hereunder. (C. C. P., s. 215; 1876-7, c. 223; 1879, c. 63; 1881, c. 51; Code, s. 379; Rev., s. 847; C. S., s. 860.)

In General.—This section specifies certain cases in which a receiver may be appointed, but does not materially alter the equitable jurisdiction of our courts upon this subject. *Skinner v. Maxwell*, 66 N. C. 45 (1872).

* This section is expressly made applicable to all receivers. *Ledbetter v. Farmers Bank, etc., Co.*, 142 F. (2d) 147 (1944).

Where the plaintiff makes it properly to appear to the court that he is in imminent danger of loss by the defendant's insolvency, or that he reasonably apprehends that the defendant's property will be destroyed, removed or otherwise disposed of by the defendant pending the action, or that the defendant is insolvent, and it must be sold to pay his debts, or that he is attempting to defraud the plaintiff, a receiver for his property may be appointed before judgment. *Kelly v. McLamb*, 182 N. C. 158, 108 S. E. 435 (1921), pointing out other instances.

Before Judgment.—Where a party establishes an apparent right to land, and the person in possession is insolvent, a receiver will be appointed to take charge of the rents and profits during the pendency of the action. *McNair v. Pope*, 96 N. C. 502, 2 S. E. 54 (1887), citing *Kerchner v. Fairley*, 80 N. C. 24 (1879); *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536 (1880); *Horton v. White*, 84 N. C. 297 (1881); *Oldham v. Bank*, 84 N. C. 304 (1881); *Roper Lumber Co. v. Wallace*, 93 N. C. 22 (1885).

Where property is the subject of an action and is liable to clear equities in a party out of possession, the court may appoint a receiver when it seems just and necessary to keep the property in dispute from the control of either party until the contro-

versy is determined. *Skinner v. Maxwell*, 66 N. C. 45 (1872).

In order to appoint a receiver before judgment under this section, it must appear that claimant has an apparent right to property which is the subject of the action and the property or the rents are in danger of being lost, *Witz v. Gray*, 116 N. C. 48, 20 S. E. 1019 (1895); *Pearce v. Elwell*, 116 N. C. 595, 21 S. E. 305 (1895); and it is generally necessary to show that the party in possession is insolvent, *Ellington v. Currie*, 193 N. C. 610, 137 S. E. 869 (1927). *In re Penny*, 10 F. Supp. 638 (1935).

Where an executor's petition to sell lands alleges merely that personalty is insufficient to pay debts, plaintiff executor is not entitled to the appointment of a receiver for the lands on the ground that the action cannot be tried until a subsequent term, and that the devisee had refused to pay taxes, the allegation merely that the personalty is insufficient failing to show plaintiff executor's apparent right to the relief as required for the appointment of a receiver under the provisions of subsection (1) of this section, especially when the devisee denies the allegation that the personalty is insufficient. *Neighbors v. Evans*, 210 N. C. 550, 187 S. E. 796 (1936).

County Court Can Not Appoint Receiver after Judgment Docketed in Superior Court.—After the judgment of a general county court is docketed in the superior court of the county the county court has no further jurisdiction of the case and may not thereafter hear a motion for the appointment of a receiver for the judgment debtor. *Essex Inv. Co. v. Pickelsimer*, 210 N. C. 541, 187 S. E. 813 (1936).

Discretion of Court.—The appointment

of a receiver pendente lite is not a matter of strict right, but rests in the sound discretion of the court. *Hanna v. Hanna*, 89 N. C. 68 (1883).

The power to appoint a receiver is inherent in a court of equity. The change to the Code did not abridge, but enlarged, it. *In re Penny*, 10 F. Supp. 638 (1935).

And Section Does Not Limit Power.—The power of the court to appoint a receiver in proper cases and upon a proper showing is not limited by this section or § 55-147. *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

A receiver will not be appointed where there is a full and adequate remedy at law. *In re Penny*, 10 F. Supp. 638 (1935).

A receiver of defendant's property will not be appointed at the request of a judgment creditor without more being shown where he has the remedy of execution against the property. *Scoggins v. Gooch*, 211 N. C. 677, 191 S. E. 750 (1937).

Unless Defense of Adequate Remedy at Law Is Waived.—A simple contract creditor may obtain, in proper cases, equitable relief where answer admits indebtedness and consents to appointment of receiver, waiving the defense of adequate remedy at law. *In re Penny*, 10 F. Supp. 638 (1935).

Where the debtor and one small creditor agree to have a receiver appointed and to restrain all other creditors from doing anything, a receivership under such circumstances is an agency for the defendant, and the title of such a receiver to the assets of the bankrupt debtor is merely colorable; and he may be required to turn over assets to trustee in bankruptcy. *In re Penny*, 10 F. Supp. 638 (1935).

Danger of Loss.—Under this section apparent danger of waste or injury to the property, or loss of the rents and profits by reason of the insolvency of the adverse party in possession, is the ground for appointing a receiver thereof. *Rollins v. Henry*, 77 N. C. 467 (1877); *Twitty v. Logan*, 80 N. C. 69 (1879).

Property or funds will not be taken from one entitled to custody thereof, and transferred to a receiver, unless there is imminent danger of loss. *Rheinstein v. Bixby*, 92 N. C. 307 (1885), citing *Thompson v. McNair*, 62 N. C. 121 (1867).

Same — Examples. — Where plaintiff mortgagor obtained an injunction to restrain the sale of the mortgaged premises until certain counterclaims could be passed upon and the sum really due ascertained, the defendant mortgagee is entitled to have a receiver appointed to take charge of the property and secure the rents and profits

where the same are in danger of being lost. *Oldham v. First Nat. Bank*, 84 N. C. 304 (1881).

Plaintiff mortgagee was administrator of one of two mortgagors, whose heirs and the other mortgagor were defendants in an action to foreclose a mortgage; the property conveyed was inadequate to pay the debt, and the mortgagor in possession was insolvent; the plaintiff denied an alleged payment of the debt and the existence of assets in his hands applicable thereto: Held, that in such case it was not error in the court on application of the plaintiff to appoint a receiver to secure the rents and profits pending the litigation. *Kerchner v. Fairley*, 80 N. C. 24 (1879), approving *Ten Broeck v. Orchard*, 74 N. C. 409 (1876); *Rollins v. Henry*, 77 N. C. 467 (1877).

Where lands were devised to two persons, both of whom were appointed executors, charged with the payment of certain debts, and one of the executors, claiming a part of the land under a deed subsequent in date to the execution of the will, had entered thereon and was proceeding to operate it as mining property, and it appeared there was some danger of waste of the property, and the solvency of the vendee-executor was doubtful: Held, to be a proper case for the appointment of a receiver. *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151 (1888).

General Allegations Insufficient.—A receiver will not be appointed pendente lite, on a general allegation that loss will ensue from nonappointment, without a full statement of the facts. *Hanna v. Hanna*, 89 N. C. 68 (1883), citing *Hughes v. Person*, 63 N. C. 548 (1869); *Wood v. Harrell*, 74 N. C. 338 (1876). See *Southern Flour Co. v. McIver*, 109 N. C. 120, 13 S. E. 905 (1891).

Insolvency Alone Insufficient. — The mere insolvency of the party in possession of property, where there is no allegation that the defendant intends to run off with or conceal or destroy the property, is not sufficient ground for the appointment of a receiver. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360 (1896).

Property Threatened by Fraud and Insolvency. — Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. *Peoples Nat. Bank v. Waggoner*, 185 N. C. 297, 117 S. E. 6 (1923).

Same—Question Postponed.—Where an application for a receiver is based on fraud as to creditors in a deed, the question of fraud will not be determined on hearing of the application, but must stand till the final hearing of the case. *Rheinstein v. Bixby*, 92 N. C. 307 (1885), citing *Levenson & Co. v. Elson*, 88 N. C. 182 (1883).

Fraudulent Confession of Judgment.—A receiver may be appointed under this section, in a suit against a debtor and others to restrain an execution sale, where the debtor has confessed judgment apparently with fraudulent intent, and executions have been levied on the only property of the debtor within the State in favor of nonresident creditors who seek to take the property out of the State. *Stern & Co. v. Austern*, 120 N. C. 107, 27 S. E. 31 (1897).

Insolvent Foreign Corporation.—An insolvent corporation, with its property or plant located in this State, is subject to the appointment by our courts of a receiver to take charge of its assets here and administer them as a trust fund for its creditors, though incorporated under the laws of another state, approving *Holshouser v. Copper Co.*, 138 N. C. 248, 50 S. E. 650 (1905). *Summit Silk Co. v. Kinston Spinning Co.*, 154 N. C. 421, 70 S. E. 820 (1911).

Infant's Estate.—On the principle of protection, a receiver may be appointed of an infant's estate if it be not vested in a trustee, for he is incompetent to take charge of it himself. *Skinner v. Maxwell*, 66 N. C. 45 (1872).

To Prevent Suspension of Business.—Where the property and franchise of a city water company were to be sold to satisfy a judgment it was held that in order to prevent all possible risk of the temporary suspension of the business of the water company, it would be proper to appoint a receiver under par. 2 of this section. *McNeal Pipe, etc., Co. v. Howland*, 111 N. C. 615, 16 S. E. 857 (1892).

Upon Application for Injunction.—Under the broad terms of this section the court has power to appoint a receiver, upon an application for an injunction where

it appears that this action will best serve the interests of both parties. *Hurwitz v. Carolina Sand, etc., Co.*, 189 N. C. 1, 126 S. E. 171 (1925).

Notice to Owner.—Notice to the owner of property should be given before appointment of a receiver therefor. *York v. McCall*, 160 N. C. 276, 76 S. E. 84 (1912).

Effect of Instrument Giving Mortgagee Power of Appointment of Trustee.—The appointment of a receiver is an equitable remedy and the provisions of this and the following section enacted before the giving of a deed of trust upon lands may not be entirely supplanted by a provision in the instrument which gives the mortgagee or trustee the unequivocal right to the appointment of a receiver in the event of the happening of certain conditions so as to prevent our courts sitting in their equity jurisdiction from administering the equities to which the mortgagor is entitled under the facts. *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475 (1931).

Apparently Good Title Sufficient.—Where a party, in this case a defendant, in an action involving the title and possession of land, demands affirmative relief and asks for the appointment of a receiver, it is sufficient if he shows an apparently good title, either not controverted, or not unequivocally denied by his adversary. *Lovett v. Slocumb*, 109 N. C. 110, 13 S. E. 893 (1891).

Where Receivership Would Cause Loss.—A receiver will not be appointed, in an action to foreclose a mortgage on a newspaper, when the defendant denies owing anything on the mortgage debt, and it is apparent that, owing to the peculiar nature of the property, the appointment of a receiver would practically destroy its value. *Whitehead v. Hale*, 118 N. C. 601, 24 S. E. 360 (1896).

Quoted in National Surety Corp. v. Sharpe, 232 N. C. 98, 59 S. E. (2d) 593 (1950).

Cited in Harris v. Hilliard, 221 N. C. 329, 20 S. E. (2d) 278 (1942).

§ 1-503. **Appointment refused on bond being given.**—In all cases where there is an application for the appointment of a receiver, upon the ground that the property or its rents and profits are in danger of being lost, or materially injured or impaired, or that a corporation defendant is insolvent or in imminent danger of insolvency, and the subject of the action is the recovery of a money demand, the judge before whom the application is made or pending shall have the discretionary power to refuse the appointment of a receiver if the party against whom such relief is asked, whether a person, partnership or corporation, tenders to the court an undertaking payable to the adverse party in an amount double the sum demanded by the plaintiff, with at least two sufficient and duly justified

sureties, conditioned for the payment of such amount as may be recovered in the action, and summary judgment may be taken upon the undertaking. In the progress of the action the court may in its discretion require additional sureties on such undertaking. (1885, c. 94; Rev., s. 848; C. S., s. 861.)

This section was enacted for the benefit and protection of a defendant against whom an application for a receiver is prosecuted. It authorizes the judge in his discretion, upon the filing of the undertaking therein stipulated, "to refuse the appointment of a receiver." *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

Upon application for a receiver it is proper to allow a defendant to continue in possession of property upon giving a sufficient bond to protect the other claimants. *Frank v. Robinson*, 96 N. C. 28, 1 S. E. 781 (1887). See also, *Kron v. Smith*, 96 N. C. 586, 2 S. E. 463 (1887); *Godwin v. Watford*, 107 N. C. 168, 11 S. E. 1051 (1890).

Where there is danger of loss of rents and profits, instead of appointing a receiver the court may allow the defendant to execute a bond to secure the rents and profits and such damages as may be adjudged the plaintiff, and require an account to be kept. *Roper Lumber Co. v. Wallace*, 93 N. C. 22 (1885); *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541 (1887); *Lewis v. Roper Lumber Co.*, 99 N. C. 11, 5 S. E. 19 (1888); *Ousby v. Neal*, 99 N. C. 146, 5 S. E. 901 (1888).

Opportunity to File Bond. — The court erred in directing a receiver to take possession and control of the mines, and machinery for operating the same, without giving the defendant an opportunity to file a bond to secure the payment over to the receiver of any proceeds therefrom, as the court might subsequently direct. *Stith v. Jones*, 101 N. C. 360, 8 S. E. 151 (1888).

Effect of Acceptance of Bond by Court.

§ 1-504. Receiver's bond.—A receiver appointed in an action or special proceeding must, before entering upon his duties, execute and file with the clerk of the court in which the action is pending an undertaking payable to the adverse party with at least two sufficient sureties in a penalty fixed by the judge making the appointment, conditioned for the faithful discharge of his duties as receiver. And the judge having jurisdiction thereof may at any time remove the receiver, or direct him to give a new undertaking, with new sureties, and on the like condition. This section does not apply to a case where special provision is made by law for the security to be given by a receiver, or for increasing the same, or for removing a receiver. (Code, s. 383; Rev., s. 849; C. S., s. 862.)

Cross References.—As to giving bond in surety company, see §§ 109-16 and 109-17. As to clerk's bond liable when clerk appointed receiver, see annotations under § 33-53.

Effect of Failure to Require Adequate

Security.—Plaintiffs who are parties at the time the court accepts bond filed pursuant to this section, and denies application for appointment of a receiver, are thereby estopped from further prosecuting their application for a receiver, and the court is without authority to revoke such order at a subsequent term over objection of defendants. *Sinclair v. Moore Central R. Co.*, 228 N. C. 389, 45 S. E. (2d) 555 (1947).

Section 1-111 Does Not Apply.—Section 1-111, requiring a defendant in ejectment to give bond before putting in a defense to the action, does not abridge the power of the court to appoint a receiver to secure the rents and profits. *Kron v. Dennis*, 90 N. C. 327 (1884); *Durant v. Crowell*, 97 N. C. 367, 2 S. E. 541 (1887); *Arey v. Williams*, 154 N. C. 610, 70 S. E. 931 (1911).

Bankruptcy of Defendant. — Where plaintiff in an action in the superior court acquires a lien on defendant's property, which is taken into the custody of the court and released on the giving of a bond under this section, upon the adjudication of the defendant a bankrupt, the State court may order that the cause proceed to trial, any judgment rendered for plaintiff to be collectible, by execution, only from the sureties on the bond, so that the plaintiff or sureties may prove the judgment as a claim in the bankruptcy proceeding. *Gordon v. Calhoun Motors*, 222 N. C. 398, 23 S. E. (2d) 325 (1942).

Applied in *Woodall v. North Carolina Joint Stock Land Bank*, 201 N. C. 428, 160 S. E. 475 (1931); *Little v. Wachovia Bank, etc., Co.*, 208 N. C. 726, 182 S. E. 491 (1935).

Security.—An order appointing a receiver is not void by reason of an omission of the court to require adequate security. *Nesbitt & Bro. v. Turrentine*, 83 N. C. 536 (1880).

An order appointing a receiver is not void because of an inadequate bond. *Led-*

better v. Farmers Bank, etc., Co., 142 F. (2d) 147 (1944), citing Nesbitt & Bro. v. Turrentine, 83 N. C. 536 (1880).

The determination of the amount of the bond is within the discretion of the court. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147 (1944).

And Mortgagee Is Not Liable for Suggesting Inadequate Bond. — The fact that mortgagees suggested an inadequate amount in the bond of a receiver was held not to thereby render them legally liable to the mortgagor. Ledbetter v. Farmers Bank, etc., Co., 142 F. (2d) 147 (1944).

Breach. — Where the receiver's delinquency is manifest, and he fails to comply with the order of the court in respect to the fund, such failure is a breach of the bond, upon which suit may be brought by leave of the court. Bank v. Creditors, 86 N. C. 323 (1882).

Same — Must Be Ascertained. — A receiver and his surety can not be sued upon the bond for an alleged breach of his trust, before a default is ascertained—the proper practice being to apply to the court for a rule on the receiver to render his account. Bank v. Creditors, 86 N. C. 323 (1882); At-

kinson v. Smith, 89 N. C. 72 (1883).

Same—Burden of Proof.—The burden is upon a receiver and his sureties to show that he used due diligence in investing the money in his hands. Waters v. Melson, 112 N. C. 89, 16 S. E. 918 (1893).

Judgment. — The court will not, by order in a cause in which a receiver has been appointed, direct a judgment to be entered against him and his sureties. The proper practice is upon a report finding the amount due by the receiver, and upon his failing to pay the same, for the court to grant leave to sue upon the bond. Atkinson v. Smith, 89 N. C. 72 (1883).

Action against Sureties. — The liability of sureties on a receiver's bond can only be enforced by independent action against them and not by motion in the cause. Black v. Gentry, 119 N. C. 502, 26 S. E. 43 (1896).

Same—Receiver Not a Party. — Where judgment has been recovered against the receiver, he is not a necessary party to an action against the sureties on his bond. Black v. Gentry, 119 N. C. 502, 26 S. E. 43 (1896).

§ 1-505. Sale of property in hands of receiver.—The resident judge or the judge assigned to hold any of the courts in any judicial district of North Carolina shall have power and authority to order a sale of any property, real or personal, in the hands of a receiver duly and regularly appointed by the superior court of North Carolina upon such terms as appear to be to the best interests of the creditors affected by said receivership. Except as provided in G. S. § 1-506 the procedure for such sales shall be as provided in article 29A of chapter 1 of the General Statutes. (1931, c. 123, s. 1; 1949, c. 719, s. 2.)

Editor's Note.—The 1949 amendment, effective Jan. 1, 1950, added the second sentence.

§ 1-506. Confirmation of sales outside county of action; notice to creditors.—Any sale made by a receiver may be confirmed outside of the county in which said action is pending, either by the resident judge or the judge assigned to hold any of the courts of the district in which said sale is made, upon proof of written notice to each creditor who has filed his claim with said receiver of at least ten days prior to the date of confirmation. The said notice shall specify the time and place when application for confirmation shall be made, and an affidavit of the receiver showing that notice was mailed to each creditor at his last known post office address shall be sufficient proof of notice to said creditors. (1931, c. 123, s. 2; 1931, c. 267.)

Editor's Note.—Public Laws 1931, c. 267, purported to amend this section by inserting the word "by" in the first line of this

section, although the published section already contained such word.

§ 1-507. Validation of sales made outside county of action.—All receiver's sales made prior to March 16, 1931, where orders were made and confirmation decreed or where either orders were made or confirmation decreed outside the county in which said actions were pending by a resident judge or the judge assigned to hold the courts of the district are hereby validated, ratified and confirmed. (1931, c. 123, s. 3.)

ARTICLE 39.

Deposit or Delivery of Money or Other Property.

§ 1-508. **Ordered paid into court.**—When it is admitted by the pleading or examination of a party that he has in his possession or under his control any money or other thing capable of delivery, which, being the subject of the litigation, is held by him as trustee for another party, or which belongs or is due to another party, the judge may order it deposited in court, or delivered to such party with or without security, subject to the further direction of the judge. (C. C. P., s. 215; Code, s. 380; Rev., s. 850; C. S., s. 863.)

Party Entitled May Retain. — The rule is quite well settled that, unless in case of threatened irreparable damage or loss of the fund, it will be suffered to remain in the hands of the party who in law is entitled to its custody and care. *Thompson v. McNair*, 62 N. C. 121 (1867); *Levenson & Co. v. Elson*, 88 N. C. 182 (1883).

When Court Will Retain. — When a

disputed fund is in possession and under the control of the court, and the right of a claimant is doubtful, it will be retained until the determination of the controversy, when it can be ascertained to whom it belongs. *Ponton v. McAdoo*, 71 N. C. 101 (1874); *Morris v. Willard*, 84 N. C. 293 (1881); *Levenson & Co. v. Elson*, 88 N. C. 182 (1883).

§ 1-509. **Ordered seized by sheriff.**—When, in the exercise of his authority, a judge has ordered the deposit, delivery or conveyance of money or other property, and the order is disobeyed, the judge, besides punishing the disobedience as for contempt, may make an order requiring the sheriff to take the money or property, and deposit, deliver, or convey it, in conformity with the direction of the judge. (C. C. P., s. 215; Code, s. 381; Rev., s. 851; C. S., s. 864.)

§ 1-510. **Defendant ordered to satisfy admitted sum.**—When the answer of the defendant expressly, or by not denying, admits part of the plaintiff's claim to be just, the judge, on motion, may order the defendant to satisfy that part of the claim, and may enforce the order as it enforces a judgment or provisional remedy. (C. C. P., s. 215; Code, s. 382; Rev., s. 852; C. S., s. 865.)

Claim Not Denied. — Where the complaint in an action on two notes set out each note as a separate cause of action and the defendant answered as to one only, it was error to refuse judgment on the note to which no defense was interposed, and from such refusal, being a denial of a substantial right, an appeal was properly taken. In such case judgment should have been given on the one note and the cause continued as to the other. *Curran v. Kerchner*, 117 N. C. 264, 23 S. E. 177 (1895).

Where in an action on a note the defendants admit liability in a certain part thereof but deny liability for the balance: Held, an order directing that plaintiff recover the amount admitted to be due with-

out prejudice to plaintiff's right to litigate the balance of the note is authorized by this section. *Meadows Fert. Co. v. Farmers Trading Co.*, 203 N. C. 261, 165 S. E. 694 (1932).

Tender of Judgment under § 1-541. — Where defendant admits liability under its own construction of the contract for a part of the amount alleged by plaintiff to be due thereunder, plaintiff is entitled, under this section, to judgment for such amount without prejudice to the litigation of the balance claimed to be due him, which right may not be defeated by defendant's tender of judgment under § 1-541. *McKay v. McNair Inv. Co.*, 228 N. C. 290, 45 S. E. (2d) 358 (1947).

SUBCHAPTER XIV. ACTIONS IN PARTICULAR CASES.

ARTICLE 40.

Mandamus.

§ 1-511. **Begun by summons and verified complaint.**—All applications

for writs of mandamus must be made by summons and complaint, which must be duly verified. (1871-2, c. 75; Code, s. 622; Rev., s. 822; C. S., s. 866.)

I. General Consideration.

II. When Mandamus Will Lie.

A. General Rules.

B. Illustrations of Mandamus as Proper Remedy.

C. Illustrations of Mandamus as Improper Remedy.

Cross Reference.

As to mandamus to aid relator in civil action to try title to office, see § 1-528.

I. GENERAL CONSIDERATION.

Historical Discussion. — See Tucker v. Justices, 46 N. C. 451 (1854); Lyon v. Commissioners, 120 N. C. 237, 26 S. E. 929 (1897); Rhodes v. Love, 153 N. C. 468, 69 S. E. 436 (1910).

The writ of mandamus is now a writ of right, to be used as an ordinary process, and every one is entitled to it where it is the appropriate process for asserting the right claimed. Belmont & Co. v. Reilly, 71 N. C. 260 (1874); Burton v. Furman, 115 N. C. 166, 20 S. E. 443 (1894).

Mandamus is an extraordinary remedy, and the writ will not issue except in cases of necessity, where no other adequate remedy is available; and when an issue of fact is raised by the pleadings the determination of which may conclude the matter, the issuance of the writ should in the meanwhile be denied. Edgerton v. Kirby, 156 N. C. 347, 72 S. E. 365 (1911); Duke v. Turner, 204 U. S. 623, 27 S. Ct. 316, 51 L. Ed. 652 (1907).

And Confers No New Authority.—Mandamus can confer no new authority. Laughinghouse v. New Bern, 232 N. C. 596, 61 S. E. (2d) 802 (1950).

Sufficient Evidence.—Before mandamus can be issued to compel the board of commissioners of a county to levy a tax to pay a judgment against the commissioners, the plaintiff, judgment-creditor, must show affirmatively by the record or other competent evidence that the consideration of the debt, upon which the judgment was obtained, was of such character as to fall under the head of ordinary or necessary county expenses. Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558 (1899).

Within Judicial Discretion. — The issuance of the writ is within the judicial and not the arbitrary discretion of the court, and where there is a right with no other adequate remedy, this writ should not be denied, if it is the proper remedy. Edgerton v. Kirby, 156 N. C. 347, 72 S. E. 365 (1911).

Resembles a Civil Action.—While man-

damus is in the nature of an execution, it is also in the nature of a civil action, with summons, pleadings, and Code practice. Bear v. Commissioners, 124 N. C. 204, 32 S. E. 558 (1899).

The motion of the plaintiff in mandamus proceedings, on the pleadings and admissions of the defendant, for a mandamus, is in the nature of a demurrer ore tenus to the answer, involving the admission of the facts set out therein. Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737 (1904).

Cited in MacRae v. Fayetteville, 198 N. C. 51, 150 S. E. 810 (1929); Leonard v. Sink, 198 N. C. 114, 150 S. E. 813 (1929); Yancey v. North Carolina State Highway, etc., Comm., 222 N. C. 106, 22 S. E. (2d) 256 (1942); Brown v. Board of Com'rs, 222 N. C. 402, 23 S. E. (2d) 315 (1942).

II. WHEN MANDAMUS WILL LIE.

A. General Rules.

Mandamus will not lie except to enforce a clear legal right against a party under legal obligation to perform the act sought to be enforced. Sovereign Camp, W. O. W. v. Board of Com'rs, 208 N. C. 433, 181 S. E. 339 (1935); Laughinghouse v. New Bern, 232 N. C. 596, 61 S. E. (2d) 802 (1950).

Mandamus Will Not Control Discretion of Officers.—It may be said, generally, that if a public officer fails to perform his legal duty to the public, mandamus will lie to compel him to do so, if it is a mandatory one, but not to control the exercise of a discretion given to him, for it is the nature of a discretion in certain persons that they are to judge for themselves, and, therefore, no court can require them to decide in a particular way or review their judgment by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the persons to whom the discretion is confided by law would not then be their own but that of the court under whose mandate or compulsion they gave it. Attorney-General v. Justices, 27 N. C. 315 (1844); Barnes v. Commissioners, 135 N. C. 27, 47 S. E. 737 (1904); Edgerton v. Kirby, 156 N. C. 347, 72 S. E. 365 (1911).

Mandamus will lie when the fact required to be done is imposed by law, is merely ministerial, and the relator has a clear right and is without any other adequate remedy. But it does not lie where judgment and discretion are to be exercised; nor to control the officer in the manner of conducting the general duties of his office. Brown v. Turner, 70 N. C. 93

(1874); *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443 (1894).

The rule is, that in all matters requiring the exercise of official judgment, or resting in the sound discretion of the person to whom a duty is confided by law, mandamus will not lie, either to control the exercise of that discretion or to determine upon the decision which shall be finally given. And whenever public officers are vested with power of a discretionary nature as the performance of any official duty, or, in reaching a given result of official action, they are required to exercise any degree of judgment, while it is proper by mandamus to set them in motion and to require their action upon all matters officially entrusted to their judgment and discretion, the courts will in no manner interfere with the exercise of their discretion nor attempt by mandamus to control or dictate the judgment to be given. *High on Ex. Rem.*, p. 50, § 42, et seq.; *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737 (1904).

It is stated generally that mandamus will not lie to command the exercise of a discretionary or voluntary act or right, of what kind soever; so neither does it lie to influence nor control the exercise of such a discretionary act, power or right. It must, however, be clearly understood that, although there may be a discretionary power, yet if it be exercised wrongfully or with manifest injustice, the court is not precluded from commanding its due exercise. So, when one is to act according to his discretion, and he will not act nor consider the matter, the court will by mandamus command him to put himself in motion to do it, that is, to hear and determine or to inquire, so that he may exercise a considerable discretion. *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737 (1904).

To Compel the Performance of a Duty.

— In *Person v. Doughton*, 186 N. C. 723, 120 S. E. 481 (1923), Justice Stacy says: "Mandamus lies only to compel a party to do that which it is his duty to do without it. It confers no new authority. The party seeking the writ must have a clear legal right to demand it, and the party to be coerced must be under a legal obligation to perform the act sought to be enforced." *Lenoir County v. Taylor*, 190 N. C. 336, 130 S. E. 25 (1925).

The purpose of the writ of mandamus is to require some superior court, officer, corporation or person to do some particular thing which appertains to their office or duty, and it will not be granted where the law affords to the party aggrieved another

and complete specific remedy. *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443 (1894).

It is a proceeding to compel a defendant to perform a duty which is owing to the plaintiff, and can be maintained only on the ground that the relator has a present, clear, legal right to the thing claimed, and that it is the duty of the defendants to render it to him. *Brown v. Turner*, 70 N. C. 93 (1874); *Lyon v. Commissioners*, 120 N. C. 237, 26 S. E. 929 (1897).

When Office Is Vacant.—When an office is vacant by reason of a motion, the remedy is mandamus. *Doyle v. Raleigh*, 89 N. C. 133 (1883); *Lyon v. Commissioners*, 120 N. C. 237, 26 S. E. 929 (1897).

Who Can Exercise. — A mandamus lies only for one who has a specific legal right, and who is without any other adequate legal remedy. *State v. Justices*, 24 N. C. 430 (1842); *Tucker v. Justices*, 46 N. C. 451 (1854); *Lyon v. Commissioners*, 120 N. C. 237, 26 S. E. 929 (1897); *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737 (1904); *Edgerton v. Kirby*, 156 N. C. 347, 72 S. E. 365 (1911).

B. Illustrations of Mandamus as Proper Remedy.

Cross Reference. — For further cases when mandamus is the proper remedy, see annotations under § 1-515.

When Treasurer Refuses to Pay as Lawfully Ordered. — Upon refusal of a county treasurer to pay from the public funds of a county an order made on him by a board of audit and finance for the payment of moneys authorized and prescribed by a legislative enactment, a mandamus will lie. *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283 (1908). See *Martin v. Clark*, 135 N. C. 178, 47 S. E. 397 (1904).

Same—Knowledge as to Validity.—It is not within the power of a county treasurer to refuse to pay moneys upon a proper order when he has funds sufficient and applicable, and his knowledge as to whether they were due to the one to whom payment was ordered is immaterial in proceedings for a mandamus to compel him to pay. *Martin v. Clark*, 135 N. C. 178, 47 S. E. 397 (1904); *Southern Audit Co. v. McKensie*, 147 N. C. 461, 61 S. E. 283 (1908).

To Compel Deposit of Public Funds.—A public officer may be compelled by mandamus to deposit public funds in his hands in the proper depository. *Bearden v. Fullam*, 129 N. C. 477, 40 S. E. 204 (1901).

To Compel Ex-Sheriff to Give Up County Property. — A mandamus at the suit of the county commissioners will lie to compel a sheriff wrongfully holding over

from a preceding term to turn over the county property pertaining to his office to his successor, lawfully appointed, qualified and inducted therein. *Lenoir County v. Taylor*, 190 N. C. 336, 130 S. E. 25 (1925).

Commissioners Locating County Site. — Where discretion has been given to commissioners in selecting and locating a site for the seat of justice for a county, and it was sought by mandamus to compel them to change the location already made, the court, said: "If the defendants had neglected or refused to execute the power entrusted to them, we certainly might call upon them to show cause why they had been so negligent, and upon insufficient return might have issued a peremptory mandamus. Here all we would do would be to command them to select the site for the permanent seat of justice for the county according to law, which under their oaths, they say they have done." *Hill v. Bonner*, 44 N. C. 257 (1853); *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737 (1904). See also *Young v. Jeffreys*, 20 N. C. 357 (1839); *State v. Moore*, 46 N. C. 276 (1854); *Taylor v. Comm'rs*, 55 N. C. 141 (1873); *Raleigh & A. R. Co. v. Jenkins*, 68 N. C. 502 (1873); *County Board v. State Board*, 106 N. C. 81, 10 S. E. 1002 (1890).

C. Illustrations of Mandamus as Improper Remedy.

Granting Liquor License. — Since the justices have a discretion, under circumstances, to refuse a liquor license to the relator, although he be a fit person, he cannot have mandamus. For it is the nature of a discretion in certain persons that they are to judge for themselves, and therefore no power can require them to decide in a particular way, or review their decision by way of appeal, or by any proceeding in the nature of an appeal, since the judgment of the justices would not then be their own, but that of the court under whose mandate they gave it. *Barnes v. Commissioners*, 135 N. C. 27, 47 S. E. 737 (1904).

Certificate by Board of Examiners. — The courts cannot by a mandamus compel the Board of Dental Examiners to certify contrary to what they have declared to be the truth. Had the Board refused to examine the applicant, upon his compliance with the regulations, the court could by mandamus compel them to examine him, but not to issue him a certificate, when the preliminary qualification required by law, that the applicant shall be found proficient and competent by examining board, is lacking. *Burton v. Furman*, 115 N. C. 166, 20 S. E.

443 (1894); *Loughran v. Hickory*, 129 N. C. 281, 40 S. E. 46 (1901); *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508 (1903).

Judgments upon School Order. — Judgments rendered upon school orders against the county commissioners will not be enforced by mandamus, when not for necessary expenses within the purview of Art. VII, § 7 of the Constitution. *Bear v. Commissioners*, 124 N. C. 204, 32 S. E. 553 (1899).

Determination of Title to Office. — In *Dillon's* work on Municipal Corporations, Vol. 2, at § 892, it is stated in substance that generally in this country, by adoption from the English law, where one is in the actual possession of an office under a claim by election or commission, and is performing the duties of the office, mandamus is not the proper proceeding in which to try the validity of such election or commission to admit another, but that quo warranto is the remedy. *Lyon v. Commissioners*, 120 N. C. 237, 26 S. E. 929 (1897).

High, in his *Extraordinary Legal Remedies*, after discussing mandamus, concludes under this head, § 70: "When the writ is sought to compel the restoration of one claiming the right to an office, it is not sufficient for him to show that he is the officer de facto, but it is also incumbent upon him to show a clear legal right, and, failing in this, he is not entitled to the peremptory writ." *I Chit. Gen. Pr.*, 791; *Worthy v. Barrett*, 63 N. C. 199 (1869); *Lyon v. Board of Commissioners*, 120 N. C. 237, 26 S. E. 929 (1897).

As a Writ of Error. — Mandamus cannot be used as a writ of error to revise and reverse erroneous judgments of a subordinate tribunal (in that case a board of health), and the court "will not and cannot look into the evidence of fact upon which the judgment of the board was based for the purpose of determining whether the conclusions drawn from it were correctly or incorrectly formed," quoting from *Kircheggessner v. Board of Health*, 53 N. J. Law 594. *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508 (1903).

Compelling City to Withdraw from State Retirement System. — Where a city has become an employer participating in the State retirement system under authority conferred by General Statutes and by an act amending its charter, the repeal of the charter provision leaves its governing authorities with discretionary power to participate in the retirement system under authority conferred by the General Statutes, and mandamus will not lie to compel

it to withdraw from the system. *Laughing-house v. New Bern*, 232 N. C. 596, 61 S. E. (2d) 802 (1950).

Compelling Treasurer to Pay Warrants.

—Where it is the duty of the county treasurer “to pay all warrants legally drawn on the treasurer by the auditor, and no moneys

shall be paid out of the treasury except on the warrant of the auditor,” no mandamus will lie to compel the treasurer to pay except upon his refusal to honor a warrant. *Burton v. Furman*, 115 N. C. 166, 20 S. E. 443 (1894).

§ 1-512. For money demand.—In applications for a writ of mandamus when the plaintiff seeks to enforce a money demand, the summons, pleadings and practice are the same as prescribed for civil actions. Provided that in all applications seeking a writ of mandamus to enforce a money demand on actions *ex contractu* against any county, city, town or taxing district within the State, the applicant shall allege and show in the complaint that the claim or debt has been reduced to a final judgment establishing what part of said judgment, if any, remains unpaid, what resources, if any, are available for the satisfaction of the judgment, including the actual value of all property sought to be subjected to additional taxation and the necessity for the issuing of such writ. (1871-2, c. 75, s. 2; Code, s. 623; Rev., s. 823; C. S., s. 867; 1933, c. 349.)

Editor's Note.—The 1933 amendment added the proviso.

The 1933 amendment to this section is constitutional, since it does not impair the obligations of a contract, the effect of the statute being merely to alter the method of procedure in which there can be no vested right. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339 (1935).

Construed with Following Section.—This and the following section divide the field of application for writs of mandamus between them and must be considered *in pari materia*. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315 (1942).

Necessity for Judgment Prior to Action to Enforce Money Demand.—Where plaintiff alleged ownership of certain county bonds, and sought mandamus to compel the county to levy taxes sufficient to pay same the effect of the action is to enforce a money demand, which can not be maintained under this section as amended by Public Laws 1933, unless the claim has been reduced to judgment. *Sovereign Camp, W. O. W. v. Board of Com'rs*, 208 N. C. 433, 181 S. E. 339 (1935).

“Prior to the 1933 amendment, the writ of mandamus was available to compel the levy of taxes and assessments to pay the principal and interest on bonds and liabilities *ex contractu* which had not been reduced to judgment. *Maryland Cas. Co. v. Leland*, 214 N. C. 235, 199 S. E. 7 (1938). But, under Chapter 349, Public Laws of 1933, amending § 1-512, the petitioner for mandamus must allege and show that the claim has been reduced to judgment. Quære whether the purpose of the statute might not be satisfied by uniting a cause of action for the recovery of the money and

a petition for mandamus to effectuate the judgment in the same action.” *Dry v. Board of Drainage Com'rs*, 218 N. C. 356, 11 S. E. (2d) 143 (1940).

Purpose in Action for Money Demand.—

The writ of mandamus is but a process of the court and the purpose of the writ is, in actions for money demands, to give the plaintiff a more speedy and effectual recovery of his debt than could be had in the ordinary way. *Belmont & Co. v. Reilly*, 71 N. C. 260 (1874).

Return of Summons.—If the summons is made returnable before the judge at chambers, when it should have been made returnable in the regular way as a civil action, or vice versa, the action should not be dismissed, but a transfer to the proper docket made. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315 (1942).

Examples of a Money Demand.—An application by a holder of North Carolina bonds for a mandamus to be directed to the Auditor of the State, commanding him to cause to be levied certain special taxes to pay the accrued interest on the said bonds, is an application “to enforce a money demand,” and as such a judge at chambers has no jurisdiction thereof. *Belmont & Co. v. Reilly*, 71 N. C. 260 (1874).

When the treasurer of a town school committee seeks a writ of mandamus to compel the treasurer of the county to pay certain money which is alleged to be due by provisions of law, such action is to “enforce a money demand” and this section applies. *Rogers v. Jenkins*, 98 N. C. 129, 3 S. E. 821 (1887).

An action to have a writ of mandamus issue compelling a board of county commissioners to pay from the general county fund, in accordance with a legislative act,

the salary of a county officer, is not such a "money demand" as to require the summons, pleadings and practice to be the same as prescribed for civil actions. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315 (1942).

An action to compel a city to pay over certain fines and penalties to the county board of education was held not an action to enforce a money demand, but an action to compel a public officer to deposit public funds in the proper place. *Bearden v. Fulham*, 129 N. C. 477, 40 S. E. 304 (1901).

An action to enforce the turning over of public funds by the ex-treasurer of the county to the present financial agents regularly appointed, and who have qualified to act in that capacity according to the terms of valid statutes directly applicable, §§ 155-16, 128-7, 128-10, 14-231, is not in strictness "a money demand," under this section, but comes under § 1-513. *Tyrrell County v.*

Holloway, 182 N. C. 64, 108 S. E. 337 (1921).

Waiver by Municipality.—The provisions of this section requiring that in an application for a writ of mandamus to enforce a money demand *ex contractu* against a municipal corporation the complaint should show that the claim or debt has been reduced to final judgment and should show what resources are available for the satisfaction of the judgment, and the actual value of all property sought to be subjected to additional taxation, and the necessity for the issuance of the writ are provisions for the protection of the municipality which may be waived by it, and where the municipality does not object thereto and agrees that the issues of fact and of law be submitted to the court, it waives the provisions of this section. *Dry v. Board of Drainage Com'rs*, 218 N. C. 356, 11 S. E. (2d) 143 (1940).

§ 1-513. For other relief returnable in vacation; issues of fact.—

When the plaintiff seeks relief other than the enforcement of a money demand, the summons must be made returnable before a judge of the superior court at chambers, or in term at a day specified in the summons, not less than ten days after the service of the summons and complaint upon the defendant; at which time the court, except for good cause shown, shall hear and determine the action, both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court, upon the motion of either party, to continue the action until the issue of fact can be decided by a jury at the next regular term of the court. (1871-2, c. 75, s. 3; Code, s. 623; Rev., s. 824; C. S., s. 868.)

Cross References.—As to jurisdiction of court in vacation or at term, see § 7-65. As to judgments rendered in vacation, see § 1-218. As to service of summons generally, see § 1-89 and note thereto.

Demand and Refusal Necessary.—A proceeding in mandamus may be made returnable before the judge at Chambers, but it cannot be sustained without demand and refusal, or what is equivalent to a refusal. *Alexander v. Commissioners*, 67 N. C. 330 (1872); *Horne v. Commissioners*, 122 N. C. 466, 29 S. E. 581 (1898).

Hearing at Term or Chambers.—Tracing the origin of this and the preceding section, it was probably the intention of the law to provide for the hearing at term of cases which, upon the face, might require a jury trial, and those which might involve questions of law only, at chambers—with a saving provision that where issues of fact are raised and a jury trial demanded, the case might be transferred to the civil issue docket in order that these issues might be determined by a jury. *Brown v. Board of Com'rs*, 222 N. C. 402, 23 S. E. (2d) 315 (1942). See note to preceding section.

Necessity for Motion for Jury Trial.—

Where neither party move for a jury trial of an issue of fact raised by the pleadings under this section, the issue may be determined by the court. *Cannon v. Wiscassett Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

Payment of Dividends — Remand for Proper Procedure.—When proceedings in mandamus have been instituted by stockholders of a private corporation to compel the distribution of a surplus ascertained in accordance with the provisions of § 55-115, before the judge holding the terms of court of the district, and the judge has issued a mandamus to compel the payment of the dividends without evidence of the actual cash value of the assets or taking into his consideration a proper deduction for the depreciation of the plant, the case will be remanded to him to be proceeded with according to law. *Cannon v. Wiscassett Mills Co.*, 195 N. C. 119, 141 S. E. 344 (1928).

When There Are Issues of Fact.—If a case is before the judge at chambers, and there are issues of fact appearing upon the pleadings, the cause should not be dismissed, but should be transferred to term for trial before a jury, just as the clerk

might so transfer it. For, it would be strange to dismiss an action already in the superior court because before the clerk or the judge at chambers, and tell the plaintiff to come back into the same court at terms before the same judge, and the same clerk, by service of another summons upon the same parties. *Ewbank v. Turner*, 134 N. C. 77, 46 S. E. 508 (1903).

Where Only Evidentiary Matters Raised.—When the answer and affidavits of a railroad company in mandamus proceedings by

a city to enforce its ordinance requiring the railroad to change from grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. *Durham v. Southern R. Co.*, 185 N. C. 240, 117 S. E. 17 (1923).

ARTICLE 41.

Quo Warranto.

§ 1-514. **Writs of sci. fa. and quo warranto abolished.**—The writs of scire facias and of quo warranto, and proceedings by information in the nature of quo warranto, are abolished; and the remedies obtainable in those forms may be obtained by civil actions under this article. (R. C., c. 26, ss. 5, 25; C. C. P., s. 362; Code, s. 603; Rev., s. 826; C. S., s. 869.)

Quo Warranto—In General.—Although the proceeding by information in the nature of the writ of quo warranto has been abolished, the remedy to be pursued whenever the controversy is as to the validity of an election, or the right to hold a public office, is by an action in the nature of a writ of quo warranto. It is not merely an action to redress the grievance of a private person who claims a right to the office, but the public has an interest in the question which the legislature seems to have considered paramount to that of the private rights of the persons aggrieved: Hence, the requirement that such actions must be brought by the Attorney General in the name of the people of the State, and upon his own information without the relation of a private person when the person aggrieved does not see proper to assert his right; and when the claimant does seek redress, he must be joined in the action, but still it must be brought by the Attorney General in the name of the people. Such is the construction which has been given to these sections by numerous decisions of this court. *Patterson v. Hubbs*, 65 N. C. 119 (1871); *People v. McKee*, 68 N. C. 429 (1873); *Brown v. Turner*, 70 N. C. 93 (1874); *People v. Hilliard*, 72 N. C. 169 (1875); *Hargrove v. Hunt*, 73 N. C. 24 (1875); *Saunders v. Gatling*, 81 N. C. 298 (1879).

Same — Historical Discussion. — See *State v. Hardie*, 23 N. C. 42 (1840); *Ex parte Daughtry*, 28 N. C. 155 (1845); *Saunders v. Gatling*, 81 N. C. 298 (1879); *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892).

Same—Action Still Called Quo Warranto.

— Though for convenience the action of quo warranto is still spoken of, it must be remembered that the action has been specifically abolished, and we have in fact only a civil action in which the subject matter is a trial of the title to an office. *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822 (1898).

Scire Facias — In General. — Writs of scire facias consisted of two classes: the object of the first class was to remedy defects in or to continue an action; that of the second class to commence some proceeding. *McDowell v. Asbury*, 66 N. C. 444 (1872).

Proceedings in the nature of a sci. fa. of the first class are almost indispensable in the administration of justice, and the object of this section was merely to abolish the name and form of writs of this class and simplify the process into a notice or summons to show cause why further proceedings should not be had to provide further relief in matters where parties had had a day in court, etc., and not to affect the substance of the remedy. *McDowell v. Asbury*, 66 N. C. 444 (1872).

On such motion the judge may allow the defendant to make any defense which he could have availed himself of under the old scire facias proceeding. *McDowell v. Asbury*, 66 N. C. 444 (1872).

Same — Continuation of Former Suit.—

A scire facias on a judgment is not a new action, but is only issued as a continuation of the former suit. *Binford v. Alston*, 15 N. C. 351 (1833); *McDowell v. Asbury*, 66 N. C. 444 (1872).

Applied in *Stephens v. Dowell*, 208 N. C.

555, 181 S. E. 629 (1935); *Swaringen v. Poplin*, 211 N. C. 700, 191 S. E. 746 (1937).

Cited in *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507 (1929).

§ 1-515. Action by Attorney General.—An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the parties offending, in the following cases:

1. When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State; or,

2. When a public officer, civil or military, has done or suffered an act which, by law, makes a forfeiture of his office.

3. When any person, natural or corporate, has or claims to have or hold any rights or franchises by reason of a grant or otherwise, in violation of the provisions of § 146-14. (C. C. P., s. 366; Code, s. 607; Rev., s. 827; 1911, cc. 195, 201; C. S., s. 870.)

Cross References.—As to actions in the nature of quo warranto against corporations by the Attorney General, see § 55-126. As to actions by Attorney General in the name of the State to vacate land grants, see § 146-69.

In General.—This and the subsequent sections provide for the fullest relief to the rightful claimant, against an unlawful intrusion, and thereby dispenses with the need of recourse to another process, unless those required to induct, still refuse to do so, after the motion of the intruder by the judgment of the court; and then they may be compelled to proceed in the discharge of their duties. As the statutory remedy is ample, so where it can be had and made effectual, it is the only mode of deciding the conflicting claims to office by an adjudication between the contesting parties. *Ellison v. Raleigh*, 89 N. C. 125 (1883).

In *Dillon on Municipal Corporations*, § 680, it is stated that "The adjudged cases in this country agree that quo warranto, or an information or proceeding in the nature of a quo warranto, is the appropriate remedy, when not changed by charter or statute, for an usurpation of a municipal franchise, as well as for unauthorized usurpations and intrusions into municipal offices"; and the author proceeds: "If another is commissioned and in actual discharge of the duties of the office, an adverse claimant to the office is not entitled to a mandamus, but must resort to quo warranto." The wrongful occupant must, however, have entered under color of authority and not be a mere usurper, in the restricted sense of that term, to put the rightful claimant to the necessity of a resort to this remedy. *Ellison v. Raleigh*, 89 N. C. 125, (1883).

Who Can Be Complainant.—Actions of this character may be instituted in the name of the State on the relation of the Attorney General or of any individual who

is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers. *Saunders v. Gatling*, 81 N. C. 298 (1879); *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892); *State v. Vann*, 118 N. C. 3, 23 S. E. 932 (1896); *State v. Taylor*, 122 N. C. 141, 29 S. E. 101 (1898); *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791 (1912).

Relator Need Not Allege Title.—In quo warranto brought by a citizen, qualified voter and taxpayer of a municipal corporation, upon leave of the Attorney General, to try the title of an officer, the chief of police of said corporation, it is not necessary to allege that the relator is entitled to the office or has any interest therein. *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892).

But the action is none the less personal as to the parties claiming the office, the issue between them being the right to the same. *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436 (1910). See *Ellison v. Raleigh*, 89 N. C. 125 (1883).

Interpleader by Judgment Creditor.—Under §§ 1-69 and 1-73, a court has power to allow a judgment creditor of a corporation to interplead to an action in the nature of a quo warranto brought by the Attorney General to annul and vacate the charter of the corporation. *State v. Simon-ton*, 78 N. C. 57 (1878).

Determining Title to Public Office.—One of the chief purposes of quo warranto or an information in the nature of quo warranto is to try the title to an office. This is the method prescribed for settling a controversy between rival claimants when one is in possession of the office under a claim of right and in the exercise of official functions or the performance of official duties; and the jurisdiction of the superior court in this behalf has never been abdicated in favor of the board of county canvassers or other officers of an election. *Swaringen v. Poplin*, 211 N. C. 700, 191 S.

E. 746 (1937), citing *Harkrader v. Lawrence*, 190 N. C. 441, 130 S. E. 35 (1925). And see *State v. Hardie*, 23 N. C. 42 (1840); *Ex parte Daughtry*, 28 N. C. 155 (1845); *Saunders v. Gatling*, 81 N. C. 298 (1879).

For all practical purposes, a judge de facto is a judge de jure as to all parties other than the State itself. His right or title to his office cannot be impeached in a habeas corpus proceeding or in any other collateral way. It cannot be questioned except in a direct proceeding brought against him for that purpose by the Attorney General in the name of the State, upon his own information or upon the complaint of a private person. In *re Wingler*, 231 N. C. 560, 58 S. E. (2d) 372 (1950).

Same—Holding Two Offices.—A citizen and taxpayer of a county is entitled to bring an action in the nature of quo warranto to try the right of a person to hold two offices in such county at the same time. *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892); *State v. Vann*, 118 N. C. 3, 23 S. E. 932 (1896); *State v. Thompson*, 122 N. C. 493, 29 S. E. 720 (1898).

Same—Allegation of Illegality.—Usually in such actions there is an allegation that the defendant has usurped and is illegally exercising the duties of the office, but § 1-521 does not require such averment. *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822 (1898).

Same — Mandamus and Injunction Improper. — It is not permissible to try the title to an office by injunction, nor by mandamus—a civil action in the nature of quo warranto, is the appropriate remedy, to be tried before a judge and jury. *Ellison v. Raleigh*, 89 N. C. 125 (1883); *Lyon v. Board*, 120 N. C. 237, 26 S. E. 929 (1897); *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822 (1898).

The title to a public office in dispute between two rival claimants must be determined by an action in the nature of quo warranto, especially when the defendant is in possession of the office under a claim of right in him to hold it and exercise its function or perform its duties; and a mandamus to compel the surrender of the books and papers will not lie until the claimant has established the disputed title. *Rogers v. Powell*, 174 N. C. 388, 389, 93 S. E. 917 (1917). See *Burke v. Commissioners*, 148 N. C. 46, 61 S. E. 609 (1908).

Same—Examples.—Where the board of county canvassers illegally determined that one who had been elected to the office of register of deeds was not so elected, and that his opponent had been, but the latter

failed to qualify and enter upon the duties of the office, whereupon the board of county commissioners declared the office vacant and appointed a third party: Held, that this could not in any wise affect the right of the duly elected officer to have the action of the board of canvassers revised by the courts in an action under this section. *State v. Calvert*, 98 N. C. 580, 4 S. E. 127 (1887).

An action against a judge of probate to vacate his office is properly brought by the Attorney General under this section. *Patterson v. Hubbs*, 65 N. C. 119 (1871); *People v. Heaton*, 77 N. C. 18 (1877).

Contested Seat in General Assembly. — The Constitution of our State withdraws from the consideration of our courts the question of title involved in a contest for a seat in the General Assembly, and an action in quo warranto will not lie under this section. *State v. Pharr*, 179 N. C. 699, 103 S. E. 8 (1920).

What Is a Public Office.—An office such as properly to come within the legitimate scope of a quo warranto information, may be defined, says a recent author, “as a public position to which a portion of the sovereignty of the county, either legislative, executive or judicial, attaches for the time being, and which is exercised for the benefit of the public.” *High Ex. Leg. Rem.*, § 620; *Eliason v. Coleman*, 86 N. C. 236 (1882).

It is manifest, that the statute has reference to such usurping occupants as are exercising public functions or conferred franchises wrongfully, and is confined to an office which, as is said in *Nichols v. McKee*, 68 N. C. 429 (1873), “is a part of the government and part of the State policy,” and to an officer “who takes part in the government.” *Eliason v. Coleman*, 86 N. C. 236 (1882).

The true test of a public office is, that it is parcel of the administration of government, civil or military, or is itself created directly by the law-making power; and an information in the nature of a quo warranto only will lie to recover the same. *Eliason v. Coleman*, 86 N. C. 236 (1882).

Same—Examples. — It has often been a matter of controversy what shall be said to be a public office. It has, however, long since been decided that a town clerk, recorder, and clerk of the peace, a constable, and even a sexton, a parish clerk, and clerk of the city works, were officers of such a public character as to come within the rule. *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436 (1910).

The office of chief of police is such an

office that an action in the nature of a quo warranto may be brought to try the title to it. *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892).

It is held in *Eliason v. Coleman*, 86 N. C. 236 (1882), that this section did not authorize a quo warranto as to the office of chief engineer in a quasi private corporation, namely, the Western North Carolina R. R. Co. *State v. Hall*, 111 N. C. 369, 16 S. E. 420 (1892).

The business of selling liquor is not an office so that the defendant's right to it shall be tested by an action in the nature of a quo warranto under this section. *Hargett v. Bell*, 134 N. C. 394, 46 S. E. 749 (1904).

To Determine Validity of Election.—A civil action in the nature of a writ of quo warranto is the appropriate remedy to test the validity of an election of the right to a public office. Such action must be brought in the name of the people of the State by the Attorney General on the relation of the party aggrieved. *Saunders v. Gatling*, 81 N. C. 298 (1879); *Davis v. Moss*, 81 N. C. 303 (1879).

Same—Tabulation Prima Facie Correct.—A tabulation of the result of an election by the clerk, in the manner required by law is prima facie correct, and can only be questioned in an action in the nature of a quo warranto proceeding. *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822 (1898), citing *Swain v. McRae*, 80 N. C. 111 (1879); *Gatling v. Boone*, 98 N. C. 573, 3 S. E. 392 (1887).

Same — Proper Certificate Ordinarily Conclusive.—"The certificate of election of an officer, or his commission coming from the proper source, is prima facie evidence in favor of the holder, and in every proceeding except a direct one to try the title of such holder it is conclusive; but in quo warranto the court will go behind the certificate or commission, and inquire into the

validity of the election or appointment and decide the legal rights of the parties upon full investigation of the facts." *Dillon's Municipal Corporations*, Vol. 2, at § 892; *Lyon v. Board*, 120 N. C. 237, 26 S. E. 929 (1897).

Same—Ballot Boxes Brought into Court.

—In *Broughton v. Young*, 119 N. C. 915, 27 S. E. 277 (1896), it was held that the preservation of the ballots is required that they may be kept as evidence to certify or correct the election returns when impeached, and that on a quo warranto the ballot boxes might be brought into court and the recount made in the presence of the court and jury. *Cozart v. Fleming*, 123 N. C. 547, 31 S. E. 822 (1898).

The facts found by the referee as to the result of an election in proceeding in the nature of a quo warranto, and approved by the trial judge, are not subject to review on appeal when supported by competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593 (1922).

The question of fraud in the returns of the county board of canvassers as to those voting in an election, in proceedings in the nature of a quo warranto, to determine the rights of contestants for a public office, is eliminated on appeal, when the report of the referee, approved by the trial judge, finds the absence of fraud, upon competent evidence. *State v. Jackson*, 183 N. C. 695, 110 S. E. 593 (1922).

Quo Warranto Is Not Proper Remedy to Test Validity of Tax.—Quo warranto is the sole remedy to test the validity of an election to public office, but not to test the validity of a tax even though it is levied under the authority of a popular election. *Barbee v. Board of Com'rs*, 210 N. C. 717, 188 S. E. 314 (1936).

Applied in *State v. Holmes*, 207 N. C. 293, 176 S. E. 746 (1934).

Cited in *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507 (1929).

§ 1-516. Action by private person with leave.—When application is made to the Attorney General by a private relator to bring such an action, he shall grant leave that it may be brought in the name of the State, upon the relation of such applicant, upon the applicant tendering to the Attorney General satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action. (1874-5, c. 76; 1881, c. 330; Code, s. 608; Rev., s. 828; C. S., s. 871.)

Cross Reference.—As to mandatory dissolution of a corporation at the instance of private persons, see § 55-124.

Section Constitutional.—This section allowing the prosecution of an action in the name of the State to assert the right of a citizen to a public office is not, for that

reason, unconstitutional. *McCall v. Webb*, 135 N. C. 356, 47 S. E. 802 (1904).

Security Must Be Given.—The section clearly provides that, before an action may be instituted or maintained on the relation of a private citizen, satisfactory security must be furnished indemnifying the State

against all costs and expenses which may accrue in consequence of bringing the action. *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791 (1912).

Interest of Public Is Paramount. — In proceedings under this and § 1-514 to try title to a public office the interest of the public is involved and is paramount to the rights of the relator, and the consent of the Attorney General, the filing of the bond, etc., as required by this section, is a prerequisite to the right of the relator to maintain the action. *Cooper v. Crisco*, 201 N. C. 739, 161 S. E. 310 (1931).

Permission Essential.—The right to proceed by an action in the nature of a quo warranto information is not guaranteed to every citizen, and can only be prosecuted by leave of the Attorney General. *Ellison v. Raleigh*, 89 N. C. 125 (1883). See *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791 (1912).

Same—Second Suit after Voluntary Nonsuit.—Common-law procedure by quo warranto, and proceedings by information in the nature thereof have been abolished by § 1-514 and the remedy in such matters is under the provisions of this section and where the relator has complied with these conditions and takes a voluntary nonsuit and within a year brings another action upon the same subject matter against the same respondent, but fails to obtain permission to bring the second action or to file bond therefor until the day before judgment is signed, his delay is fatal and the action is properly dismissed, it being necessary that the provisions of the section be again complied with before the bringing of the second action. *Cooper v. Crisco*, 201 N. C.

739, 161 S. E. 310 (1931).

Same—Effect of § 1-518.—This view that leave is essential is strengthened by § 1-518, which provided that even after leave is given and action commenced, the same may, under certain conditions be withdrawn and, on certificate to that effect being properly filed, the judge shall, on motion, dismiss the action. *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791 (1912).

May Be Given after Commencement of Suit.—The court has held in *State v. Withers*, 121 N. C. 376, 28 S. E. 522 (1897), that it is not absolutely essential that the leave should be had before the suit is commenced, provided it is obtained afterwards and supplied, but it must always be made to appear, pending the proceedings, that the leave of the Attorney General has been given to prosecute the action. *Midgett v. Gray*, 158 N. C. 133, 73 S. E. 791 (1912).

Upon Failure to Show Leave Action Dismissed. — It appearing that, by inadvertence, the record in this action of quo warranto to try the title of office did not show that permission of the Attorney General was given according to the requirements of this section, it is held that proof of such permission given anterior to the commencement of the action may be offered upon the new trial awarded, and upon failure thereof the action may be dismissed. *State v. Gray*, 159 N. C. 443, 74 S. E. 1050 (1912).

Applied in *State v. Holmes*, 207 N. C. 293, 176 S. E. 746 (1934).

Cited in *Bouldin v. Davis*, 197 N. C. 731, 150 S. E. 507 (1929); *Barbee v. Board of Com'rs*, 210 N. C. 717, 188 S. E. 314 (1936).

§ 1-517. **Solvent sureties required.**—The Attorney General, before granting leave to a private relator to bring a suit to try the title to an office, may require two sureties to the bond required by law to be filed to indemnify the State against costs and expenses, and require such sureties to justify, and may require such proof and evidence of the solvency of the sureties as is satisfactory to him. (1901, c. 595, s. 2; Rev., s. 829; C. S., s. 872.)

§ 1-518. **Leave withdrawn and action dismissed for insufficient bond.**—When the Attorney General has granted leave to a private relator to bring an action in the name of the State to try the title to an office, and it afterwards is shown to the satisfaction of the Attorney General that the bond filed by the private relator is insufficient, or that the sureties are insolvent, the Attorney General may recall and revoke such leave, and upon a certificate of the withdrawal and revocation by the Attorney General to the clerk of the court of the county where the action is pending, it is the duty of the presiding judge, upon motion of the defendant, to dismiss the action. (1891, c. 595; Rev., s. 830; C. S., s. 873.)

§ 1-519. **Arrest and bail of defendant usurping office.**—When action is brought against a person for usurping an office, the Attorney General, in addition to the statement of the cause of action, may set forth in the complaint the

name of the person rightfully entitled to the office, with a statement of his right thereto; and in such case, upon proof by affidavit that the defendant has received fees or emoluments belonging to and by means of his usurpation of the office, an order shall be granted by a judge of the superior court for the arrest of the defendant, and holding him to bail; and thereupon he shall be arrested and held to bail in the same manner, and with the same effect, and subject to the same rights and liabilities, as in other civil actions where the defendant is subject to arrest. (C. C. P., s. 369; 1883, c. 102; Code, s. 609; Rev., s. 831; C. S., s. 874.)

Cross Reference. — As to arrest in civil actions, see §§ 1-409 through 1-439.

§ 1-520. Several claims tried in one action.—Where several persons claim to be entitled to the same office or franchise, one action may be brought against all of them, in order to try their respective rights to the office or franchise. (C. C. P., s. 374; Code, s. 614; Rev., s. 832; C. S., s. 875.)

§ 1-521. Trials expedited.—All actions to try the title or right to any State, county or municipal office shall stand for trial at the next term of court after the summons and complaint have been served for thirty days, regardless of whether issues were joined more than ten days before the term; and it is the duty of the judge to expedite the trial of these actions and to give them precedence over all others, civil or criminal. It is unlawful to appropriate any public funds to the payment of counsel fees in any such action. (1874-5, c. 173; Code, s. 616; 1901, c. 42; Rev., s. 833; C. S., s. 876; 1947, c. 781.)

Editor's Note.—The 1947 amendment re-wrote this section.

§ 1-522. Time for bringing action.—All actions brought by a private relator, upon the leave of the Attorney General, to try the title to an office must be brought, and a copy of the complaint served on the defendant, within ninety days after his induction into the office to which the title is to be tried; and when it appears from the papers in the cause, or is otherwise shown to the satisfaction of the court, that the summons and complaint have not been served within ninety days, it is the duty of the judge upon motion of defendant to dismiss the action at any time before the trial, at the cost of the plaintiff. (1901, c. 519; 1903, c. 556; Rev., s. 834; C. S., s. 877.)

When Section Does Not Apply. — This provision requiring a private relator, upon leave of the Attorney General, to bring his action within ninety days after the induction of the defendant into the contested office, does not apply where the alleged in-

truder has occupied the office more than ninety days before the plaintiff's cause of action accrued, or where it is impossible under the circumstances to give the required notice. *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436 (1910).

§ 1-523. Defendant's undertaking before answer.—Before the defendant may answer or demur to the complaint he must execute and file in the superior court clerk's office of the county wherein the suit is pending, an undertaking, with good and sufficient surety, in the sum of two hundred dollars, which may be increased from time to time in the discretion of the judge, to be void upon condition that the defendant pays to the plaintiff all such costs and damages, including damages for the loss of such fees and emoluments as may or ought to have come into the hands of the defendant, as the plaintiff may recover. (1895, c. 105; Rev., s. 835; C. S., s. 878.)

§ 1-524. Possession of office not disturbed pending trial.—In any civil action pending in any of the courts of this State in which the title to an office is involved, the defendant being in the possession of the office and discharging the duties thereof shall continue therein pending the action, and no judge shall make a restraining order interfering with or enjoining such officer in the premises. The

officer shall, notwithstanding any such order, continue to exercise the duties of the office pending the litigation, and receive the emoluments thereof. (1899, c. 33; Rev., s. 836; C. S., s. 879.)

Purpose of the Section.—An injunction to prevent the exercise of a public office would produce general inconvenience; for instance, an injunction against one who it is alleged has usurped the office of the clerk of a court, forbidding him to discharge the duties of the office, would stop all judicial proceedings and the public would be made to suffer by this mode of contesting the right to the office and to the fees and emoluments. Hence, in this and the like cases, the appropriate remedy is by an action in the nature of a quo warranto, not an injunction. *Patterson v. Hubbs*, 65 N. C. 119 (1871).

Title Should Be Determined First.—Individuals claiming to comprise the board of

trustees of a school district de jure may not enjoin those in possession under a colorable claim of right as such board from the performance of their duties as such, and require the defendants to turn over to them the school buildings, etc., and thus determine collaterally the question of title, nor would remedy by injunction be permitted in quo warranto proceedings, where the title to office is directly involved, but the parties should first try out the question of title in an action brought directly for the purpose. *Rogers v. Powell*, 174 N. C. 388, 93 S. E. 917 (1917).

Stated in *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

§ 1-525. Judgment by default and inquiry on failure of defendant to give bond.—At any time after a duly verified complaint is filed alleging facts sufficient to entitle plaintiff to the office, whether this complaint is filed at the beginning of the action or later, the plaintiff may, upon ten days notice to the defendant or his attorney of record, move before the judge resident in or riding the district, at chambers, to require the defendant to give the undertaking specified in § 1-523. It is the duty of the judge to require the defendant to give the undertaking within ten days, and if it is not so given, the judge shall render judgment in favor of plaintiff and against defendant for the recovery of the office and the costs, and a judgment by default and inquiry to be executed at a term for damages, including loss of fees and salary. Upon the filing of the judgment for the recovery of such office with the clerk, it is his duty to issue and the sheriff's duty to serve the necessary process to put the plaintiff into possession of the office. If the defendant shall give the undertaking, the court, if judgment is rendered for plaintiff, shall render judgment against the defendant and his sureties for costs and damages, including loss of fees and salary. Nothing herein prevents the judge's extending, for cause, the time in which to give the undertaking. (1895, c. 105, s. 2; 1899, c. 49; Rev., s. 837; C. S., s. 880.)

Editor's Note.—For discussion of section, see *McCall v. Webb*, 135 N. C. 356, 47 S. E. 802 (1904), cited in *Morganton*

Graded School v. McDowell, 157 N. C. 316, 72 S. E. 1083 (1911).

§ 1-526. Service of summons and complaint.—The service of the summons and complaint as hereinbefore provided may be made by leaving a copy at the last residence or business office of the defendant or defendants, and service so made shall be deemed a legal service. (1899, c. 126; Rev., s. 838; C. S., s. 881.)

If the copy of summons left at defendant's residence be not essentially a true copy of the original, then it would be insufficient under the statute, for only by virtue of this section, is substituted service allowable in this way. *McLeod v. Pearson*, 208 N. C. 539, 181 S. E. 753 (1935).

If the copy of summons left at defendant's residence be a true copy of the original, but was neither signed by the clerk nor under seal, it is fatally defective. *McLeod v. Pearson*, 208 N. C. 539, 181 S. E. 753 (1935).

§ 1-527. Judgment in such actions.—In every such case judgment shall be rendered upon the right of the defendant, and also upon the right of the party alleged to be entitled, or only upon the right of the defendant, as justice requires. When the defendant, whether a natural person or corporation, against whom the

action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding or exercising any office, franchise or privilege, judgment shall be rendered that the defendant be excluded from such office, franchise or privilege, and also that the plaintiff recover costs against him. The court may also, in its discretion, fine the defendant a sum not exceeding two thousand dollars. (Const., Art. IX, s. 5; R. C., c. 95; C. C. P., ss. 370, 375; Code, ss. 610, 615; Rev., ss. 839, 840; C. S., s. 882.)

Discretion of Court as to Fine.—Where the defendant went into office under the authority of an unconstitutional appointment by the General Assembly, the court

presumed that there was no criminal intent and did not impose the fine. *Nichols v. McKee*, 68 N. C. 429 (1873).

§ 1-528. **Mandamus to aid relator.**—In any civil action brought to try the title or right to hold any office, when the judgment of the court is in favor of the relator in the action, it is the duty of the court to issue a writ of mandamus or such other process as is necessary and proper to carry the judgment into effect, and to induct the party entitled into office. (1885, c. 406, s. 1; Rev., s. 841; C. S., s. 883.)

Cross Reference. — As to mandamus in general, see §§ 1-511 through 1-513.

§ 1-529. **Appeal; bonds of parties.**—No appeal by the defendant to the Supreme Court from the judgment of the superior court in such action shall stay the execution of the judgment, unless a justified undertaking is executed on the part of the appellant by one or more sureties, in a sum to be fixed by the court, conditioned that the appellant will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellant by virtue or under color of the office. In no event shall the judgment be executed pending appeal, unless a justified undertaking is executed on the part of the appellee by one or more persons in a sum to be fixed by the court, conditioned that the appellee will pay to the party entitled to the same the salary, fees, emoluments and all moneys whatsoever received by the appellee by virtue or under color of office during his occupancy thereof. (1885, c. 406, s. 2; Rev., s. 842; C. S., s. 884.)

§ 1-530. **Relator inducted into office; duty.**—If the judgment is rendered in favor of the person alleged to be entitled, he shall be entitled, after taking the oath of office and executing such official bond as may be required by law, to take upon himself the execution of the office. It is his duty, immediately thereafter, to demand of the defendant in the action all the books and papers in his custody, or within his power, belonging to the office from which he has been excluded. (C. C. P., ss. 371, 373; Code, ss. 611, 613; Rev., ss. 843, 844; C. S., s. 885.)

Recovery of Fees and Emoluments.—It was held, under this section, that compensation in damages for the loss of the fees and emoluments of the office could be recovered from the intruder who had received the same, in an action brought after the rendition of the judgment for money had and received to the relator's use. *State v. Tate*, 70 N. C. 161 (1874); *Swain v. McRae*, 80 N. C. 111 (1879); *State v. Jones*, 80 N. C. 127 (1879). For further discussion of the recovery of damages in an independent action, see *McCall v. Webb*, 135 N. C. 356, 47 S. E. 802 (1904), cited in *Morganston Graded School v. McDowell*, 157 N. C. 316, 72 S. E. 1083 (1911).

Person Entitled Has Property in Office.—A person who is rightfully entitled to an

office, although not in the actual possession thereof, has a property therein, and may maintain an action for money had and received against a mere intruder who may perform the duties of such office for a time and receive the fees arising therefrom; and such intruder cannot retain any part of the fees as a compensation for his labor. *State v. Tate*, 70 N. C. 161 (1874); *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

Oath and Bond. — Where defendant alleges that he refused to surrender the office because he was entitled thereto, his motion to amend his answer to allege, as a further reason for refusal, that the relator had not filed bond or taken the oath of office, is properly denied, since such further allega-

tions do not constitute a defense, the filing of bond and the taking of oath not being required of relator when defendant refuses to surrender the office on the ground that he is the de jure officer, because in such circumstances such action would be a vain thing which the law does not require, and it being expressly provided by this section, that if judgment is rendered in favor of the relator he shall be entitled to take over the office after taking oath and executing the official bond, and the fact that the motion is made after defendant has surrendered the office and the relator has filed bond and taken the oath, does not alter this result, the defense not being germane on the question of the right to the emoluments of the office between the time of relator's election and his actual induction into office. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

§ 1-531. Refusal to surrender official papers misdemeanor.—If a person against whom a judgment has been rendered in an action brought to recover a public office shall fail or refuse to turn over, on demand, to the person adjudged to be entitled to such office, all papers, documents and books belonging to such office, he shall be guilty of a misdemeanor. (C. C. P., s. 372; Code, s. 612; Rev., s. 3601; C. S., s. 886.)

§ 1-532. Action to recover property forfeited to State.—When any property, real or personal, is forfeited to the State, or to any officer for its use, an action for the recovery of such property, alleging the grounds of the forfeiture, may be brought by the proper officer in any superior court. (C. C. P., s. 381; Code, s. 621; Rev., s. 845; C. S., s. 887.)

ARTICLE 42.

Waste.

§ 1-533. Remedy and judgment.—Wrongs, remediable by the old action of waste, are subjects of action as other wrongs; and the judgment may be for damages, forfeiture of the estate of the party offending, and eviction from the premises. (C. C. P., s. 383; Code, s. 624; Rev., s. 853; C. S., s. 888.)

Definition. — Waste is a spoiling or destroying of the estate, with respect to buildings, wood or soil, to the lasting injury of the inheritance; but the acts done or permitted which constitute such injury differ according to the condition of the country. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Clearing of Land. — In England the clearing of land by a life tenant was waste. In *Shine v. Wilcox*, 21 N. C. 631 (1837) the court says: "While our ancestors brought over to this country the principles of common law, these were nevertheless accommodated to their new condition. It would have been absurd to hold that the clearing of the forest, so as to fit it for the habitation and use of man, was waste."

Court Can Enforce Demand for Documents.—When the relator has taken office and made the demand for the books and papers belonging to the office, the court can issue any appropriate process to enforce compliance with such demand by a refractory or contumacious defendant. *Rhodes v. Love*, 153 N. C. 468, 69 S. E. 436 (1910).

Complying with Induction Requirements Not Prerequisite to Action to Try Title.—It is the intention of the lawmaking power that one who is rightfully entitled to an office which another wrongfully claims and withholds shall not be required, as a condition precedent to an action to try title to that office, to do the vain thing of going through the formality of complying with the requirements for induction into the office. *Osborne v. Canton*, 219 N. C. 139, 13 S. E. (2d) 265 (1941).

See *King v. Miller*, 99 N. C. 583, 6 S. E. 660 (1888); *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Nature of Action.—An action for wrongs in the nature of waste is not necessarily an action "for penalties," or "for damages merely vindictive"; on the contrary, the action is generally used to recover actual and substantial damages. And that an action survives when such is its purpose, either to or against the personal representative, is well established. *Riphey v. Miller*, 33 N. C. 247 (1850); *Butner v. Keelhn*, 51 N. C. 60 (1858); *Collier v. Arrington*, 61 N. C. 356 (1867); *Peebles v. N. C. R. Co.*, 63 N. C. 238 (1869); *Shuler v. Millsaps*, 71 N. C. 297 (1874); *Shields v. Lawrence*, 72 N. C. 43 (1875).

Discretion of Jury.—It must be left, in large measure, to the discretion of the jury to say whether the destruction of timber, or giving up a cultivated field and permitting bushes to grow and take possession of it, in the light of the evidence in the case, has proved a lasting injury to the inheritance. *King v. Miller*, 99 N. C. 583, 6 S. E. 660 (1888); *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

§ 1-534. **For and against whom action lies.**—In all cases of waste, an action lies in the superior court at the instance of him in whom the right is, against all persons committing the waste, as well tenant for term of life as tenant for term of years and guardians. (52 Hen. III, c. 23; 6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 1; Code, s. 625; Rev., s. 854; C. S., s. 889.)

No Action unless Plaintiff Has Estate.—The writ of waste is founded upon principles, peculiar to itself, and more especially dependent upon a privy between the reversioner and tenant. No one shall have the action of waste, unless he hath the immediate estate of inheritance; and between the heir of the reversioner and the tenant, who commits waste, there is no privy, the waste being committed in the lifetime of the reversioner. *Browne v. Blick*, 7 N. C. 511 (1819).

Contingent Remainderman Cannot Sue.—A contingent remainderman cannot sue for waste, but, for the protection of his right, he must resort to equity for the protection of his interest. *Gordon v. Lowther*, 75 N. C. 193 (1876); *Latham v. Lumber Co.*, 139 N. C. 8, 51 S. E. 780 (1905); *Richardson v. Richardson*, 152 N. C. 705, 68 S. E. 217 (1910).

No Application to Judgment Creditor.—The judgment creditor is in no sense like a remainderman or reversioner. He cannot bring "the old action of waste," as it was at common law, nor is he embraced in any one of the classes "for and against whom an action of waste lies" under this section. *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889).

Right to Restrain Waste.—The right to sue for waste includes the right to restrain its commission. *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80 (1897); *Morrison v. Morrison*, 122 N. C. 598, 29 S. E. 901 (1898).

Holder of a Vested Estate for Life.—In the case of *Gordon v. Lowther*, 75 N. C.

To Determine Liability.—In ascertaining whether a given act or omission falls within the rule, and subjects the tenant to liability, the condition of the land when dower was assigned should be compared with its state during the period for which damage is claimed. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Cited in *Batten v. Corporation Commission*, 199 N. C. 460, 154 S. E. 748 (1930).

193 (1876), the court said, in effect, that while persons holding a vested estate for life, coupled with contingent interest, are not liable in an action for waste, they and their tenants may be restrained from further despoiling and injuring the inheritance, where it appears that they have been removing from the land timber trees not cut down in the course of prudent husbandry. That case was cited with approval in the later case of *Jones v. Britton*, 102 N. C. 166, 9 S. E. 554 (1889); *Farabow v. Green*, 108 N. C. 339, 12 S. E. 1003 (1891).

Conflicting Evidence as to Title.—In an action of trespass and damages for the unlawful cutting and removing of timber upon the plaintiff's lands, there was evidence of the plaintiff's and defendant's chain of title from a common source, and that one of the deeds under which the defendant claims was only of a life estate, but that through inadvertence or mutual mistake this should have conveyed the fee. The defendant was in possession and claimed title by adverse possession under color of this deed. It was held that the defendant's motion as of nonsuit under the conflicting evidence was improperly allowed upon the principle that if a life estate were outstanding, his possession, during its continuance, would not be adverse to the plaintiff; and the action should be retained under the provisions of this section. It was held further, that while the evidence in this case as to location of the land was meager it was sufficient. *Howell v. Shaw*, 183 N. C. 460, 112 S. E. 38 (1922).

§ 1-535. **Tenant in possession liable.**—Where a tenant for life or years grants his estate to another, and still continues in the possession of the lands, tenements, or hereditaments, an action lies against the said tenant for life or years. (11 Hen. VI, c. 5; R. C., c. 116, s. 2; Code, s. 626; Rev., s. 855; C. S., s. 890.)

§ 1-536. **Action by tenant against cotenant.**—Where a joint tenant or

a tenant in common commits waste, an action lies against him at the instance of his cotenant or joint tenant. (13 Edw. I, c. 22; R. C., c. 116, s. 4; Code, s. 627; Rev., s. 856; C. S., s. 891.)

Section Changes Common-Law Rule. — One of the settled rules at common law in England, was that one tenant in common could not sue his cotenant, except for partition, and our legislature, feeling the practical difficulties at an early date, enacted that one tenant in common might maintain an action for waste against his cotenant or joint tenant. And the tenant can also restrain his cotenant from the commission

of waste. *Morrison v. Morrison*, 122 N. C. 598, 29 S. E. 901 (1898).

Cutting Trees.—Under this section, one tenant in common may sue his cotenant for waste for cutting down trees to be sold as cross ties and hauled off the land. *Hinson v. Hinson*, 120 N. C. 400, 27 S. E. 80 (1897).

Applied in *Daniel v. Tallassee Power Co.*, 204 N. C. 274, 168 S. E. 217 (1933).

§ 1-537. **Action by heirs.**—Every heir may bring action for waste committed on lands, tenements, or hereditaments of his own inheritance, as well in the time of his ancestor as in his own. (6 Edw. I, c. 5; 20 Edw. I, st. 2; 11 Hen. VI, c. 5; R. C., c. 116, s. 5; Code, s. 628; Rev., s. 857; C. S., s. 892.)

Heirs Cannot Set Up Damages for Waste as Counterclaim. — In a suit by a widow against the heirs to recover payments allowed to her as dower and made a charge on the land, the heirs cannot set up by way of counterclaim damages for

waste committed by the widow but must proceed under the statute. *Hybart v. Jones*, 130 N. C. 227, 41 S. E. 293 (1902).

Cited in *State v. Palmer*, 212 N. C. 10, 192 S. E. 896 (1937).

§ 1-538. **Judgment for treble damages and possession.**—In all cases of waste, when judgment is against the defendant, the court may give judgment for treble the amount of the damages assessed by the jury, and also that the plaintiff recover the place wasted, if the damages are not paid on or before a day to be named in the judgment. (6 Edw. I, c. 5; 20 Edw. I, st. 2; R. C., c. 116, s. 3; Code, s. 629; Rev., s. 858; C. S., s. 893.)

In General.—Under this section a tenant in dower, or other life tenant, who, by neglect or wantonness, occasions permanent waste or injury to the inheritance, whether voluntary or permissive, thereby subjects himself to liability to pay the actual damages, or treble damages, at the discretion of the judge, and also to forfeit the place wasted on a day to be fixed by the judge, if he should in the meantime fail to pay the damages recovered of him. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Section Changes Former Law. — This section is substantially the same as the law in force before the enactment of the Code except for two important changes. The word "may" has been substituted for "shall" in the old statute of Gloucester, and, by a qualification added to it, the judgment for the place wasted must be conditional, and can take effect only upon the failure of the defendant to pay the actual damages before a day certain. So that it is left within the sound discretion of the judge who tries the action to determine whether he will give treble or single damages, as well as to fix a day after which a writ of possession may issue for the place wasted, if the damage allowed shall not have been in the meantime actually paid. The old statute was,

manifestly, amended when the Code was enacted, for the purpose of vesting a discretionary power in the court in reference to the amount of the judgment, and fixing the time for forfeiture of the place wasted on failure to pay the amount recovered. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Prospective Damages Not Allowed. — The jury cannot allow prospective damages, where the roof of a building has become decayed, for the value of the whole building, on the supposition that the tenant will suffer the decay to continue till the structure shall have rotted and fallen down. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Where Damages Insignificant. — In an action for waste, where the jury find insignificant damages, judgment will be arrested. *Sheppard v. Sheppard*, 3 N. C. 382 (1806).

Judgment for Damages Only.—It is not error for the judgment in an action of waste to be for the damages only, and not also for the place wasted. *Bright v. Wilson*, 1 N. C. 251 (1800).

New Action for Subsequent Injury.—If the life tenant should allow the inheritance to sustain further injury after the time of

trial, damage may be recovered in another action. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

Appeal.—This section says the court may give judgment for treble damages and

the place wasted, and on appeal the court will not make such discretionary power obligatory. *Sherrill v. Connor*, 107 N. C. 630, 12 S. E. 588 (1890).

ARTICLE 43.

Nuisance and Other Wrongs.

§ 1-539. Remedy for nuisance.—Injuries remediable by the old writ of nuisance are subjects of action as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. (C. C. P., s. 387; Code, s. 630; Rev., s. 825; C. S., s. 894.)

Cross Reference.—As to injunction against nuisance, see § 1-485 and annotations thereunder.

Editor's Note.—Nuisances consist of two general classes, public and private. A public nuisance exists when a right or privilege, common to all the citizens of the community, is interfered with, even though no actual damage to any individual is caused. In such cases in order to maintain a civil action under this section the plaintiff must show special damages differing both in degree and in kind from that suffered by the general public.

A private nuisance exists where the right or privilege interfered with is essentially a private one. If the offense is so general as to affect a number of citizens in the neighborhood the aggravation of offenses will amount to a public wrong and may be the subject of a public prosecution. But in such a case the individual can still maintain a civil action, and he need not show that his particular damage differs in kind and degree from that of the other individuals affected. See *McManus v. Southern Ry. Co.*, 150 N. C. 655, 64 S. E. 766 (1909).

When the alleged nuisance would constitute a private wrong, by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. See *Farmer, etc., Mfg. Co. v. R. R.*, 117 N. C. 579, 23 S. E. 43 (1895); *Pruitt v. Bethell*, 174 N. C. 454, 93 S. E. 945 (1917).

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. See *Baltimore, etc., R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 S. Ct. 719, 27 L. Ed. 739 (1883).

An Adequate Remedy.—Where a nui-

sance has been established, working harm to the rights of an individual citizen, the law of our State is searching and adequate to afford an injured person ample redress, both by remedial and preventive remedies, as will be readily seen by reference to numerous decisions of the court on the subject. *McManus v. Southern Ry. Co.*, 150 N. C. 655, 64 S. E. 766 (1909).

The ancient writ of nuisance has been superseded under this section by civil action for damages or for a removal of the nuisance, or for both. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

Purpose of Damages.—Damages in nuisance should be such as to lead to the abatement of the nuisance. *Bradley v. Amis*, 3 N. C. 399 (1806).

Appreciable Damage Must Be Suffered.—To sustain an action for a nuisance, public or private, which does not involve the physical invasion of the property of another, it is always required to be shown that some appreciable damage has been suffered, or that some serious or irreparable injury is threatened, and unless this is made to appear a right to nominal damages does not arise. *McManus v. Southern Ry. Co.*, 150 N. C. 655, 64 S. E. 766 (1909).

When Special Damage Necessary.—An individual may not maintain an action for a public nuisance unless he shows unusual and special damage, different from that suffered by the general public. *Pedrick v. Raleigh, etc., R. Co.*, 143 N. C. 485, 55 S. E. 877 (1906); *McManus v. Southern Ry. Co.*, 150 N. C. 655, 64 S. E. 766 (1909); *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

But an action by an individual to abate a nuisance cannot be successfully resisted on the ground that no special damage to the plaintiff has been shown, when it appears that the nuisance complained of was the fact that the defendant caused water to flood adjoining lands, which bred fever carrying mosquitoes, thereby inflicting sickness on the plaintiff and his family,

although others in the community suffered sickness from the same cause. *Pruitt v. Bethell*, 174 N. C. 454, 93 S. E. 945 (1917).

Diminution of Damage. — In an action for damages from a permanent nuisance, the suit being in the nature of a proceeding to condemn the plaintiff's property, it was held, that special benefits arising out of the establishment of the nuisance may be set off in diminution of damages. *Brown v. Virginia-Carolina Chemical Co.*, 162 N. C. 83, 77 S. E. 1102 (1913).

Injunction Lies.—One suffering peculiar damages from a public nuisance is not restricted but may sue for an injunction. *Reyburn v. Sawyer*, 135 N. C. 328, 47 S. E. 761 (1904).

When Injury Irreparable. — Where the nuisance is continuous and recurrent and the injury irreparable, and remedy by way of damages inadequate, equity will restrain, even though the enterprise be in itself lawful. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

In order for an injury to be irreparable it is not required that it be beyond the possibility of repair or compensation in damages, but it is sufficient if it be one to which complainant should not be required to submit or the other party to inflict and is of such continuous and frequent recurrence that reasonable redress cannot be had in a court of law. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

No Permanent Damage. — Permanent damages for the depreciation of property can not be recovered. The owners may enjoin commission of the acts constituting the nuisance and recover such temporary damages as their property has sustained thereby. *Taylor v. Seaboard, etc., Railway*, 145 N. C. 400, 59 S. E. 129 (1907).

Proximate Cause. — In order to recover damages the maintenance of a public nuisance must be the proximate cause of the injuries. *McGhee v. Norfolk, etc., R. Co.*, 147 N. C. 142, 60 S. E. 912 (1908).

Abatement of a private nuisance is not dependent upon recovery of damages. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

Plaintiff alleged that by reason of the topography and the manner of its use and operation, planes using the airport on adjoining property flew over plaintiff's clinic at a height of not more than 100 feet, so as to constitute a recurrent danger and disturbance to plaintiff and patients of his clinic. It was held that the complaint alleged a private nuisance, and upon verdict of the jury that the airport constituted a nuisance as alleged in the complaint, plaintiff was entitled to enjoin such use notwithstanding the further finding of the jury that plaintiff had not been damaged in a special and peculiar way. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

An airport is not a nuisance per se, but may become a nuisance if its location, structure and manner of use and operation result in depriving complainant of the comfort and enjoyment of his property. *Barrier v. Troutman*, 231 N. C. 47, 55 S. E. (2d) 923 (1949).

Obstruction of Fish in Passage Upstream.—The rule that a riparian owner is not entitled to maintain an action for the reason that he had sustained no peculiar injury through the obstruction of fish in their upstream passage to his fishery, has not been rendered obsolete by this section and the prescription of a right to sue in like cases. *Hampton v. North Carolina Pulp Co.*, 49 F. Supp. 625 (1943).

§ 1-539.1. **Damages for unlawful cutting or removal of timber.**—Any person not being the bona fide owner thereof or agent of the owner who shall knowingly and without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed. (1945, c. 837.)

SUBCHAPTER XV. INCIDENTAL PROCEDURE IN CIVIL ACTIONS.

ARTICLE 44.

Compromise.

§ 1-540. **By agreement receipt of less sum is discharge.**—In all claims, or money demands, of whatever kind, and howsoever due, where an agreement is made and accepted for a less amount than that demanded or claimed to be

due, in satisfaction thereof, the payment of the less amount according to such agreement in compromise of the whole is a full and complete discharge of the same. (1874-5, c. 178; Code, s. 574; Rev., s. 859; C. S., s. 895.)

I. General Consideration.

II. Effect of Compromise or Receipt of Part in Full Payment.

III. Application of Section.

IV. Procedure.

I. GENERAL CONSIDERATION.

Editor's Note.—For a discussion of the law of contracts in relation to this section, see 13 N. C. Law Rev. 45.

Constitutionality of Section. — The section is constitutional. *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316 (1889); *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208 (1894); *Wittkowsky v. Baruch*, 127 N. C. 313, 37 S. E. 449 (1900).

The acceptance of a lesser sum in full payment of a larger sum is valid under this section. *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218 (1950). See *Union Bank v. Board of Com'rs*, 116 N. C. 339, 21 S. E. 410 (1895), citing *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316 (1889).

Under the construction placed upon our statute the offer of a less sum than is due, when the amount of the debt is certain, is in effect the same as the offer of a given sum in satisfaction of a contingent or unliquidated claim. And the courts are governed by the rule adopted in reference to offers to settle contingent claims, because they are analogous to proposals of compromise of indebtedness under the statute. *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208 (1894).

Rule Prior to Section. — Prior to the passage of the Acts 1874-'75, ch. 178 an agreement to receive a part in lieu of the whole of a debt due was held to be a nudum pactum as to all in excess of the sum actually paid. *Union Bank v. Board of Com'rs*, 116 N. C. 339, 21 S. E. 410 (1895), citing *Hayes v. Davidson*, 70 N. C. 573 (1874); *Mitchell v. Sawyer*, 71 N. C. 70 (1874); *Love v. Johnston*, 72 N. C. 415 (1875); *Currie v. Kennedy*, 78 N. C. 91 (1878). And see *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208 (1894).

An agreement to compromise and settle disputed matters is valid and binding. The law favors the avoidance or adjustment of litigation, and a compromise made in good faith for such a purpose will be sustained as not only based upon a sufficient consideration but upon the highest consideration of public policy as well, and this, too, without any special regard to the special merits of the controversy or the character or validity of the claims of the respective par-

ties. *York v. Westall*, 143 N. C. 276, 55 S. E. 724 (1906). See generally *Williams v. Alexander*, 39 N. C. 207 (1845); *Barnawell v. Threadgill*, 56 N. C. 50 (1856); *Mayo v. Gardner*, 49 N. C. 359 (1857); *Mathis v. Bryson*, 49 N. C. 508 (1857); *Findly v. Ray*, 50 N. C. 125 (1857).

When the amount due is uncertain or unliquidated, if an offer in satisfaction of the claim is accompanied with such acts and declarations as amount to a condition that the money shall be accepted only as a payment in full of the claim, and the party to whom the offer is made must of necessity understand, from its very terms, that if he takes the money he takes it subject to such condition, then, in law, the payment operates to discharge the whole claim. *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208 (1894).

Essentials of Compromise. — As in the case of other contracts, mutuality is essential to a valid compromise. There must be a meeting of minds upon every feature and element of such agreement. See *Horn v. Detroit, etc., Co.*, 150 U. S. 610, 14 S. Ct. 214, 37 L. Ed. 1199 (1893).

The agreement, in order to be binding upon the parties, must have been executed voluntarily and without duress, or undue influence, in good faith, deliberately and understandingly. *Hennessy v. Bacon*, 137 U. S. 78, 11 S. Ct. 17, 34 L. Ed. 605 (1890).

What Constitutes Accord and Satisfaction. — When at a sale under a deed of trust, it was agreed between the creditor and debtor that the former would bid for the property, and if it brought less than the debt he would accept it in satisfaction of the sums due him, and the debtor was thereby induced not to bid or procure others to do so, and the property was bid off by the creditor for a less sum than his debt. Held, that there was a sufficient consideration to support the agreement and the debtor was discharged from his obligation. *Jones v. Wilson*, 104 N. C. 9, 10 S. E. 79 (1889).

When a debtor pays a sum supposed by him to be the balance due on his bond, and the creditor refuses to give up the bond, but says that he will credit the amount paid, it does not amount to a compromise and satisfaction of the bond, although the debtor intends it as such. *King v. Phillips*, 94 N. C. 555 (1886).

Where the plaintiff's damages, caused by the defendant's breach of contract, are based upon two distinctive items, the plain-

tiff agreeing upon and receiving compensation for the first item does not preclude a recovery upon the second one, when it appears that the settlement had been made in contemplation of the first item alone. *Garland v. Improvement Co.*, 184 N. C. 551, 115 S. E. 164 (1922).

Same—Tort and Contract Actions.—Accord and satisfaction is a method of discharging a contract or settling a cause of action arising either from a contract or tort, by the parties compromising the matter in dispute between them, and accepting its benefits. *Walker v. Burt*, 182 N. C. 325, 109 S. E. 43 (1921).

Same—Mistake as to Amount.—Where the plaintiff agreed to accept a lesser sum in discharge of a larger, which he thought was the amount of the debt, but was mistaken and later found that the debt was larger, there was no compromise as to the amount of the mistake. *Holden v. Warren*, 118 N. C. 326, 24 S. E. 770 (1896).

Same—Money Paid into Court.—Money tendered and deposited into court by the defendant with costs accrued, "in full tender of all indebtedness of defendant to plaintiffs," if withdrawn by the plaintiffs, pending the litigation, it amounts to a satisfaction of their claims, and subjects the plaintiffs to all subsequently accruing costs. *Cline v. Rudisill*, 126 N. C. 523, 36 S. E. 36 (1900).

Slight Irregularities Do Not Vitiare.—Where a plea in accord and satisfaction, has been made in bar to an action that defendant had paid an agreed amount and costs into the clerk's office, the fact that a witness ticket of a small amount, which the plaintiff had refused to receive, was not taxed in the costs, will not affect the validity of the tender. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701 (1917).

Where a creditor agrees to accept a lesser amount in satisfaction of his debt, the lesser amount to include advertising, the amount of which was to be agreed upon by the creditor, the failure of the debtor to pay the amount of the compromise, the creditor having refused to state the amount of advertising he would take, does not invalidate the compromise. *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651 (1904).

Offer and Acceptance by Telegram.—Offer and acceptance by telegram to pay a sum certain in full settlement of a claim in dispute, followed by immediate payment by debtor, constitutes a valid compromise in full satisfaction of the claim. *Pruden v. R. Co.*, 121 N. C. 509, 28 S. E. 349 (1897).

II. EFFECT OF COMPROMISE OR RECEIPT OF PART IN FULL PAYMENT.

Acts as Complete Discharge.—The receipt of a part in satisfaction of the whole is now as effective as if the whole amount of the debt had been paid. *Tiddy v. Harris*, 101 N. C. 589, 8 S. E. 227 (1888); *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316 (1889); *Petit v. Woodlief*, 115 N. C. 120, 20 S. E. 208 (1894); *Union Bank v. Board of Com'rs*, 116 N. C. 339, 21 S. E. 410 (1895); *Wittkowsky v. Baruch*, 127 N. C. 513, 37 S. E. 449 (1900).

Precludes Further Action Thereon.—Where a plaintiff agreed to accept a certain sum by way of compromise in full satisfaction of his claim, and having been paid that amount by the defendant, he cannot maintain an action thereon. *Pruden v. R. R. Co.*, 121 N. C. 509, 28 S. E. 349 (1897).

Checks Accepted as Settlement in Full of Account.—Under a uniform construction of this section, as announced in a long line of decisions, it is held that where two parties are in dispute as to the correct amount of an account, and one sends the other a check, or makes a payment, clearly purporting to be in full settlement of the claim, and the other knowingly accepts it upon such condition, this will amount to a full and complete discharge of the debt. *Mercer v. Lumber Co.*, 173 N. C. 49, 91 S. E. 588 (1917); *Blanchard v. Peanut Co.*, 182 N. C. 20, 108 S. E. 332 (1921); *De Loache v. De Loache*, 189 N. C. 394, 127 S. E. 419 (1925).

Where an employee was discharged and received and cashed a check for \$125, on which was written, "In full for services," which amount was less than claimed, he cannot recover more, although he attempted to qualify his acceptance of the proceeds of the check by writing across the check, above his signature, the words, "Accepted for one month's services." *Kerr v. Sanders*, 122 N. C. 635, 29 S. E. 943 (1898).

Same—Whether Transaction Embraced in Account Question of Law or Fact.—Where a check is sent in full payment of an account, the creditor cannot accept and appropriate the check and afterwards recover the amount of any item which was a part of the account. Having elected to take a part in satisfaction of the whole, he will be held to his agreement; but the principle, of course, does not apply to a transaction not embraced by the account. Whether it is or not may often be a question of law upon admitted facts; but some-

times the evidence may be such as to make it a question for the jury. *Aydlett v. Brown*, 153 N. C. 334, 69 S. E. 243 (1910); *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218 (1950).

Plaintiff's evidence was to the effect that defendant promised to pay him a stipulated amount annually, the remuneration to be paid on the basis of weekly checks for a stipulated commission on sales made by plaintiff, with quarterly payments to make up the proportionate part of the annual salary. It was held that the acceptance of weekly checks by plaintiff with stipulations above plaintiff's endorsement that the payment released the payer of all claims due to date, with accompanying voucher stipulating that the sums included in the checks covered no items except commissions and travel allowances, raised for the determination of the jury the question as to whether the weekly payments composed one account of liability and the quarterly payments another, and therefore whether the settlement included the claim for quarterly payments. *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218 (1950).

III. APPLICATION OF SECTION.

Incorporated in Contract. — Where agreements to receive a part in lieu of the whole debt due have been made since the enactment of this section, they are deemed to have been entered into in as full contemplation of its provisions as though it had been incorporated into the contract. *Bank v. Commissioners*, 116 N. C. 339, 21 S. E. 410 (1895), citing *Koonce v. Russell*, 103 N. C. 179, 9 S. E. 316 (1889).

Must Be Compromise. — The section is not applicable where the payment is not intended as a compromise of the whole, or any part of the debt, but as a payment in full. *Smith v. Richards*, 129 N. C. 267, 40 S. E. 5 (1901).

When Creditor Remitted to Original Rights. — If the debtor, as in *Hunt v. Wheeler*, 116 N. C. 422, 21 S. E. 915 (1895); repudiates the agreement or unreasonably delays to execute it, the creditor is remitted to his rights under the original contract, for payment of the sum agreed to be paid under the new contract is essential to a discharge of the old contract. *Ramsey v. Browder*, 136 N. C. 251, 48 S. E. 651 (1904).

Right to Demand Acceptance. — When a proposal to pay a given sum, provided that the payment shall operate to relieve one of three judgment debtors, is accepted by the creditor, and the debtor within a reasonable time tenders the amount, he has the right

to demand that it shall be received and applied in discharge of his obligation to make any further payment. *Boykin v. Buie*, 109 N. C. 501, 13 S. E. 879 (1891).

When Payer Is Entitled to Restitution. —

Where one pays a certain sum upon a contested debt in compromise thereof in case it shall afterwards be established, a finding by the jury that it never existed will entitle the payer to a restitution for the money advanced by him. *Fickey v. Merrimon*, 79 N. C. 585 (1878).

Principal Bound by Acts of Agent. — A principal may not repudiate the act of his agent in compromising a debt due, and receive the benefit of the consideration therefor. *Cashmar Supply Co. v. Down*, 146 N. C. 191, 59 S. E. 685 (1907).

Payment of One Account Not Settlement of Another. — While the acceptance of a lesser sum in full payment of a larger sum is valid under this section, the payment of one account is not the settlement of another. And the acceptance of a lesser sum constitutes a settlement only as to those items of liability embraced in the settlement. *Lochner v. Silver Sales Service*, 232 N. C. 70, 59 S. E. (2d) 218 (1950).

When the sum paid under an indemnity insurance policy is the only sum due at the time, the language of the receipt will be restricted to the amount due, and will not be construed as a compromise of the whole claim of indemnity for future sickness. *Moore v. Casualty Co.*, 150 N. C. 153, 63 S. E. 675 (1909).

Where one of several makers of a note agree with the payee that they shall be released from their obligations by giving a new note in a smaller sum, subject to the same conditions of warranty as the old one, the giving of a new note is valid as a compromise under this section, and the warranty in the former transaction is a part of the consideration for the new one, and is enforceable. *Bank v. Walser*, 162 N. C. 53, 77 S. E. 1006 (1913).

IV. PROCEDURE.

Discretion of Court. — Where, among other defenses to an action, the defendant pleads accord and satisfaction, the discretionary power of the trial judge in submitting this issue to the jury before submitting the other issues upon the merits will not be reversed on appeal. *McAuley v. Sloan*, 173 N. C. 80, 91 S. E. 701 (1917).

Landlord and Cropper. — Where the cropper sues for damages arising from the breach by the landlord of his contract in several particulars, and there is evidence on the trial of full accord and satisfaction

between them, the submission of the one issue as to the compromise and settlement will not be considered for error when the case has thereunder been presented to the

jury, without prejudice to any of the appellant's rights. *Walker v. Burt*, 182 N. C. 325, 109 S. E. 43 (1921).

§ 1-541. Tender of judgment.—The defendant, at any time before the trial or verdict, may serve upon the plaintiff an offer in writing to allow judgment to be taken against him for the sum or property, or to the effect therein specified, with costs. If the plaintiff accepts the offer, and gives notice thereof in writing within ten days, he may file the summons, complaint, and offer, with an affidavit of notice of acceptance, and the clerk must thereupon enter judgment accordingly. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the plaintiff fails to obtain a more favorable judgment he cannot recover costs, but must pay the defendant's costs from the time of the offer. If the defendant sets up a counterclaim in his answer to an amount greater than the plaintiff's claim, or sufficient to reduce the plaintiff's recovery below fifty dollars, then the plaintiff may serve upon the defendant an offer in writing to allow judgment to be taken against him for the amount specified, or to allow the counterclaim to the amount specified, with costs. If the defendant accepts the offer, and gives notice thereof in writing within ten days, he may enter judgment as above for the amount specified, if the offer entitles him to judgment, or if the amount specified in the offer is allowed him in the trial of the action. If the notice of acceptance is not given, the offer is deemed withdrawn, and cannot be given in evidence; and if the defendant fails to recover a more favorable judgment, or to establish his counterclaim for a greater amount than is specified in the offer, he cannot recover costs, but must pay the plaintiff's costs from the time of the offer. (C. C. P., s. 328; Code, s. 573; Rev., s. 860; C. S., s. 896.)

Cross Reference.—As to tender of judgment in justice's court, see Rule 14, § 7-149.

Nature of Offer Required.—An offer of compromise to be sufficient under the statute must be in a form that will enable the plaintiff, if he accepts it, to have judgment entered by the clerk conformably to the offer. It must consequently come from all the defendants, or their common attorney at law, since otherwise the clerk would not be authorized to enter judgment against all. *Williamson v. Canal Co.*, 84 N. C. 629 (1881).

The defendant would have no right, under the provisions of the section to force the plaintiff to accept the property, when it might have been injured or rendered worthless after conversion, or pay the costs, on refusal to do so, even if the action had been brought to recover the specific property tendered, unless the offer had also included with the proposed delivery of articles tendered in kind a proposal to pay an amount as damages for detention not less than that ultimately assessed by the jury. *Stephens v. Koonce*, 103 N. C. 266, 9 S. E. 315 (1889).

Unaccepted Tender of Judgment.—The purpose of the section can be best subserved by holding according to its language that a tender of judgment unaccepted "cannot be given in evidence," and can only be used after verdict before the judge,

to enable him to adjudge who shall pay the costs. *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 78 S. E. 276 (1913).

In *Blanton Grocery Co. v. Taylor*, 162 N. C. 307, 78 S. E. 276 (1913), it was said: "The statute authorizing a tender of judgment says that the tender, when not accepted, is to be deemed withdrawn, and cannot be given in evidence, and while this provision is primarily for the protection of the one making the tender, and to prevent its introduction against him, the statute is a part of the wholesome scheme devised to encourage compromises and settlements, before and after action commenced."

When defendants tender judgment for a smaller amount on another and different liability from that alleged in the complaint, and plaintiff does not accept as provided by this section, the tender is thereby withdrawn, and upon judgment of nonsuit on the cause alleged, plaintiff is not entitled to judgment for the amount tendered, there being no admission of liability in any amount upon the cause alleged. *Doggett Lbr. Co. v. Perry*, 213 N. C. 533, 196 S. E. 831 (1938).

A defendant may not defeat the purpose of § 1-510 by undertaking to make a tender under this section. *McKay v. McNair Inv. Co.*, 228 N. C. 290, 45 S. E. (2d) 358 (1947).

Tender Sufficient to Stop Costs.—A tender of payment under the section, to

stop the costs and the accrual of interest on a judgment subsequently rendered, must be in writing, signed by the party making it, and contain an offer of judgment for the amount tendered. *Medicine Co. v. Davenport*, 163 N. C. 294, 79 S. E. 602 (1913).

Costs — When Taxed on Plaintiff. — Where a plaintiff is given judgment for no more than the amount tendered by the defendant, costs from the time the tender was made should be taxed on the plaintiff. *Cowles v. Assurance Society*, 170 N. C. 368, 87 S. E. 119 (1915).

Where defendant tenders judgment in its answer for the amount recovered by plaintiff, which tender is refused by plaintiff upon her claim that she is entitled to recover a larger amount, the costs are properly taxed against plaintiff. *Webster v. Wachovia Bank, etc., Co.*, 208 N. C. 759, 182 S. E. 333 (1935).

Same — When Taxed on Defendant. — Where, in a justice's court, judgment was rendered against two defendants, and one

appealed, and, pending the appeal, tendered in cash as a satisfaction of the judgment as to himself a less sum than the amount of the justice's judgment, but more than that ultimately rendered in the superior court, the plaintiff was entitled to costs. *Wyatt v. Wilson*, 152 N. C. 276, 67 S. E. 501 (1910).

Error to Dismiss. — Where on the admissions in the pleadings the plaintiff is entitled to recover any amount it is error for the trial court to dismiss the action as in case of nonsuit, and the fact that the defendant had tendered the amount admitted to be due with interest and cost to the time of filing answer, and had paid it into court subject to the plaintiff's order does not vary this result. *Penn v. King*, 202 N. C. 174, 162 S. E. 376 (1932).

Cited in Doggett Lbr. Co. v. Perry, 212 N. C. 713, 194 S. E. 475 (1938); *Long v. Townsend*, 215 N. C. 723, 3 S. E. (2d) 13 (1939).

§ 1-542. Conditional tender of judgment for damages. — In an action arising on contract, the defendant may, with his answer, serve upon the plaintiff an offer in writing, that if he fails in his defense, the damages be assessed at a specified sum; and if the plaintiff signifies his acceptance thereof in writing, ten days before the trial, and on the trial has a verdict, the damages shall be assessed accordingly. If the plaintiff does not accept the offer, he must prove his damages, as if it had not been made, and may not introduce it in evidence. If the damages assessed in his favor do not exceed the sum mentioned in the offer, the defendant shall recover his expenses incurred in consequence of any necessary preparation or defense in respect to the question of damages. This expense shall be ascertained at the trial. (C. C. P., ss. 329, 330; Code, ss. 575, 576; Rev., ss. 861, 862; C. S., s. 897.)

Cross Reference. — As to costs, see § 1-541 and note.

Tender Should Accompany Answer. — A tender may accompany an answer, and this alone is its proper placing so far as a pleading is concerned, or in reply to a counterclaim; it will not be permitted as an aid to a defective demurrer. *Hall v. Telegraph Co.*, 139 N. C. 369, 52 S. E. 50 (1905).

Agreement as Evidence Fixing Damages. — Where, pending an action to recover for damages done to a lot of tobacco which the plaintiff had bought and paid for

under a guarantee of soundness by the defendants, an agreement was entered into adjusting the amount of damage per pound which the plaintiff should recover, if entitled to recover at all, said agreement to be without prejudice to either party; Held, that such an agreement was not an offer of compromise in the meaning of this section and was admissible on the trial of the action to determine the amount of the plaintiff's recovery. *Garrett v. Pegram*, 120 N. C. 288, 26 S. E. 778 (1897).

§ 1-543. Disclaimer of title in trespass; tender of judgment. — In actions of trespass upon real estate, the defendant in his answer may disclaim any title or claim to the lands against which the trespass is alleged, may allege that the trespass was by negligence or involuntary, and may make a tender or offer of sufficient amends for the trespass. In the event of such disclaimer, defense and offer by the defendant, the plaintiff is required to file a reply before trial, with respect to the defendant's allegation that the trespass was negligent or involuntary, and that a sufficient tender has been made.

If the plaintiff controverts such answer or a part thereof, and at the trial ver-

dict is found for the defendant or the plaintiff is nonsuited, other than voluntarily, then in either such event he is barred from the said action.

All costs incurred after the defendant's disclaimer and tender shall be charged against the plaintiff in the event the jury finds for the defendant on the issues of disclaimer and tender, or in the event the plaintiff is nonsuited. (1715, c. 2, s. 7, P. R.; R. C., c. 31, s. 79; Code, s. 577; Rev., s. 863; C. S., s. 898; 1947, c. 781.)

Editor's Note.—The 1947 amendment inserted the second sentence of the first paragraph, added the last paragraph and made other changes.

Involuntary Trespass.—Where a person occupying land adjoining another and in ignorance of the true boundaries of the tracts, trespasses upon the land of the adjacent owner, but disclaims title and tenders reasonable amends before the suit was brought, such trespasser is protected by this section. *Blackburn v. Bowman*, 46 N. C. 442 (1854).

Effect of Disclaimer Generally.—If a de-

fendant is sued for the recovery of land, a part of which he does not claim or about which he does not intend to litigate with the plaintiff, he should enter a disclaimer; and when he does so, he cannot be taxed with any costs relating to that part of the land; but when, instead of doing so, he takes issue with plaintiff as to all of the land, and the plaintiff recovers any part of it, he is entitled to recover his costs, although he may have failed to recover the other tract. *Swain v. Clemmons*, 175 N. C. 240, 95 S. E. 498 (1918).

ARTICLE 45.

Arbitration and Award.

§ 1-544. **Agreement for arbitration.**—Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this article, any controversy existing between them at the time of the agreement to submit. Such an agreement shall be valid and enforceable, and neither party shall have the power to revoke the submission without the consent of the other party or parties to the submission save upon such grounds as exist in law or equity for the rescission or revocation of any contract. (1927, c. 94, s. 1.)

Editor's Note.—This statute is a verbatim enactment of the Uniform Arbitration Act and North Carolina was among the first states to adopt it.

Provisions of Article Are Cumulative and Concurrent.—The statutory methods of arbitration provided by this article are to be regarded merely as constituting an enlargement on the common-law rule, and the provisions of this article are cumulative and concurrent rather than exclusive. *Thomasville Chair Co. v. United Furniture Workers*, 233 N. C. 46, 62 S. E. (2d) 535 (1950).

This article does not exclude the common-law remedy of arbitration, but is cumulative and concurrent thereto, and it does not prevent the parties to a controversy from contracting by parol to submit their differences to arbitration in cases where a parol agreement on the subject matter would be enforceable, and an award reached under the parol agreement to arbitrate will not be invalidated by reason of failure to follow in all respects the method and procedure prescribed by the statute. *Copney v. Parks*, 212 N. C. 217, 193 S. E. 21 (1937).

And Parties May Adopt Common-Law

Method of Arbitration.—Where the method of arbitration adopted by the parties is in accordance with procedure at common law, and not with that prescribed in this article, plaintiff's motion to strike report of arbitrator must be considered in light of common law. *Tarpley v. Arnold*, 226 N. C. 679, 40 S. E. (2d) 33 (1946).

The common law governs a written agreement for arbitration which is not in accordance with the procedure prescribed by this article. *Brown v. Moore*, 229 N. C. 406, 50 S. E. (2d) 5 (1948).

Distinction between Arbitration and Reference.—There are several distinctions between arbitration and reference under the statutes. While a reference may be by consent of the parties it may also be compelled by the judge in certain instances (see § 1-189); but an arbitration under this article is always by consent. It would seem that in a reference the referee must report the facts upon which his conclusions are based—the finding of facts may be the extent of his duty—and state them separately from the conclusions of law; but the arbitrator is not required to report the facts but only his award or conclusion which must be done in writing. Referees

are required to conduct a trial according to the rules of court and have the same power generally as judges (see § 1-192) but there are no rules restricting the arbitrators to any particular mode or manner of trial, they are not even required to decide according to law and their award may be general. The proceedings for setting aside, vacating, confirming, and entering judgment are also different. For distinctions between reference and common-law award, see *Keener v. Goodson*, 89 N. C. 273 (1883).

Arbitrator Defined.—"An arbitrator is a person selected by the mutual consent of the parties, to determine matters in controversy between them, whether they be matters of law or fact. He is invested with judicial functions, limited by the terms of the submission, [and this statute since its passage] and he must be incorrupt and impartial, and not exceed or fall short of his duty, and if he acts otherwise, his award may be set aside." *Crisp v. Love*, 65 N. C. 126 (1871).

Applicability to Agreement Respecting Future Controversies.—It seems that this section does not apply to contracts to arbitrate future controversies since it is expressly limited to controversies existing at the time of the agreement, and that the law as to future disputes remains as it was prior to the statute. If this be the proper construction then future contracts to arbitrate which classify as conditions precedent are valid but those classifying as collateral stipulations are invalid. The test applied to the contract is whether it ousts the court of jurisdiction over the contract generally; if it does, it is invalid. See *Swaim v. Swaim*, 14 N. C. 24 (1831). The cases in the following paragraphs discuss the rule and illustrate its application as to future disputes.

Our court has uniformly held to the doctrine that when a cause of action has arisen, the courts cannot be ousted of their jurisdiction by agreements, previously entered into, to submit the liabilities and rights of the parties to the determination of other tribunals named in the agreement; but it has been also generally held that the agreement to submit the particular question of the amount of loss or damage of the assured under an insurance policy is not against public policy and is sustained. That is simply a method for the ascertainment of a single fact, and not the determination of the legal liability of the insurer. *Kelly v. Trimont Lodge*, 154 N. C. 97, 69 S. E. 764 (1910), citing *Mfg. Co. v. Assur.*

Co., 106 N. C. 28, 19 S. E. 1057 (1890). And in *Braddy v. Ins. Co.*, 115 N. C. 345, 20 S. E. 477 (1894), it is said that the proposition is well settled that an agreement to submit to arbitration the single question of the amount of loss by fire is valid. *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 72 S. E. 998 (1911).

"It is generally accepted that it is competent to contract that the amount of damages may be recovered, or the existence of any fact which may enter into the right to recover, shall be submitted to arbitration, provided the right of action is not embraced in the agreement." *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 72 S. E. 998 (1911).

Although an agreement to arbitrate the entire controversy is not enforceable, and prior to the award either party may revoke the agreement, if he fails to do so, and enters upon the arbitration, and an award is made, he is bound. *Nelson v. Atlantic Coast Line R. Co.*, 157 N. C. 194, 72 S. E. 998 (1911). See *Williams v. Mfg. Co.*, 154 N. C. 205, 70 S. E. 290 (1911).

Arbitration Pending Reference.—Where a cause has been referred, and pending the reference the parties agree to an arbitration and that the referee's conclusions of law should be based on the arbitrators' findings, the arbitration is not one submitted in accordance with this section and its provisions do not apply. *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319 (1934).

Arbitration as Matter of Contract.—It will be observed that this statute makes the right of arbitration a matter of contract; and it is only by agreement of the parties that a proceeding under it may be had. This is but the adoption of the common law in this respect for it has been held uniformly in this State that a submission to arbitration was a contract resulting from the agreement to refer, and that it was governed by the general law concerning contracts. *Sprinkle v. Sprinkle*, 159 N. C. 81, 74 S. E. 739 (1912).

Controversies involving the right or title to real estate, under the later common law, could be submitted to arbitration provided the submission was in writing. Oral submissions were invalid because they fell within the statute of frauds. This was the law of this State prior to this statute (see *Crissman v. Crissman*, 27 N. C. 498 (1845); *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685 (1892)); and it would seem that this statute, since it requires a written submission, would extend to all disputes existing, including those involving title to land.

Sufficiency of Contract. — Since under this statute the submission of a dispute to arbitration is a contract, it is but reasonable to suppose that such contracts must have all the elements necessary to a binding contract. See the general discussion in 5 C. J. [§ 15 et seq.] 23.

The consideration supporting the contract of arbitration is the mutual promises and this is sufficient. See *Mayo v. Gardner*, 49 N. C. 359 (1857).

Who May Make Contract. — This section provides that "Two or more parties may agree." It does not specify whether the parties may do so by their general agents or by their attorneys. Prior to this act it was held under the common-law practice that the attorneys might make such an agreement and this without the consent of the clients (*Millsaps v. Estes*, 134 N. C. 486, 46 S. E. 988 (1904)); it would seem that a party could have made the contract by agent in the same manner that any other contract could have been made. It is to be presumed that the word "parties" as here used is given the meaning ordinarily ascribed to the word in legal terminology and that about the same latitude will be given the parties in making the agreement that they have always had. As has always been the case, administrators (see § 28-111, and *McLeod v. Graham*, 132 N. C. 473, 43 S. E. 935 (1903)), trustees, guardians and other representatives may no doubt represent the estates or their wards, *cestui que trusts*, etc., in this capacity.

It was held prior to this section, following the ordinary rule of contracts, that an agreement made by an infant was voidable. It was also held that a guardian ad litem could not bind the infant by a submission to arbitration, even though the submission was made the rule of the court. *Millsaps v. Estes*, 137 N. C. 535, 50 S. E. 227 (1905).

Necessity of Controversy Being Litigated.—It is not necessary, it would seem, that the controversy be pending in a court before it can be arbitrated, for any existing

controversy might be arbitrated. See *Parish v. Strickland*, 52 N. C. 504 (1860). A cause that is pending may be arbitrated (see *Islay v. Steward*, 20 N. C. 297 (1838)); this was true at common law and under all the statutes, it would seem, unless the contrary is expressly provided for. See 5 C. J., p. 26, §§ 22-24.

Necessity for Writing. — Prior to this article, the necessity of the agreement being in writing depended upon the law of general contracts so that some of such contracts had to be in writing and others did not, depending upon whether they fell within the statute. See *Crissman v. Crissman*, 27 N. C. 498 (1845); *Fort v. Allen*, 110 N. C. 183, 14 S. E. 685 (1892).

Power to Revoke.—Since the word "submission" means to agree to refer the matter in dispute (see *Words and Phrases*, title "Submission" and see 56 C. J. [§ 19] p. 21), this section denies the right to revoke a contract to submit an existing controversy to arbitration after it is once made. It changes the prior rule in this State which permitted a revocation by either party at any time before the rendition of the award [for prior law see *Williams v. Mfg. Co.*, 153 N. C. 7, 68 S. E. 902 (1910); *Long v. Cromer*, 181 N. C. 354, 107 S. E. 217 (1921)], or thereafter, even when it has been made a rule of the court, with the consent of the judge (see *Tyson v. Robinson*, 25 N. C. 333 (1843), for the prior law).

Effect of Death of Party.—While prior to this article the death of one of the parties before the award automatically revoked the contract to arbitrate (see *Whitfield v. Whitfield*, 30 N. C. 163 (1847); *Williams v. Branning Mfg. Co.*, 153 N. C. 7, 68 S. E. 902 (1910)) this section changes the rule so that now the effect of such death upon contract is the same as it is upon an ordinary contract.

Notice to Arbitrators of Appointment.—See note under § 1-547.

Cited in *In re Reynolds' Estate*, 221 N. C. 449, 20 S. E. (2d) 348 (1942).

§ 1-545. **Statement of questions in controversy.**—The arbitration agreement must state the question or questions in controversy with sufficient definiteness to present one or more issues or questions upon which an award may be based. (1927, c. 94, s. 2.)

§ 1-546. **"Court" defined.**—The term "court" when used in this article means a court having jurisdiction of the parties and of the subject matter. (1927, c. 94, s. 3.)

§ 1-547. **Cases where court may appoint arbitrator; number of arbitrators.**—Upon the application in writing of any party to the arbitration

agreement and upon notice to the other parties thereto, the court shall appoint an arbitrator or arbitrators in any of the following cases:

(a) When the arbitration agreement does not prescribe a method for the appointment of arbitrators, in which case the arbitration shall be by three arbitrators.

(b) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.

(c) When any arbitrator fails or is otherwise unable to act, and his successor has not been appointed in the manner in which he was appointed.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate. (1927, c. 94, s. 4.)

Notice of Appointment to Arbitrators.—There was no necessity that the arbitrators under the former law be informed of their appointment by a formal or written notice.

It was sufficient if they were appointed, met and made an award. *Allison v. Bryson*, 65 N. C. 44 (1871).

§ 1-548. **Application in writing; hearing.**—Any application made under authority of this article shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions, except as otherwise herein expressly provided. (1927, c. 94, s. 5.)

§ 1-549. **Notice of time and place of hearing.**—The arbitrators shall appoint a time and place for the hearing, and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award. (1927, c. 94, s. 6.)

Former Law. — It may be stated as a general rule that the parties had a right to a notice of the time and place of hearing if the judgment of the arbitrators may have been influenced or enlightened by evidence. *Grimes v. Brown*, 113 N. C. 154, 18 S. E. 87 (1893). This probably extended to adjourned meetings, except that no notice of a final meeting to make up and sign the award was ever necessary. *Zell v. Johnston*, 76 N. C. 302 (1877); 5 C. J. [§ 181], 87.

Right to Notice.—A party to an arbitration agreement has the right, both at common law and by this section, to notice and an opportunity to present evidence as to all matters submitted, and in the absence of notice the award is not binding upon him and does not estop him from instituting action in the superior court. *Grimes v. Home Ins. Co.*, 217 N. C. 259, 7 S. E. (2d) 557 (1940).

§ 1-550. **Hearing if party fails to appear.**—If any party neglects to appear before the arbitrators after reasonable notice the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them. (1927, c. 94, s. 7.)

§ 1-551. **Award within sixty days.**—If the time within which the award shall be made is not fixed in the arbitration agreement, the award must be made within sixty days from the time of the appointment of the arbitrators, and an award made after the lapse of sixty days shall have no legal effect unless the parties extend the time in which said award may be made, which extension or ratification shall be in writing. (1927, c. 94, s. 8.)

Provisions Subject to Waiver. — Where hearings are held before the arbitrators more than sixty days after the submission to arbitration, and all parties are present or represented by counsel, the unsuccessful party may not wait until after the award has been made and then set up for the first

time his contention that the award was of no effect because not made within sixty days after the submission, the provisions of this section being subject to waiver, and the award as rendered is binding on the parties. *Andrews v. Jordan*, 205 N. C. 618, 172 S. E. 319 (1934).

§ 1-552. Representation before arbitrators.—No one other than a party to said arbitration, or a person regularly employed by such party for other purposes, or a practicing attorney at law, shall be permitted by the arbitrator or arbitrators to represent before him or them any party to the arbitration. (1927, c. 94, s. 9.)

§ 1-553. Requirement of attendance of witnesses.—The arbitrator or arbitrators, or a majority of them, may require any person to attend before him or them as a witness, and to bring with him any book or writing or other evidence.

The fees for such attendance shall be the same as the fees of witnesses in the superior court.

Subpoenas shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrator or arbitrators, or a majority of them, and shall be directed to the person and shall be served in the same manner as subpoenas to testify before a court of record in this State; if any person so summoned to testify shall refuse or neglect to obey such subpoenas, upon petition the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this State. (1927, c. 94, s. 10.)

Editor's Note.—At common law the arbitrators could not of themselves compel the attendance of witnesses. And where they heard evidence they were not compelled to administer oaths, though they could do so. *McCrae v. Robeson*, 6 N. C.

127 (1812). The mode of hearing testimony must have been fair and impartial to the parties. See *Pierce v. Perkins*, 17 N. C. 250 (1832); *Hurdle v. Stallings*, 109 N. C. 6, 13 S. E. 720 (1891).

§ 1-554. Depositions.—Depositions may be taken with or without a commission in the same manner and for the same reasons as provided by law for the taking of depositions in suits pending in the courts of record in this State. (1927, c. 94, s. 11.)

§ 1-555. Orders for preservation of property.—At any time before final determination of the arbitration the court may upon application of a party to the submission make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award. (1927, c. 94, s. 12.)

§ 1-556. Questions of law submitted to court; form of award.—The arbitrators may, on their own motion, and shall by request of a party to the arbitration,

(a) At any stage of the proceedings submit any question of law arising in the course of the hearing for the opinion of the court, stating the facts upon which the question arises, and such opinion when given shall bind the arbitrators in the making of their award;

(b) State their final award in the form of a conclusion of fact for the opinion of the court on the questions of law arising on the hearing. (1927, c. 94, s. 13.)

§ 1-557. Award in writing and signed by arbitrators.—The award of the arbitrators, or a majority of them, shall be drawn up in writing and signed by the arbitrators or a majority of them; the award shall definitely deal with all matters of difference in the submission requiring settlement, but the arbitrators may, in their discretion, first make a partial award which shall be enforceable in the same manner as the final award; upon the making of an award, the arbitrators shall deliver a true copy thereof to each of the parties thereto, or their attorneys, without delay. (1927, c. 94, s. 14.)

Necessity for Writing under Prior Law.—It would seem that under the prior law

the award need be in writing only when required by the agreement or come within

the general statutes of fraud. See *Crissman v. Crissman*, 27 N. C. 498 (1845); *Gaylord v. Gaylord*, 48 N. C. 368 (1856). See also 5 C. J. [§ 262] 114.

Signature of Arbitrators.—In order for an award to have been available, as evidence under the prior law, it was necessary that it be signed by the arbitrators. *Morrison v. Russell*, 32 N. C. 273 (1849). The signature by persons other than the arbitrators has been held not to vitiate the award when it is properly signed by a majority of the arbitrators. *Carter v. Sams*, 20 N. C. 321 (1838).

Dealing with All Matters Submitted.—It has always been necessary for arbitrators to pass on all the points particularly referred to them; *Osborne v. Calvart*, 83 N. C. 365 (1880); otherwise the award was entirely void. But if the submission covered all matters in difference without specifying them, the arbitrators could make an award of only such things as they had notice, and the award was good. *Walker v. Walker*, 60 N. C. 255 (1864).

“The award on its face ought to show that the arbitrators have acted upon all the matters submitted.” *Crisp v. Love*, 65 N. C. 126 (1871).

Matters Not Submitted.—Matters passed on by the arbitrators not submitted to them rendered the award void in the absence of waiver as by the voluntary introduction of evidence on matters not submitted. *Robertson v. Marshall*, 155 N. C. 167, 71 S. E. 67 (1911). The power of the arbitrators is derived from the submission

and the award must be made in strict accordance with it, and must not go beyond what is embraced in it. *Cullifer v. Gilliam*, 31 N. C. 126 (1848); *Cutler v. Cutler*, 163 N. C. 482, 86 S. E. 301 (1915).

However, if the decision of submitted questions involved the decision of other questions not submitted, the decision of the latter was not error. *Zell v. Johnston*, 76 N. C. 302 (1877).

Copy and Delivery of Award.—Under the prior law it was not necessary, in the absence of agreement to that effect, that a copy of the award be given to the parties. All that was necessary was that the parties have notice of the award as by being present when it was agreed upon and signed. With full understanding as to its meaning a demand for a copy should have been made at the time of rendition if the parties wanted it. See *Morrison v. Russell*, 32 N. C. 273 (1849); *Crawford v. Orr*, 84 N. C. 246 (1881).

Form of Award.—There has never been any requirement in this State as to the form of the award, this having been left to the choice of the arbitrators unless the agreement specified a form. *Ball Thrash Co. v. McCormack*, 172 N. C. 677, 90 S. E. 916 (1916).

Award Liberally Construed.—Under the prior law it was held that the court will always intend everything in favor of an award and will give such construction to it that it may be supported if possible. *Carter v. Sams*, 20 N. C. 321 (1838).

§ 1-558. Time for application for confirmation.—At any time within three months after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is vacated, modified, or corrected, as provided in §§ 1-559 and 1-560. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. (1927, c. 94, s. 15.)

§ 1-559. Order vacating award.—In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(a) Where the award was procured by corruption, fraud or other undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Where an award is vacated and the time, within which the agreement required

the award to be made, has not expired, the court may, in its discretion, direct a re-hearing by the arbitrators. (1927, c. 94, s. 16.)

§ 1-560. **Order modifying or correcting award.**—In any of the following cases the court shall, after notice and hearing make an order modifying or correcting the award, upon the application of any party to the arbitration:

(a) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them.

(c) Where the award is imperfect in a matter of form, not affecting the merits of the controversy.

The order must modify and correct the award, so as to effect the intent thereof. (1927, c. 94, s. 17.)

§ 1-561. **Notice of motion to vacate, modify or correct award within three months.**—Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after an award is filed or delivered, as prescribed by law for service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award. (1927, c. 94, s. 18.)

§ 1-562. **Judgment or decree entered.**—Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. (1927, c. 94, s. 19.)

§ 1-563. **Papers to be filed on motion relating to award.**—The party moving for an order confirming, modifying, correcting or vacating an award, shall at the time such motion is filed with the clerk, file, unless the same have theretofore been filed, the following papers with the clerk:

(a) The written contract or a verified copy thereof containing the agreement for the submission; the selection or appointment of the arbitrator or arbitrators, and each written extension of the time, if any within which to make the award.

(b) The award.

(c) Every notice, affidavit and other paper used upon an application to confirm, modify, correct or vacate the award, and each order made upon such an application.

The judgment or decree shall be entered (or docketed) as if it were rendered in an action. (1927, c. 94, s. 20.)

§ 1-564. **Force and effect of judgment or decree.**—The judgment or decree so entered (or docketed) shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to a judgment or decree; and it may be enforced, as if it had been rendered in the court in which it is entered. (1927, c. 94, s. 21.)

Editor's Note.—For cases under prior law, see *Alexander v. Burton*, 21 N. C. 469 (1837); *Cunningham v. Howell*, 23 N. C. 9 (1840); *Lusk v. Clayton*, 70 N. C. 185 (1874).

§ 1-565. **Appeal.**—An appeal may be taken from the final judgment or decree entered by the court. (1927, c. 94, s. 22.)

Presumption on Appeal.—Where parties to an action in ejectment consent to arbitration on questions of boundaries and an order is made accordingly under this article, but the record discloses no evidence upon which the arbitrators based their decision, the courts will assume that there was evidence to support their action. *Bryson v. Higdon*, 222 N. C. 17, 21 S. E. (2d) 836 (1942).

§ 1-566. **Uniformity of interpretation; interpretation of article.**—

This article shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it. (1927, c. 94, s. 23.)

§ 1-567. **Citation of article.**—This article may be cited as the uniform arbitration act. (1927, c. 94, s. 24.)

ARTICLE 46.

Examination before Trial.

§ 1-568: Repealed by Session Laws 1951, c. 760, s. 2.

Cross Reference.—See note under § 1-568.1.

§ 1-568.1. **Definitions.**—As used in this article,

- (1) "Action" includes any civil action or special proceeding;
- (2) "Clerk" means the clerk of the superior court in which the action is pending;
- (3) "Examining party" means the party who procures the examination of a person pursuant to this article;
- (4) "Judge" means the judge having jurisdiction. (1951, c. 760, s. 1.)

Editor's Note.—Session Laws 1951, c. 760, s. 1, changed the title of this article from "Examination of Parties" to "Examination before Trial," and inserted §§ 1-568.1 to 1-568.27. Section 2 of the act repealed former §§ 1-568 and 1-569 through 1-576.

As to liberal construction of former statute, see *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928); *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31 (1936); *Douglas v. Buchanan*, 211 N. C. 664, 191 S. E. 736 (1937).

As to effect of former statute as abolishing bill of discovery, see *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890); *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029 (1891); *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161 (1893); *Dunn v. Johnson*, 115 N. C. 249, 20 S. E. 390 (1894); *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928); *McGraw v. Southern Ry. Co.*,

209 N. C. 432, 184 S. E. 31 (1936); *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390 (1936); *Douglas v. Buchanan*, 211 N. C. 664, 191 S. E. 736 (1937).

The fact that a defendant might have proceeded under the former statute for an examination of the adverse party did not render the granting of his motion to require plaintiff to make his complaint more definite and certain as provided by § 1-153, or file a bill of particulars under § 1-150, improvident as a matter of law. *Temple v. Western Union Tel. Co.*, 205 N. C. 441, 171 S. E. 630 (1933).

For other decisions under the former sections, see *Sudderth v. Simpson*, 224 N. C. 181, 29 S. E. (2d) 550 (1944); *Fox v. Yarborough*, 225 N. C. 606, 35 S. E. (2d) 885 (1945); *Guy v. Baer*, 230 N. C. 748, 55 S. E. (2d) 501 (1949).

§ 1-568.2. **Notice to attorney.**—Whenever notice is required to be given to a party pursuant to this article, such notice may be given in lieu thereof to such party's attorney, as provided by G. S. 1-585, except when the party is the person to be examined. (1951, c. 760, s. 1.)

§ 1-568.3. **Purposes for which examination may be had.**—An examination may be had before trial pursuant to the provisions of this article—

- (1) For the purpose of obtaining information necessary to prepare a pleading or an amendment to a pleading, or
- (2) For the purpose of obtaining evidence to be used at the trial, or at any hearing incident to the trial, or
- (3) For both purposes. (1951, c. 760, s. 1.)

Editor's Note.—As to purpose of examination under former statute, see *Og-*

burn v. Sterchi Bros. Stores, 218 N. C. 507, 11 S. E. (2d) 460 (1940).

§ 1-568.4. **Who may examine and be examined.**—(a) Any party to an action may examine before trial any other party to the action.

(b) A plaintiff may also examine any person for whose immediate benefit the action is being defended even though such person is not a party to the action.

(c) A defendant may also examine any person for whose benefit the action is being prosecuted even though such person is not a party to the action.

(d) A person in whose behalf an action is being prosecuted or defended may be examined only under the same conditions and circumstances as the prosecuting or defending party might be examined pursuant to this article.

(e) An examination may be had of any officer, agent or employee of a corporation which is a party to the action.

(f) A person may be examined pursuant to this article irrespective of whether he is a resident or nonresident of this State. (1951, c. 760, s. 1.)

Editor's Note.—As to right of either party to subject other to examination under former statute, see *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69 (1893). As to requirement under former statute that testimony sought be that of a person immediately interested in the action, see *Strudwick v. Broadnax*, 83 N. C. 401 (1880). As to examination of co-plaintiff or codefendant under former statute, see *Penny v. Brink*, 75 N. C. 68 (1876); *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414 (1941). As to examination of directors of corporation under former statute, see *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E. 919 (1895). As to examination of nonresident under former statute, see *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928).

ute, see *Penny v. Brink*, 75 N. C. 68 (1876); *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414 (1941). As to examination of directors of corporation under former statute, see *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E. 919 (1895). As to examination of nonresident under former statute, see *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928).

§ 1-568.5. Where examination may be held.—(a) Except as provided by subsection (b), the examination shall be held in the county, or other corresponding governmental subdivision, in which the person to be examined resides.

(b) If a person is to be examined as an officer, agent or employee of a corporation, the examination may, at the option of the examining party, be held in the county, or other corresponding governmental subdivision, where the home or principal office of such corporation is located or where such officer, agent or employee resides, or where he regularly performs duties for the corporation in or out of this State.

(c) Upon application made by either the examining party or the person to be examined, and for good cause shown, the clerk may make an order changing the place of examination from that fixed by the original order of examination pursuant to subsections (a) and (b) to some place other than one of those prescribed by those subsections, or changing the time fixed therefor, or both. Such order may be made only upon notice of the application therefor to the other parties to the action and to the person to be examined if he is not the applicant. The notice shall be given as provided by G. S. 1-568.14 (b) and (c).

(d) By agreement of the examining party and the person to be examined, the examination may be held anywhere in or out of the State. (1951, c. 760, s. 1.)

Editor's Note.—As to place of examination under former statute, see *Commissioners v. Lemly*, 85 N. C. 342 (1881);

Bailey v. Matthews, 156 N. C. 78, 72 S. E. 92 (1911).

§ 1-568.6. Examination held by commissioner.—The examination shall be held by a commissioner appointed by the judge or clerk. (1951, c. 760, s. 1.)

Editor's Note.—As to examination before clerk, judge or commissioner under former statute, see *Bradley Fertilizer Co. v. Taylor*, 112 N. C. 141, 17 S. E. 69

(1893); *Harper v. Pinkston*, 112 N. C. 293, 17 S. E. 161 (1893); *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 97 S. E. 147 (1918).

§ 1-568.7. Powers of commissioner.—In addition to his other powers the commissioner may—

- (1) Grant continuances from time to time for good cause;
- (2) Administer oaths to witnesses; and
- (3) Designate a reporter to take and transcribe the examination. (1951, c. 760, s. 1.)

§ 1-568.8. Procedure exclusive; judge's or clerk's authority to fix details.—The procedure prescribed by this article is the sole procedure for the examination before trial of the persons designated in G. S. 1-568.4. The judge or the clerk, however, has authority to fix and determine all necessary procedural details with respect to such an examination in all instances in which this article does not make definite provision. (1951, c. 760, s. 1.)

§ 1-568.9. When examination is and when not matter of right.—(a) Before the examining party has filed his complaint, petition or answer, he may procure an examination pursuant to this article only upon showing by affidavit, as provided by G. S. 1-568.10, that the examination is necessary to enable him properly to prepare his complaint, petition or answer.

(b) After the examining party has filed his complaint, petition or answer, such party may not examine another person before such person or the party prosecuting or defending in his behalf has filed his complaint, petition or answer.

(c) After both the examining party and the person to be examined, or the party prosecuting or defending on his behalf, have filed their complaint, petition or answer, as the case may be, an examination is a matter of right, and may be had as provided by G. S. 1-568.11. (1951, c. 760, s. 1.)

Editor's Note. — As to examination of defendant to aid in preparing complaint under former statute, see *Pender v. Mallett*, 123 N. C. 57, 31 S. E. 351 (1898); *Bailey v. Matthews*, 156 N. C. 78, 72 S. E. 92 (1911); *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621 (1918); *Smith v. Wooding*, 177 N. C. 546, 94 S. E. 404 (1917); *Chesson v. Washington County Bank*, 190 N. C. 187, 129 S. E. 403 (1925).

§ 1-568.10. Preliminary procedure for examination before examining party's initial pleading has been filed.—(a) Before a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who may be examined by him as provided by G. S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced and the purpose thereof;
- (2) That, in order to prepare his complaint, petition or answer, it is necessary for the applicant to secure information from the person proposed to be examined about certain matters, which matters must be designated with reasonable particularity;
- (3) That the information sought is not otherwise available to the applicant, together with a statement of the reasons therefor;
- (4) That, if the person proposed to be examined is not a party, the action is being prosecuted or defended in his behalf, together with facts in support thereof;
- (5) That the application is made in good faith; and
- (6) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of the examination, subject to the provisions of G. S. 1-568.5;
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination; and
- (4) Designating the particular matters about which the person may be examined. (1951, c. 760, s. 1.)

Editor's Note.—As to how proceedings instituted under former statute, see *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 97 S. E. 147 (1918). As to necessity for leave of court under former statute, see *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297

(1928); *Douglas v. Buchanan*, 211 N. C. 664, 191 S. E. 736 (1937). As to sufficiency of application under former statute, see *Bell v. Murchison National Bank*, 196 N. C. 233, 145 S. E. 241 (1928); *Gudger v. Robinson Bros. Contractors*, 219 N. C. 251, 13 S. E. (2d) 414 (1941); *Washington v. Safe Bus*, 219 N. C. 856, 15 S. E. (2d) 372 (1941), and cases cited therein. As to joinder of order under former statute with order for inspection of writings under § 8-89, see *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928). As to appeal from order directing examination under former statute, see *Holt v. Southern Finishing, etc., Co.*, 116 N. C. 480, 21 S. E.

919 (1895); *Pender v. Mallett*, 122 N. C. 163, 30 S. E. 324 (1898); *Jones v. Union Guano Co.*, 180 N. C. 319, 104 S. E. 653 (1920); *Monroe v. Holder*, 182 N. C. 79, 108 S. E. 359 (1921); *Whitehurst v. Hinton*, 184 N. C. 11, 113 S. E. 500 (1922); *Abbitt v. Gregory*, 196 N. C. 9, 144 S. E. 297 (1928); *Johnson v. Mills*, 196 N. C. 93, 144 S. E. 534 (1928). As to appeal from refusal of court to set aside order of clerk under former statute, see *Vyne v. Fogle Bros. Co.*, 176 N. C. 351, 97 S. E. 147 (1918); *Bohannon v. Wachovia Bank, etc., Co.*, 210 N. C. 679, 188 S. E. 390 (1936).

§ 1-568.11. Preliminary procedure for examination after initial pleadings have been filed.—(a) After a party has filed his complaint, petition or answer, he may, without notice to other parties, apply to the clerk or judge for an order for the examination of any person who has also filed his complaint, petition or answer, as the case may be, or on whose behalf a complaint, petition or answer has been filed as provided by G. S. 1-568.4.

(b) The application must be in the form of, or supported by, an affidavit showing:

- (1) That the action has been commenced;
- (2) That the applicant has filed complaint, petition or answer;
- (3) That the applicant desires to examine a designated person who has filed a petition, complaint or answer or on whose behalf a petition, complaint or answer has been filed;
- (4) That the examination should be held at a place designated in the affidavit, together with facts showing the reasons therefor.

(c) If the judge or clerk finds that the facts are as set out in the affidavit, he shall make an order:

- (1) Appointing a commissioner to hold the examination;
- (2) Fixing the time and place of the examination, subject to the provisions of G. S. 1-568.5; and
- (3) Directing the person to be examined to appear before the commissioner at such time and place for examination. (1951, c. 760, s. 1.)

§ 1-568.12. Subsequent procedure the same.—Except as provided in G. S. 1-568.10 and 1-568.11, the procedure for examining a person before the examining party has filed his complaint, petition or answer and the procedure for examining a person after the examining party and the person to be examined or the person filing such pleading in his behalf, have filed their complaint, petition or answer, as the case may be, are the same. (1951, c. 760, s. 1.)

§ 1-568.13. Service of order upon person to be examined.—(a) The examining party shall cause a copy of the order for examination to be served upon the person to be examined not less than 10 days before the date fixed for the examination, and no other notice of such examination need be given him.

(b) When a person is to be examined as an officer, agent or employee of a corporation, the service required by this section shall be had both upon the corporation and the officer, agent or employee thereof who is to be examined.

(c) Service of the order may be had on a corporation in the same manner as service of summons.

(d) Service on a nonresident outside this State may be had in the same manner as service of summons pursuant to G. S. 1-104.

(e) Service on a foreign corporation may also be had as follows:

A copy of the order may be mailed to the sheriff or other process officer of the county where the home or principal office of the corporation is located in the state in which such corporation is incorporated, with the request that it be served upon the corporation by delivering it to the president or other head of the corporation, secretary, cashier, treasurer, a director or managing agent thereof. If the sheriff or process officer serves a copy of the order, such service shall be valid for the purposes of this section. Such sheriff or process officer shall execute an affidavit of the service and send it to the party who forwarded the order for service together with a certificate from the clerk of a court of record of the jurisdiction in which the order was served, certifying that the person who served the order was a person duly authorized by the laws of the state to serve legal process in that jurisdiction. Such affidavit and certificate shall be prima facie evidence of the service of the order. (1951, c. 760, s. 1.)

§ 1-568.14. Notice to other parties.—(a) The examining party shall give notice of the examination to all parties other than the party to be examined.

(b) Whenever any party is represented by a next friend, guardian, guardian ad litem or any other person acting in a representative capacity, the notice required by this section need be given only to such representative or his attorney of record.

(c) Such notice, which shall consist of a copy of the order for the examination, shall be delivered at least five days before the date fixed for the examination or shall be properly mailed at least 10 days before such date. For good cause shown the judge or clerk, without notice to parties, may make an order reducing the number of days notice or specifying the manner of giving notice. (1951, c. 760, s. 1.)

§ 1-568.15. When order not served or notice not given; new order.—In the event a person cannot be served as provided by G. S. 1-568.13, or notice cannot be given as provided by G. S. 1-568.14, such fact with the reason therefor may be reported to the clerk or judge, and a new order may be issued fixing a later date for the examination. Whenever a new order is issued, it shall be served as provided by G. S. 1-568.13 and notice shall be given as provided by G. S. 1-568.14. (1951, c. 760, s. 1.)

§ 1-568.16. The examination.—(a) An examination pursuant to this article shall be conducted in the same manner and subject to the same rules as if the examination were being had at the trial of the action, except as otherwise provided in this section.

(b) The commissioner before whom the deposition is to be taken shall put the witness on oath or affirmation, and, unless the parties agree otherwise, shall personally, or by someone acting under his direction, record the testimony of the witness in his presence, and cause it to be transcribed.

(c) All objections made at the time of the examination to the qualifications of the commissioner taking the deposition, or to the conduct of any person, and any other objection to the proceedings, shall be recorded and transcribed as part of the deposition.

(d) Evidence objected to shall be taken subject to the objection, except that, when an objection is made on the ground of privilege or on the ground that the question goes beyond the proper scope of the examination, the person being examined may refuse to answer the question, in which case such refusal and the grounds therefor shall be recorded and transcribed as part of the deposition. The procedure when the person being examined refuses to answer a question is governed by G. S. 1-568.18 and 1-568.19.

(e) Any party may examine the person being examined and may make all proper objections to the proceedings and to the evidence taken, but the scope of an

examination ordered pursuant to G. S. 1-568.10 shall not thereby be enlarged beyond the scope specified in the order for the examination. (1951, c. 760, s. 1.)

Editor's Note.—As to manner of examination under former statute, see *Cartwright v. Southern, etc., R. Co.*, 176 N. C. 36, 96 S. E. 647 (1918). As to claim of privilege against self-incrimination under former statute, see *Ward v. Martin*, 175 N. C. 287, 95 S. E. 621 (1918).

§ 1-568.17. Written interrogatories.—(a) An examining party may examine upon written interrogatories as provided in this section. Except as otherwise provided in this section, such examination shall be subject to all the provisions of this article.

(b) A party desiring to examine any person designated in G. S. 1-568.4 upon written interrogatories shall deliver a copy of the order for the examination, and a copy of the interrogatories, to all other parties. Within 10 days after any party is so served, he may deliver cross interrogatories to the examining party. Within five days thereafter the examining party may deliver redirect interrogatories to any party who has thus served cross interrogatories. Within three days after being thus served with redirect interrogatories, such party may deliver recross interrogatories to the examining party. Upon application without notice and for good cause, the judge or clerk may extend the time limits fixed herein.

(c) A copy of the order for the examination and of any other orders relating thereto together with copies of all interrogatories thus served shall be delivered by the examining party to the commissioner designated in the order who shall proceed promptly to take the testimony of the person to be examined in response to the interrogatories and to prepare, certify, and file it with the clerk, or send it by registered mail to the clerk for filing, together with the copies of all orders and interrogatories received by him. (1951, c. 760, s. 1.)

§ 1-568.18. Refusal to answer question; procedure to compel answer.—If the person being examined refuses to answer any question propounded, the examination may be completed on other matters or it may be adjourned, as the propounder of the question may prefer. The propounder may, upon notice, as provided by G. S. 1-568.14 (b) and (c), given to the person examined and to all other parties, make a motion before the judge or clerk that the person examined be required to answer the question or questions he had refused to answer and to answer any additional questions which relate to the matter or matters as to which he had refused to testify. If the motion is granted, the judge or clerk shall fix a time and place for such further examination. No additional notice of such further examination need be given. (1951, c. 760, s. 1.)

§ 1-568.19. Failure to appear for examination or to answer question as ordered.—If the person to be examined fails to appear at the time and place fixed in an order for his examination or in an order issued pursuant to G. S. 1-568.18, or refuses, without good cause, to answer any question required to be answered pursuant to G. S. 1-568.18, such failure to appear or refusal to answer constitutes contempt of court and is punishable as such. The judge or clerk may also make all proper orders in regard to the failure to appear, or the refusal to answer any question, including the taxing of costs incident thereto, the striking out of pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default or by default and inquiry against the disobedient party. (1951, c. 760, s. 1.)

§ 1-568.20. Submission of transcript of testimony to witness; changes; signing.—When the testimony is transcribed, such transcript shall be submitted to the witness for examination. Any changes in form or substance which the witness desires to make shall be entered by the commissioner on the record immediately following the recorded testimony of the witness, together with

a statement of the reasons given by the witness for such changes. The transcript shall then be signed by the witness. Both the submission of the transcript to the witness and the signing thereof by him may be waived by the witness or his counsel, or by the parties, and neither is necessary if the witness cannot be found or is ill or for any other reason is unable to examine the transcript or sign it. If the transcript is not submitted to or is not signed by the witness, the commissioner shall sign it and state on the record the reason for the witness not signing it. The record may then be used as if signed, unless on motion to suppress, subject to the provisions of G. S. 1-568.22, the court holds that the reasons for the refusal to sign require rejection of the testimony in whole or in part. (1951, c. 760, s. 1.)

§ 1-568.21. Certification and filing of record of examination; notice.—The commissioner shall certify on the record of the examination that the witness was duly sworn by him and that the record is a true record of the examination. He shall then securely seal the record in an envelope indorsed with the title of the action and marked "Deposition of (here insert name of witness)" and shall promptly file it with the clerk or send it by registered mail to the clerk for filing. No formal opening of the deposition is necessary, but, upon receipt thereof, the clerk shall open it, file it with the other papers in the action, and notify all parties that it is on file and open for inspection. (1951, c. 760, s. 1.)

§ 1-568.22. Motion to suppress deposition or resume examination; order.—(a) Within 10 days after the deposition is filed, any party may file a written motion to suppress the deposition for any error or irregularity not waived as provided by G. S. 1-568.23, or to resume the examination when the witness has made changes in his testimony as permitted by G. S. 1-568.20. The motion shall state the grounds upon which it is based. For good cause shown, the clerk may, without notice, make an order extending the time within which such motions may be filed.

(b) Upon the filing of a motion to suppress the deposition, the clerk shall make an order fixing a time for the same to be heard before him, and the moving party shall promptly serve a copy of the motion and a copy of the clerk's order upon all other parties.

(c) No notice of a motion to resume an examination is necessary, and the clerk shall pass thereon. An order therefor shall be served pursuant to G. S. 1-568.13 upon the person to be examined. Notice to other parties of such order shall be given pursuant to G. S. 1-568.14. The procedure for a resumed examination shall be the same as in the case of an original examination. (1951, c. 760, s. 1.)

§ 1-568.23. Waiver of errors and irregularities.—(a) All errors and irregularities in the notice for taking an examination are waived unless written objection is promptly served upon the party giving the notice.

(b) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are waived by failure to make them before or during the taking of the deposition, if the ground of the objection is one which might have been obviated or removed if presented at that time.

(c) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(d) Objections to the form of written interrogatories submitted under G. S. 1-568.17 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within three days after service of the last interrogatories authorized.

(e) Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, trans-

mitted, filed or otherwise dealt with are waived unless a motion to suppress the deposition or some part thereof is made within 10 days after the filing of the deposition. (1951, c. 760, s. 1.)

§ 1-568.24. Use of deposition at trial.—(a) Upon the trial of the action or at any hearing incident thereto, any party may offer in evidence the whole, but, if objection is made, not a part only, of any deposition taken pursuant to this article, but such deposition shall not be used as evidence against any party not notified of the taking thereof as provided by G. S. 1-568.14.

(b) Subject to the provisions of subsection (c) of this section and G. S. 1-568.23, objection may be made at the trial or hearing to the receiving in evidence of testimony of a person examined pursuant to the provision of this article for any reason which would require the exclusion of the testimony if the witness were then present and testifying.

(c) Objections to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time. (1951, c. 760, s. 1.)

Editor's Note.—As to nature of examination as evidence under former statute, see *Whitaker v. Jenkins*, 138 N. C. 476, 51 S. E. 104 (1905); *Phillips v. Interstate Land Co.*, 174 N. C. 542, 94 S. E. 12 (1917); *Beck v. Wilkins-Ricks Co.*, 186 N. C. 210, 119 S. E. 235 (1923); *Swainey v. Great Atlantic, etc., Tea Co.*, 204 N. C. 713, 169 S. E. 618 (1933); *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31 (1936). As to necessity for reading entire examination under former statute, see *Enloe v. Charlotte Coca-Cola Bottling Co.*, 210 N. C. 262, 186 S. E. 242 (1936). As to right to cross-examine witnesses under former statute, see *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31 (1936). As to effect of death of witness under former statute, see *Phillips v. Interstate Land Co.*, 174 N. C. 542, 94 S. E. 12 (1917). As to right of party examining not to use testimony under former statute, see *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328 (1893).

Enloe v. Charlotte Coca-Cola Bottling Co., 210 N. C. 262, 186 S. E. 242 (1936). As to right to cross-examine witnesses under former statute, see *McGraw v. Southern Ry. Co.*, 209 N. C. 432, 184 S. E. 31 (1936). As to effect of death of witness under former statute, see *Phillips v. Interstate Land Co.*, 174 N. C. 542, 94 S. E. 12 (1917). As to right of party examining not to use testimony under former statute, see *Shober v. Wheeler*, 113 N. C. 370, 18 S. E. 328 (1893).

§ 1-568.25. Effect of taking deposition and of introducing deposition; rebuttal.—(a) A party by examining a person pursuant to the provisions of this article does not make such person his witness; but the party who introduces the deposition in evidence, or who first introduces any part thereof in evidence, does make such person his witness.

(b) If the person whose deposition, or part thereof, has been introduced in evidence, testifies at the trial or hearing, he is not subject to cross-examination or impeachment by the party whose witness he is, but such party may nevertheless show the facts to be otherwise than as testified to by such person. (1951, c. 760, s. 1.)

Editor's Note. — As to rebutting, contradicting and impeaching testimony under former statute, see *Spencer v. White*, 23 N. C. 236 (1840); *Shelton v. Hampton*, 28 N. C. 216 (1845); *Hice v. Cox*, 34 N.

C. 315 (1851); *Wilson v. Derr*, 69 N. C. 137 (1873); *Coates v. Wilkes*, 92 N. C. 377 (1885); *Helms v. Green*, 105 N. C. 251, 11 S. E. 470 (1890); *Hudson v. Jordan*, 108 N. C. 10, 12 S. E. 1029 (1891).

§ 1-568.26. Commissioner's fee and reporter's compensation taxed as costs.—Upon the termination of the action, a reasonable fee for the commissioner, and reasonable compensation for the reporter, shall be fixed by the clerk and taxed as part of the costs. (1951, c. 760, s. 1.)

§ 1-568.27. Right to change of venue not affected by examination.—An examination of a person pursuant to the provisions of this article does not affect or prejudice the right of any party to a change of venue when such change is authorized by law. (1951, c. 760, s. 1.)

§§ 1-569 to 1-576: Repealed by Session Laws 1951, c. 760, s. 2.

ARTICLE 47.

Motions and Orders.

§ 1-577. **Definition of order.**—Every direction of a court or judge, made or entered in writing, and not included in a judgment, is an order. (C. C. P., ss. 344, 345; Code, s. 594; Rev., s. 873; C. S., s. 908.)

An appeal from an order continuing in force a former order made in the cause will be dismissed. *Childs v. Martin*, 68 N. C. 307 (1873).

§ 1-578. **Motions; when and where made.**—An application for an order is a motion. Motions may be made to a clerk of a superior court, or to a judge out of court, except for new trial on the merits. Motions must be made within the district in which the action is triable. A motion to vacate or modify a provisional remedy, and an appeal from an order allowing a provisional remedy, have preference over all other motions. (C. C. P., ss. 344, 345; Code, s. 594; Rev., s. 874; C. S., s. 909.)

Cross Reference. — As to motions in civil actions heard at criminal terms, see § 7-72.

Editor's Note.—A motion in general relates to some incidental question collateral to the main object of the action. A motion is not a remedy in the sense of the Code, but is based upon some remedy, and is always connected with the principal remedy. It is to furnish relief in the progress of the action or proceeding in which it is made, and generally relates to matters of procedure, although it may be used to secure some right in consequence of the determination of the principal remedy.

Form of Motion.—A motion must be in writing. *Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

On appeal to the Supreme Court a statement of record that the defendant filed a written motion to dismiss, negatives the exception that it was an oral motion, not in conformity with the requirements of the statute. *Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

While it is the better form for one making a written motion, as an attorney at law and in fact, to first state the names of those he represents and then that he is acting for them in the capacity of attorney, the error in stating that he appears as attorney at law and in fact for certain named parties, etc., is merely informal and harmless, and therefore good against a demurrer, it clearly appearing that the attorney is not claiming any interest in the lands for himself, but is acting solely in a representative capacity for the persons named. *Hartsfield v. Bryan*, 177 N. C. 166, 98 S. E. 379 (1919).

Where Motions Must Be Made. — Except by consent or in those cases specially permitted by statute the judge can make no orders in a cause outside of the county in which the action is pending. *Bynum v.*

Powe, 97 N. C. 374, 2 S. E. 170 (1887); *McNeill v. Hodges*, 99 N. C. 248, 6 S. E. 127 (1888); *Gatewood v. Leak*, 99 N. C. 363, 6 S. E. 706 (1888); *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

As to injunctions, attachments, and arrest and bail, authority is granted to hear and pass on motions to vacate or modify such orders out of the county. *Parker v. McPhail*, 112 N. C. 502, 16 S. E. 848 (1893).

When Procedure Must Be by Motion.—It is well established in this State that no party to a suit is permitted by a new and independent action praying for an injunction to seek any relief which he might obtain by a motion in the original action. *Mason v. Miles*, 63 N. C. 564 (1869); *Jarman v. Saunders*, 64 N. C. 367 (1870); *Faison v. McIlwaine*, 72 N. C. 312 (1875).

An action is inadmissible as a mode of obtaining relief against an execution for irregularity, the proper relief is, as formerly, by motion to set it aside. *Foard v. Alexander*, 64 N. C. 69 (1870).

A proceeding by a motion supported by affidavits after a notice to the opposite party, to have satisfaction of a judgment entered of record upon the ground that it has been paid since its rendition, is the appropriate remedy in such a case, but is neither a special proceeding nor a civil action. It is only a motion in a cause still pending. *Foreman v. Bibb*, 65 N. C. 128 (1871).

Power of Judge. — After leaving the bench for a term of the superior court to expire by limitation, the judge cannot hear motions or other matters outside of the courtroom except by consent, unless, they are such as are cognizable at chambers. *May v. Insurance Co.*, 172 N. C. 795, 90 S. E. 890 (1916).

An order to stay proceedings, made without notice by a judge out of court for

a longer time than twenty days, is irregular, and a demurrer to the complaint in the action in which such order was made may be treated as a motion to vacate. *Foard v. Alexander*, 64 N. C. 69 (1870).

Same — To Continue Motions, etc. — The judge below has no power to continue motions for judgments or to set aside verdicts to be passed upon by him at a subsequent term of court, without the consent of the parties litigant. *Oak Hall Clothing Co. v. Bagley*, 147 N. C. 37, 60 S. E. 648 (1908).

Such consent should certainly appear in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from what appears in the record. *Godwin v. Monds*, 101 N. C. 354, 7 S. E. 793 (1888).

Same—Can Not Reverse Another.—One superior court judge cannot reverse or set aside an order of another. *Henry v. Hil-*

liard, 120 N. C. 479, 27 S. E. 130 (1897).

When Refused by Judge without Jurisdiction.—The refusal of a judge to grant a motion for want of jurisdiction is no bar to an entertainment of the motion by a judge having jurisdiction. *First National Bank v. Wilson*, 80 N. C. 200 (1879).

Motions Which May Be Renewed. — Motions made in the progress of a cause to facilitate the trial, but which involves no substantial right, and the decision of which is not subject to an appeal to the Supreme Court, may be renewed as subsequent events require, and are not obstructed by the former action of the court. *Sanderson v. Daily*, 83 N. C. 68 (1880); *Roulhac v. Brown*, 87 N. C. 1 (1882); *Henry v. Hilliard*, 120 N. C. 479, 27 S. E. 130 (1897).

Res Adjudicata.—If a decision affects a substantial right, and may be reviewed and corrected on appeal, and the complaining party acquiesces, the doctrine of res adjudicata applies. *Sanderson v. Daily*, 83 N. C. 68 (1880).

§ 1-579. **Affidavit for or against, compelled.**—When a party intends to make or oppose a motion in a court of record, and it is necessary for him to have the affidavit of any person who has refused to make it, the court may, by order, appoint a referee to take the affidavit or deposition of such person. The person may be subpoenaed and compelled to attend and make an affidavit before such referee, as before a referee to whom an issue is referred for trial. (C. C. P., ss. 344, 345; Code, s. 594; Rev., s. 875; C. S., s. 910.)

The matter of reference, under the section, rests in the discretion of the court. *In re Brown*, 168 N. C. 417, 84 S. E. 690 (1915).

§ 1-580. **Motions determined in ten days.**—When a motion is made in a cause or proceeding in any of the courts to obtain an injunction order, order of arrest, or warrant of attachment, granted in any such case or proceeding, or to vacate or modify the same, it is the duty of the judge before whom the motion is made to render his decision within ten days after the day on which the motion was submitted to him for decision. (C. C. P., ss. 344, 345; Code, s. 594; Rev., s. 876; C. S., s. 911.)

Section Directory.—As to section being directory, see *Childs v. Martin*, 68 N. C. 307 (1873).

§ 1-581. **Notice of motion.**—When notice of a motion is necessary, it must be served ten days before the time appointed for the hearing; but the court or judge may, by an order made without notice, prescribe a shorter time. (C. C. P., s. 346; Code, s. 595; Rev., s. 877; C. S., s. 912; 1951, c. 837, s. 10.)

Cross Reference.—As to notice in supplemental proceedings, see § 1-352 and annotations thereto.

Editor's Note. — The 1951 amendment substituted the words "made without notice" for the words "to show cause" near the end of the section.

By § 346 of the C. C. P. only eight days' notice was required. However, this was changed by § 595 of the Code of 1883 to

ten days. See *Branch v. Walker*, 92 N. C. 87 (1885).

Compliance with Section Required.—Notice of a motion to set aside a judgment must ordinarily be given as required by this section, and the pleadings in an action to reform a deed of trust upon allegations of mutual mistake are insufficient as notice of a motion to set aside the decree of foreclosure for irregularity and

surprise, etc., the pleadings in the suit for reformation containing no allegations of irregularities in the foreclosure or of surprise. *Virginia-Carolina Joint Stock Bank v. Alexander*, 201 N. C. 453, 160 S. E. 462 (1931).

When Notice Required — When Heard Out of Term.—Notice of a motion applies only when such motion is heard out of term; parties are fixed with notice of all motions or orders made during the term of court in causes pending therein. *Hemp-hill v. Moore*, 104 N. C. 379, 10 S. E. 313 (1889); *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

Same—Proceedings before Clerk. — A party is not fixed with notice of orders before the clerk. *Blue v. Blue*, 79 N. C. 69 (1873); *State v. Johnson*, 109 N. C. 852, 13 S. E. 843 (1891).

Same — Appeal from Justice of the Peace.—In an appeal from a justice of the peace to the superior court, notice must be served by an officer (unless service is accepted or the appeal is taken at the trial), and within ten days both upon the justice who tried the case and upon the appellee. *State v. Johnson*, 109 N. C. 852, 13 S. E. 843 (1891).

Same — New Trial for Newly Discovered Evidence. — When a motion for a new trial for newly discovered evidence in the Supreme Court is contemplated, notice of such motion should always be given the other side. The appellant should give notice at least ten days before the beginning of the call of the district to which the cause belongs, unless the information comes to him after that time, when the court may shorten the notice. *Herndon v. R. R.*, 121 N. C. 498, 28 S. E. 144 (1897).

Failure to Give Notice in Proceedings under § 1-83.—Where a judgment by default final has been entered against a de-

fendant for the want of an answer, and it appears that the defendant lodged his motion in apt time for a change of venue, in accordance with § 1-83, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days' notice of his motion, required of this section before time for answering has expired, will not affect his rights to have the judgment by default against him vacated. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Orders in Fieri during Term. — Judgments and orders are in fieri during the term they are rendered, and motions may be made to set them aside without notice; but after that term such motions can only be heard after due notice. *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173 (1892).

Ten Days' Notice Required.—Notice of all motions and orders made out of term must be given, and the time is fixed at ten days, but the judge is authorized to shorten the time. *Jones v. Jones*, 173 N. C. 279, 91 S. E. 960 (1917).

Unless a verbal or written motion to amend a complaint after time for filing answer has expired be made at the trial term of the action, previous notice of ten days must be given the defendant unless the time is shortened by the court, and an order allowing the amendment to be made, entered without such notice, is irregular. *Carolina Discount Corp. v. Butler*, 200 N. C. 709, 158 S. E. 249 (1931).

When No Provision Made for Notice.—When a statute confers power upon a judicial tribunal or an administration agency to render judgment or make an order affecting rights of a person or property, and no provision is made for notice, the court will require a reasonable notice. *Bank v. Hotel Co.*, 147 N. C. 594, 61 S. E. 570 (1908).

§ 1-582. Orders without notice, vacated.—An order made out of court, without notice to the adverse party, may be vacated or modified without notice by the judge who made it, or may be vacated or modified on notice, in the manner in which other motions are made. (C. C. P., s. 297; Code, s. 546; Rev., s. 514; C. S., s. 913.)

When Judge May Vacate or Modify.—A judge of the superior court has the power to vacate or modify orders made in a cause at any time before final judgment. *Welch v. Kingsland*, 89 N. C. 178 (1883).

In *Sledge v. Blum*, 63 N. C. 374 (1869), Pearson, C. J., speaking for the court, said: "Where a judge acting on the complaint without notice to the defendant grants an injunction, he may afterwards, acting on the complaint alone, without notice to the plaintiff modify or vacate the

injunction as irregularly or improvidently granted. But if he goes out of the complaint and takes into consideration the answer and the affidavits filed for the defendants the plaintiff is then entitled to notice, and may meet the affidavit by counter-affidavits."

Motion for Change of Venue before Clerk.—The power to entertain a demand of the defendant to remove an action to the proper venue under the provisions of this section, is now conferred upon the

clerk, subject to the right of appeal to the judge, when the motion shall be heard and passed on de novo. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Where a defendant has made a motion before the clerk to remove the action to the proper venue, the question is then a

matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

§ 1-583. Orders by clerk on motion to remove; right of appeal; notice.—All motions to remove as a matter of right shall be made before the clerk, who is authorized to make all necessary orders, and an appeal shall lie from such order upon such motion to the judge at chambers, or at the next term, who shall hear and pass upon such motion de novo. But no such motion shall be heard until ten days' notice thereof shall first have been given to the opposing party or his attorney. (Ex. Sess. 1921, c. 92, s. 15; C. S., s. 913(a); 1925, c. 282, s. 1.)

Editor's Note.—The 1925 amendment inserted the words "at chambers or" after the word "judge" in the first sentence and added the second sentence.

This section is a part of the legislation to restore to the clerk the power originally given him by the C. C. P. but taken away by the suspension acts. It changed the law by permitting the clerk to hear the motion but giving a right of appeal. See *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

Change of Venue under § 1-83 Affected by Section.—The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of § 1-83, is now conferred by this section upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon de novo. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Effect of Motion upon Further Proceedings.—Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

When the defendant has proceeded by motion to have the action removed to the proper county before the time for filing the answer has expired, a judgment by default final for the want of answer is contrary to the practice of the courts, and will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Roberts v. Moore*, 185 N. C. 254, 116 S. E. 728 (1923).

Motion to Dismiss as Affecting Removal.—Where the defendant moves the clerk to dismiss the action for want of proper

venue, but the clerk upon his own motion orders a removal, and upon appeal the judge at term orders the cause removed, the fact that the motion to dismiss was made is immaterial as affecting the judge's power to order a removal. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

Removal by Judge Valid.—The act of the judge in ordering a removal, where the defendant has complied with all the requirements of the law as to filing a motion in apt time, is a valid exercise of jurisdictional authority. *Southern Cotton Oil Co. v. Grimes*, 183 N. C. 97, 112 S. E. 598 (1922).

Removal Not Matter of Right.—This section refers only to motions to remove as a matter of right. Motions for removal, which may be allowed or disallowed, in the discretion of the court, should be made before the judge, at any time during a term of the court. *Howard v. Hinson*, 191 N. C. 366, 131 S. E. 748 (1926). The clerk is without power, under the statute, to remove an action, upon the ground that the convenience of witnesses and the ends of justice would be promoted by the removal. The motion for removal upon this ground can be made only before the judge, during a term of the superior court. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928).

Effect of Motion on Other Proceedings.—See note under § 1-220.

On appeal from order of clerk transferring a cause to another county as a matter of right, on the ground that the action involves an interest in lands under § 1-76 the matter should be heard de novo during the term of court. *Causey v. Morris*, 195 N. C. 532, 142 S. E. 783 (1928).

Applied in *Miller v. Miller*, 205 N. C. 753, 172 S. E. 493 (1934); *White v. Rankin*, 206 N. C. 104, 173 S. E. 282 (1934).

§ 1-584. Petition to remove to federal court; order by the court.—When it shall appear to a court of this State that a petition for removal of any action or proceeding pending therein has been filed in a district court of the United States, the State court may then, upon its own motion or the motion of a party to the action or proceeding, order that no further proceedings be had in the State court unless and until the action or proceeding has been remanded to the State court by the United States court and a certified copy of the order of remand is filed with the clerk; but failure to enter such order shall not entitle the State court or any party to proceed; the appearance of a party for the purpose of making the above-mentioned motion shall not affect or be deemed a waiver of the right to remove. (Ex. Sess. 1921, c. 92, s. 16; C. S., s. 913(b); 1925, c. 282, s. 2; 1949, c. 808, s. 2.)

Editor's Note.—The 1925 amendment made the same changes in this section as it made in § 1-583. And the 1949 amendment rewrote this section. For brief comment on the 1949 amendment, see 27 N. C. Law Rev. 477.

Effect of Improper Order.—An order of the clerk of the superior court, having jurisdiction of a motion to remove a cause under this section as it formerly read, that

the cause be removed as prayed by the defendants, meeting the requirements of the federal statutes, relating thereto, and made in apt time, when improperly made is erroneous and not void. Such order is effective until reversed on appeal or until remanded by the federal court. *Abbitt v. Gregory*, 195 N. C. 203, 141 S. E. 587 (1928).

ARTICLE 48.

Notices.

§ 1-585. Form and service.—All notices must be in writing, and notices and other papers may be served on the party or his attorney personally, where not otherwise provided in this chapter. (C. C. P., ss. 349, 353; Code, s. 597; Rev., ss. 878, 879; C. S., s. 914.)

Cross References.—As to service on Sunday, see § 103-3; as to service of summons, see § 1-88 et seq.

Form of Notice Required.—When a statute requires notice to be given, it must be given in writing, addressed to the proper person, contain the substances, intelligently and sufficiently expressed, of the information to be communicated, signed by the party giving it, or his attorney, and served in such way so that the court can see and learn that it has been served, and, it, or a copy of it, must be returned into court, properly authenticated unless it shall in some way be waived, as by the appearance of the party to be affected by it. *Allen v. Strickland*, 100 N. C. 225, 6 S. E. 780 (1888); *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173 (1892).

Section Should Be Strictly Observed.—The service of notice, made in a way and manner recognized and sanctioned by the law, is an essential requisite of it; without this it is ineffectual for the purpose intended and void. Unless it is given as the law directs or allows, the party to whom it is given is not bound to recognize or act upon it; nor, indeed, is it notice. It is the legal sanction that gives the notice, in sufficient form and substance, life and efficacy. *Allen v. Strickland*, 100 N. C. 225,

6 S. E. 780 (1888), citing *Wade on Notice*, §§ 1293, 1295, 1335, 1342.

Applicable to Cases on Appeal.—The statute regulating the manner of service of notices is applicable to service of cases on appeal and exceptions thereto. *State v. Price*, 110 N. C. 599, 15 S. E. 116 (1892).

Verbal Notice Insufficient.—A motion heard upon verbal notice given on the day of the hearing is irregular, and should have been dismissed. *Harper v. Sugg*, 111 N. C. 324, 16 S. E. 173 (1892).

Where Writing Not Required.—A summons to a person liable to road duty does not fall within the purview of this article, and need not be in writing. *State v. Telfair*, 130 N. C. 645, 40 S. E. 976 (1902).

Notice to sureties on an indemnity bond that the sheriff has been sued for the wrongful levy of an execution need not be in writing. *Martin v. Buffalo*, 128 N. C. 305, 38 S. E. 902 (1901).

Service on Attorney.—The counsel is responsible to the court and his client, and generally, the court recognizes him as having charge of the action, and authorized and bound to take notice of all motions and proceedings in it. This is so upon general principles that govern courts ordinarily in the administration of justice; and under this section, in respect to notices

and the filing and service of papers, expressly provides that service may be made on the party or his attorney. *Branch v. Walker*, 92 N. C. 87 (1885).

Plaintiff is not entitled to have notice of motion to strike out served on her by an officer, under this section, where reason for such service is rendered nugatory by a finding that notice was mailed to and received by plaintiff's attorneys within the time allowed. *Heffner v. Jefferson Standard Life Ins. Co.*, 214 N. C. 359, 199 S. E. 293 (1938).

Personal Notice.—Where notice of appeal was served on the plaintiff by leaving a copy with him, another notice of the same appeal served the next day by reading it to the plaintiff was unnecessary under this section. *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514 (1892).

Same—Determined by Clerk.—The fact that personal notice was given to the defendant is determined affirmatively by the clerk in making the order. *Surratt v. Crawford*, 87 N. C. 372 (1882).

Service Must Be by Officer.—Service of all papers, except subpoenas, and in cases where service by publication is authorized, must be by an officer, or acceptance of service. *Smith v. Smith*, 119 N. C. 314, 25 S. E. 878 (1896).

Same—Case on Appeal.—A case on appeal, unless service is accepted, can be served only by an officer. *State v. John-*

son, 109 N. C. 852, 13 S. E. 843 (1891); *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632 (1894).

The notice of appeal from a justice of the peace, when the notice is not given on the trial, must be served by an officer. *Clark v. Manufacturing Co.*, 110 N. C. 111, 14 S. E. 518 (1892).

Qualifications of Officer Serving.—Service of notices must be made by an officer authorized generally and by virtue of his office to serve process of the court having jurisdiction of the action in which the notice is given. *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33 (1896).

Same—Town Constable.—A town constable cannot serve a notice to take a deposition in an action pending in the superior court. *Forte v. Boone*, 114 N. C. 176, 19 S. E. 632 (1894); *Cullen v. Absher*, 119 N. C. 441, 26 S. E. 33 (1896).

Same—Chief of Police or Marshal.—Where a town charter provides for the appointment of a chief of police or marshal and declares that, in the execution of process, he shall have the same power, etc., which sheriff and constables have, the service by such officer of a summons directed to "the sheriff of W. County or town constable of W. town" is valid. *Lowe v. Harris*, 121 N. C. 287, 28 S. E. 535 (1897).

Cited in *Roth v. Greensboro News Co.*, 214 N. C. 23, 197 S. E. 569 (1938).

§ 1-586. Service upon attorney.—Notice upon an attorney may be served during his absence from his office, by leaving a copy of the paper with his clerk, or a person having charge of the office; or, when there is no person in the office, by leaving it, between the hours of six a. m. and nine p. m., in a conspicuous place in the office; or, if it is not open so as to admit of such service, then by leaving it at the attorney's residence with some person of suitable age and discretion. (C. C. P., ss. 349, 353; Code, s. 597; Rev., s. 880; C. S., s. 915.)

Notice to Attorney Is Notice to Client.—In *Ladd v. Teague*, 126 N. C. 544, 36 S. E. 45 (1900), quoting from *United States v. Curry*, 6 How. (47 U. S.) 106 (1848), it was said:

"No attorney or solicitor can withdraw his name after he has once entered it on the record without the leave of the court. And while his name continues there, the adverse party has the right to treat him as the authorized attorney or solicitor, and the service of notice on him is as valid as if served on the party himself." See also *Walton v. Sugg*, 61 N. C. 93 (1867); *Branch v. Walker*, 92 N. C. 87 (1885); *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

Notice of Motion.—A notice of a motion

to set aside a judgment may be properly served on the attorney of record of the opposing party. *Branch v. Walker*, 92 N. C. 87 (1885).

Nothing else appearing, an attorney of record continues in this relationship to the client not only until the rendition of final judgment but also so long as the opposing party has the right, by statute or otherwise, to challenge the validity of the judgment, and therefore such attorney may be served with notice of motion in the cause to set aside the judgment on the ground of fraud upon the jurisdiction of the court, and such notice is notice to the party. *Henderson v. Henderson*, 232 N. C. 1, 59 S. E. (2d) 227 (1950).

§ 1-587. Service upon a party.—Notice upon a party may be served by leaving a copy of the paper at his residence, between the hours of six a. m. and

nine p. m., with some person of suitable age and discretion. (C. C. P., ss. 349, 353; Code, s. 597; Rev., s. 881; C. S., s. 916.)

Notice Left with Wife.—Notice may be duly served by leaving a copy thereof at the residence of the person sought to be served, with his wife, she being of suitable age and discretion. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 713 (1891).

Compliance with Section Sufficient.—Service made under the section is sufficient. The court has jurisdiction in cases

like this of the party to the action, and it is deemed sufficient to give him notice in the way prescribed for any motion or proceeding in the action. It is the duty of parties to actions to be on the alert at all times, until the same shall be completely ended. *Turner v. Holden*, 109 N. C. 182, 13 S. E. 731 (1891).

§ 1-588. Service by publication.—Notice upon a person who cannot be found after due diligence, or who is not a resident of this State, may be served by its publication once a week for four successive weeks in a newspaper published in the county from which the notice is issued; and if no newspaper is published therein, then in some newspaper published within the judicial district; and the proof of service is the same as is required by law in the case of service of summonses by publication. (C. C. P., ss. 349, 353; Code, s. 597; Rev., s. 882; C. S., s. 917.)

Cross References.—As to service by publication generally, see §§ 1-98, 1-99 and notes. As to when service by publication is complete, see § 1-100 and note.

Substitute for Ten Days Personal Notice.—The publication "once a week for four successive weeks" is a substitute for and stands in lieu of the "ten days," which is allowed to a party personally served.

Guilford v. Georgia Co., 109 N. C. 310, 13 S. E. 861 (1891).

Form of Publication.—It is sufficient if the publication contains the substantial elements of the summons, and the fact that it is not a literal copy will not render the service void. *Guilford v. Georgia Co.*, 109 N. C. 310, 13 S. E. 861 (1891).

§ 1-589. Service by telephone or registered mail on witnesses and jurors.—Sheriffs, constables and other officers charged with service of such process may serve subpoenas for witnesses and summonses for jurors by telephone or by registered mail, and such service shall be valid and binding on the person served. When such process is served by telephone the return of the officer serving it shall state it is served by telephone. When served by registered mail a copy shall be mailed and a written receipt requested of the addressee and such receipt shall be filed with the return and be a necessary part thereof. (1915, c. 48; C. S., s. 918; 1925, c. 98; 1945, c. 635.)

Editor's Note.—The 1925 amendment inserted the words "or by registered mail" in the first sentence, and added the last sentence.

The 1945 amendment substituted in the last sentence the words "requested of the addressee" for the word "demanded."

§ 1-590. Subpoena, service and signature.—Service of a subpoena for witnesses may be made by a sheriff, coroner or constable, and proved by the return of such officer, or the service may be made by any person not a party to the action, and proved by his oath. A subpoena for witnesses need not be signed by the clerk of the court, and is sufficient if subscribed by the party or by his attorney. (C. C. P., ss. 349, 353; Code, s. 597; Rev., s. 884; C. S., s. 919.)

Cross Reference.—As to issuance by clerk, see § 8-59.

13 S. E. 843 (1891); *Smith v. Smith*, 119 N. C. 314, 25 S. E. 878 (1896).

Stated in *State v. Johnson*, 109 N. C. 852,

§ 1-591. Application of this article.—This article does not apply to the service of a summons, or other process (except summonses for jurors, as provided in § 1-589), or of any paper to bring a party into contempt. (C. C. P., ss. 349, 353; Code, s. 597; Rev., s. 885; C. S., s. 920.)

Article Applies Where Papers Not Excepted.—It seems clear that the article applies to all papers except those excepted by this section. *State v. Price*, 110 N. C. 599, 15 S. E. 116 (1892).

§ 1-592. **Officer's return evidence of service.**—When a notice issues to the sheriff, his return thereon that the same has been executed is sufficient evidence of its service. (1799, c. 537, P. R.; R. C., c. 31, s. 123; Code, s. 940; Rev., ss. 886, 1529; C. S., s. 921.)

Officer's Return Is Prima Facie Correct.—In *Caviness v. Hunt*, 180 N. C. 384, 104 S. E. 763 (1920), it was said that the return on the process is prima facie correct and cannot be set aside unless the evidence is clear and unequivocal.

The sheriff's return is taken as prima facie correct, and may not be successfully attacked by motion in the cause, except by clear and unequivocal evidence, requiring the testimony of more than one person to overturn the official return of the officer. *Commissioners v. Spencer*, 174 N. C. 36, 93 S. E. 435 (1917); *Penley v. Rader*, 208 N. C. 702, 182 S. E. 337 (1935).

Where the sheriff's return was regular upon its face, but each plaintiff testified that service was not made on him, but did not testify as to whether service was made on the other plaintiff, and there was no evidence corroborating plaintiffs' testimony, defendant sheriff's motion for judgment as of nonsuit was properly granted. *Penley v. Rader*, 208 N. C. 702, 182 S. E. 337 (1935).

Where the officer's return shows service it is deemed prima facie correct under this section and the remedy of defendant asserting nonservice is by motion in the cause upon a showing of nonservice by clear and unequivocal proof. *Dunn v. Wilson*, 210 N. C. 493, 187 S. E. 802 (1936).

Same—Service on Infant.—Where process has been served upon the general guardian of an infant, and it appears from

The exceptions provided for in this section do not include the service of cases and countercases on appeal. *State v. Price*, 110 N. C. 599, 15 S. E. 116 (1892).

the officers return that service has been executed upon the infant, such return is sufficient evidence of its service upon the infant to take the case to the jury upon the question involved in the issue. *Long v. Rockingham*, 187 N. C. 199, 121 S. E. 461 (1924).

Imports Verity.—Where the summons in an action has been duly served on a party defendant by a proper officer, it imports verity, and will not be set aside and a judgment vacated in the absence of clear and unequivocal proof that the summons had not in fact been served, and such proof must be more than the one affidavit by the defendant. *Raleigh, etc., Trust Co. v. Nowell*, 195 N. C. 449, 142 S. E. 584 (1928).

Sheriff's Signature Acted on without Proof.—The official returns of the sheriff are acted on without proof of his signature in a court in which he is an officer. *McDonald v. Carson*, 94 N. C. 497 (1886).

The term "executed by delivering copy" necessarily implies a delivery to each of those to whom the notice is addressed, as otherwise it would be but a partial and uncompleted service. *McDonald v. Carson*, 94 N. C. 497 (1886).

The word "executed" in the return of a process *ex vi termini* carries with it the idea of a full performance of all that the law requires. *Isley v. Boon*, 113 N. C. 249, 18 S. E. 174 (1893).

Cited in *Adams v. Cleve*, 218 N. C. 302, 10 S. E. (2d) 911 (1940).

ARTICLE 49.

Time.

§ 1-593. **How computed.**—The time within which an act is to be done, as provided by law, shall be computed by excluding the first and including the last day. If the last day is Sunday or a legal holiday, it must be excluded. (C. C. P., s. 348; Code, s. 596; Rev., s. 887; C. S., s. 922.)

Uniform Rule.—The cases all go to establish one uniform rule, whether the question arises upon the practice of the courts, or the construction of a statute, and the rule is to exclude the first day from the computation. *Cook v. Moore*, 95 N. C. 1 (1886); *Walker v. Scott*, 104 N. C. 481, 10 S. E. 523 (1889); *Burgess v.*

Burgess, 117 N. C. 447, 23 S. E. 336 (1895).

"From the day of the date" and "from the date" signify the same thing, and according to the intent are either inclusive or exclusive. *Houser v. Reynolds*, 2 N. C. 114, 1 Am. Dec. 551 (1794).

Actions on Judgments.—Where a judgment was rendered on October 20, 1873,

and an action was brought on the judgment on October 20, 1883, it was held that the statute barring actions on judgments in ten years was not a defense. *Cook v. Moore*, 95 N. C. 1 (1886). Judgment in this case was inadvertently entered for the defendant; the mistake was corrected in *Cook v. Moore*, 100 N. C. 294, 6 S. E. 795, 6 Am. St. Rep. 587 (1888).

Time for Filing Appeal.—In calculating the time within which the case on appeal must be filed, the first day on which the court adjourned, is to be excluded. *Turrentine v. Richmond, etc., R. Co.*, 92 N. C. 642 (1885).

Petition for Rehearing.—Under the rule requiring petitions to rehear to be filed within twenty days after the commencement of the succeeding term, the first day of the period allowed is to be excluded from the count. *Barcroft v. Roberts*, 92 N. C. 250 (1885).

Service of Case. — Where thirty days were allowed by agreement within which to serve a case on appeal, and the court adjourned on October 31st, the time for service expired on November 30th, the last day not being Sunday, and service on December 1st was a nullity. *Zell Guano Co. v. Hicks*, 120 N. C. 29, 26 S. E. 650 (1897).

Bill and Notes.—A note drawn payable one day after date is due the second day after its execution without demand. *Baucom v. Smith*, 66 N. C. 537 (1872).

Limit of Option.—An option given February 7th, provided no better offer was received that day by mail, to close "by 8 February," includes the latter day. *Blacklock v. Clark*, 133 N. C. 306, 45 S. E. 642 (1903).

When Last Day Is Sunday.—The last

day for service of a case on appeal being Sunday, service on the following day was legal. *Pittsburg Lumber Co. v. Rowe*, 151 N. C. 130, 65 S. E. 750 (1909). See *Sondley v. Asheville*, 110 N. C. 84, 14 S. E. 514 (1892).

Sunday Excluded Only When Last Day.—The section excludes Sunday only when it is the last day of the time limited. *Glanton v. Jacobs*, 117 N. C. 427, 23 S. E. 335 (1895); *Davis v. Atlantic, etc., R. Co.*, 145 N. C. 207, 59 S. E. 53 (1907).

In *Drake v. Fletcher*, 50 N. C. 411 (1858), in construing the statute which allowed twenty days in which a ca. sa. must be executed, the court held that Sundays must be counted, though the statute forbade service of such process on Sunday, the court saying that when Sundays are to be excluded the legislature so declares in express terms. In *Barcroft v. Roberts*, 92 N. C. 250 (1885), the court held, as to the twenty days allowed in which a petition to rehear could be filed, that the first day is to be excluded from the count, and the last day is to be counted unless Sunday, and counted all other Sundays in the twenty days. *Davis v. Atlantic, etc., R. Co.*, 145 N. C. 207, 59 S. E. 53 (1907).

Same—Transportation of Freight. — Though freight trains are prohibited from running on Sunday within certain hours, Sundays are not excluded from the reasonable time in which railroads are given to transport freight, except when Sunday is the last day in computing the time. *Davis v. Atlantic, etc., R. Co.*, 145 N. C. 207, 59 S. E. 53 (1907).

Applied in *Pettit v. Wood-Owen Trailer Co.*, 214 N. C. 335, 199 S. E. 279 (1938).

Cited in *Adcock v. Fuquay Springs*, 194 N. C. 423, 140 S. E. 24 (1927).

§ 1-594. **Computation in publication.**—The time for publication of legal notices shall be computed so as to exclude the first day of publication and include the day on which the act or event of which notice is given is to happen, or which completes the full period required for publication. (C. C. P., s. 359; Code, s. 602; Rev., s. 888; C. S., s. 923.)

ARTICLE 50.

General Provisions as to Legal Advertising.

§ 1-595. **Advertisement of public sales.**—When a statute or written instrument stipulates that an advertisement of a sale shall be made for any certain number of weeks, a publication once a week for the number of weeks so indicated is a sufficient compliance with the requirement, unless contrary provision is expressly made by the terms of the instrument. (1909, cc. 794, 875; C. S., s. 924.)

Cross Reference.—As to manner of publication generally, see § 1-99.

Notice of Sale under Mortgage.—Powers

of sale in a mortgage are contractual, and it is essential to the validity of a sale under a power to comply fully with the re-

quirements of giving notice of the sale. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

Where a mortgage of lands provides that notice of the sale under the power thereof given in the conveyance shall be published in a newspaper, etc., "for a time not less than thirty days prior to the date of the sale," by the agreement the advertisement should be inserted in the newspaper once a week for four consecutive weeks, and not consecutively for thirty days, and an allowance made in the su-

perior court for an advertisement for thirty consecutive days was erroneous. *Saving Bank, etc., Co. v. Leach*, 169 N. C. 706, 86 S. E. 701 (1915).

Burden of Proof.—However, the presumption of law is in favor of the regularity in the execution of the power of sale; and if there was any failure to advertise properly, the burden of showing such failure is on the person setting it up. *Jenkins v. Griffin*, 175 N. C. 184, 95 S. E. 166 (1918).

§ 1-596. Charges for legal advertising.—The publication of all advertising required by law to be made in newspapers in this State shall be paid for at not to exceed the local commercial rate of the newspapers selected. Any public or municipal officer or board created by or existing under the laws of this State that is now or may hereafter be authorized by law to enter into contracts for the publication of legal advertisements is hereby authorized to pay therefor prices not exceeding said rates.

No newspaper in this State shall accept or print any legal advertising until said newspaper shall have first filed with the clerk of the superior court of the county in which it is published a sworn statement of its current commercial rate for the several classes of advertising regularly carried by said publication, and any owner or manager of a newspaper violating the provisions of this section shall be guilty of a misdemeanor. (1919, c. 45, ss. 1, 2; C. S., s. 2586; 1945, c. 635; 1949, c. 205, s. 1½.)

Local Modification.—Nash: 1949, c. 205, s. 2.

Editor's Note.—The 1945 amendment substituted the first "or" in the second sentence for "of" and rewrote the former

last sentence of the first paragraph so as to make it subject to the former limitations prescribed by § 1-99 with respect to the cost of service by publication. The 1949 amendment struck out such last sentence.

§ 1-597. Regulations for newspaper publication of legal notices, advertisements, etc.—Whenever a notice or any other paper, document or legal advertisement of any kind or description shall be authorized or required by any of the laws of the State of North Carolina, heretofore or hereafter enacted, or by any order or judgment of any court of this State to be published or advertised in a newspaper, such publication, advertisement or notice shall be of no force and effect unless it shall be published in a newspaper with a general circulation to actual paid subscribers which newspaper at the time of such publication, advertisement or notice, shall have been admitted to the United States mails as second class matter in the county or political subdivision where such publication, advertisement or notice is required to be published, and which shall have been regularly and continuously issued in the county in which the publication, advertisement or notice is authorized or required to be published, at least one day in each calendar week for at least twenty-five of the twenty-six consecutive weeks immediately preceding the date of the first publication of such advertisement, publication or notice; provided that in the event that a newspaper otherwise meeting the qualifications and having the characteristics prescribed by §§ 1-597 to 1-599, should fail for a period not exceeding four weeks in any calendar year to publish one or more of its issues such newspaper shall nevertheless be deemed to have complied with the requirements of regularity and continuity of publication prescribed herein. Provided further, that where any city or town is located in two or more adjoining counties, any newspaper published in such city or town shall, for the purposes of §§ 1-597 to 1-599, be deemed to be admitted to the mails, issued and published in all such counties in which such town or city of publication is located, and every publication, advertisement or

notice required to be published in any such city or town or in any of the counties where such city or town is located shall be valid if published in a newspaper published, issued and admitted to the mails anywhere within any such city or town, regardless of whether the newspaper's plant or the post office where the newspaper is admitted to the mails is in such county or not, if the newspaper otherwise meets the qualifications and requirements of §§ 1-597 to 1-599. This provision shall be retroactive to May first, one thousand nine hundred and forty, and all publications, advertisements and notices published in accordance with this provision since May first, one thousand nine hundred and forty, are hereby validated. (1939, c. 170, s. 1; 1941, c. 96.)

§ 1-598. Sworn statement prima facie evidence of qualification; affidavit of publication.—Whenever any owner, partner, publisher, or other authorized officer or employee of any newspaper which has published a notice or any other paper, document or legal advertisement within the meaning of § 1-597 has made a written statement under oath taken before any notary public or other officer or person authorized by law to administer oaths, stating that the newspaper in which such notice, paper, document, or legal advertisement was published, was, at the time of such publication, a newspaper meeting all of the requirements and qualifications prescribed by § 1-597, such sworn written statement shall be received in all courts in this State as prima facie evidence that such newspaper was at the time stated therein a newspaper meeting the requirements and qualifications of § 1-597. When filed in the office of the clerk of the superior court of any county in which the publication of such notice, paper, document or legal advertisement was required or authorized, any such sworn statement shall be deemed to be a record of the court, and such record or a copy thereof duly certified by the clerk shall be prima facie evidence that the newspaper named was at the time stated therein a qualified newspaper within the meaning of § 1-597. Nothing in this section shall preclude proof that a newspaper was or is a qualified newspaper within the meaning of § 1-597 by any other competent evidence. Any such sworn written statement shall be prima facie evidence of the qualifications on any newspaper at the time of any publication of any notice, paper, document, or legal advertisement published in such newspaper at any time from and after the first day of May, 1940.

The owner, a partner, publisher or other authorized officer or employee of any newspaper in which such notice, paper, document or legal advertisement is published, when such newspaper is a qualified newspaper within the meaning of § 1-597, shall include in the affidavit of publication of such notice, paper, document or legal advertisement a statement that at the time of such publication such newspaper was a qualified newspaper within the meaning of § 1-597. (1939, c. 170, s. 1½; 1947, c. 213, ss. 1, 2.)

Editor's Note.—The 1947 amendment rewrote this section.

A provision making a false statement a misdemeanor was eliminated from this section by the 1947 amendment. The effect

of this deletion may well be to bring false swearing in the affidavit within the purview of the perjury statute, § 14-209, thus making it a felony. 25 N. C. Law Rev. 450.

§ 1-599. Application of two preceding sections.—The provisions of §§ 1-597 to 1-599 shall not apply in counties wherein only one newspaper is published, although it may not be a newspaper having the qualifications prescribed by § 1-597; nor shall the provisions of §§ 1-597 to 1-599 apply in any county wherein none of the newspapers published in such county has the qualifications and characteristics prescribed by § 1-597. (1939, c. 170, ss. 2, 4½; 1941, c. 49.)

§ 1-600. Proof of publication of notice in newspaper; prima facie evidence.—(a) Publication of any notice permitted or required by law to be published in a newspaper may be proved by a printed copy of the notice together with an affidavit made before some person authorized to administer oaths, of the

publisher, proprietor, editor, business or circulation manager, advertising, classified advertising or any other advertising manager, or foreman of the newspaper, showing that the notice has been printed therein and the date or dates of publication. If the newspaper is published by a corporation, the affidavit may be made by one of the persons hereinbefore designated or by the president, vice president, secretary, assistant secretary, treasurer, or assistant treasurer of the corporation.

(b) Such affidavit and copy of the notice shall constitute prima facie evidence of the facts stated therein concerning publication of such notice.

(c) The method of proof of publication of a notice provided for in this section is not exclusive, and the facts concerning such publication may be proved by any competent evidence. (1951, c. 1005, s. 2.)

STATE OF NORTH CAROLINA

DEPARTMENT OF JUSTICE

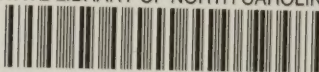
Raleigh, North Carolina

June 12, 1953

I, Harry McMullan, Attorney General of North Carolina, do hereby certify that the foregoing recompilation of the General Statutes of North Carolina was prepared and published by The Michie Company under the supervision of the Division of Legislative Drafting and Codification of Statutes of the Department of Justice of the State of North Carolina.

HARRY McMULLAN,
Attorney General of North Carolina

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